Regulators provide much needed clarity around new regulatory references regime

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If you work in a senior role in banking or insurance the chances are that you will be familiar by now with at least some of the principles of the senior managers' regulatory regimes, introduced earlier this year.

The major parts of the new regimes, aimed at raising individuals' accountability for personal or institutional failings, came into force in March. However, the Financial Conduct Authority and Prudential Regulation Authority had held off from introducing an important component – the new rules on regulatory references – whilst feedback arising from public consultation was taken into account.

This changed at the end of September when the regulators issued policy statements setting out the final detail of the new rules and providing some much-needed clarity. The rules are extremely important in the new regulatory landscape because regulatory references are considered to be key tools in a prospective employer's ability to assess an individual's fitness and propriety when they are hiring. This is obviously crucial to anyone who wants to work in a relevant role.

In summary:

- The hiring firm will have to seek regulatory references for candidates being recruited into various types of senior function, and other key functions, in the business. This includes certain non-executive directorships;
- The hiring firm has to seek regulatory references going back six years from the current employer and all former employers of the candidate where the person carried out a relevant function. In the case of overseas employers, this means the hiring firm having to take reasonable steps to obtain the regulatory reference;
- The current/former firm giving the regulatory reference should do so as soon as reasonably practicable – the FCA suggests within six weeks of the request;
- Certain roles, such as those that are controlled functions, need pre-approval of the regulator before they can be offered by the hiring firm. This remains the case but regulatory references also have to be obtained by the hiring firm – ideally before the application for

pre-approval is submitted. Where the current employer is listed, meaning it has legal obligations to make announcements to the relevant stock exchange within what can be tight timeframes, there are relaxations around the timing for the hiring firm having to obtain regulatory references;

- The reference must follow a prescribed template. The firm giving the reference must include information where 'disciplinary action' was taken against the individual that relates to something they did or failed to do that amounts to a breach of individual conduct rules. 'Disciplinary action' has a wide meaning, and includes not only obvious matters such as the dismissal of the individual for misconduct or gross misconduct, or the issuing of a final written warning, or where the individual's variable compensation was reduced or clawed back due to a conduct breach, but also where the individual was suspended (except where the investigation was still pending);
- The prescribed template also has a section where the firm giving the reference should provide all other information which it reasonably considers to be relevant to the hiring firm's assessment of whether the candidate is fit and proper, including for example if there is information about mitigating circumstances that go some (or indeed all) of the way to explaining why a person behaved as they did;
- The obligation to give the reference arises irrespective of any terms restricting confidentiality or the making of derogatory statements contained, for example, in a settlement agreement.

You do not need legal training to see that the candidate's current or former employer is potentially in a position of some power, given its obligations and rights to provide the regulatory reference to the prospective employer under the new rules. A lot could stand and fall for the individual,

depending on what is said in the reference, and how it is said.

We are regularly instructed by individual clients, in a wide range of circumstances, who do not trust their current or former employer to present alleged conduct issues in a balanced way in a reference. It is true that it is often the case that where there has been alleged or actual misconduct by an individual, institutions have their own reputations to protect – and their own agendas.

One of the most perplexing parts of the proposed new regulatory references regime for the individual has been the lack of an appeal against a negative or imbalanced regulatory reference.

Whilst there are often other levers that can be pulled in any given scenario, and whilst the individual does have common law rights to have the reference prepared with due skill and care, and for it to be true, accurate and fair, based on documented fact, and not be defamatory, this lack of explicit control by the individual over the process has been a concern.

With that in mind, the regulators' policy statements are helpful as they identify that fairness will normally require the firm giving the reference to first give the individual an opportunity to comment on prejudicial information in it. This is not the same as a right of the individual to edit the reference. However, the guidance is clear that, if the firm has not provided the employee with any opportunity to comment on the information, it must do so, and before the reference is given. The firm must then take the individual's comments into account when considering whether something should be disclosed, and how the disclosure is drafted, in the reference.

The new regulatory reference rules will come into effect on 7 March 2017, until when transitional arrangements remain in

effect.

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