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Australian Securities and Investments Commission

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via email: referencechecking@asic.gov.au

The FBAA welcomes the opportunity to make a submission in response to CP333.

The FBAA is broadly supportive of the strengthened reference checking and has been a long-term advocate for reference checking. For almost 20 years the Association has been encouraging members to conduct reference checks.

Our priorities with respect to the reference checking obligations are these:

- A. The obligations should compliment sensible business practice.
- B. The obligations should permit the efficient discharge of the reference checking obligations. Where possible they should eliminate duplication of effort.
- C. Tied to our point above, the framework needs to allow multiple parties to rely on a single reference. Reference checking is not always linear as between the recruiting licensee and a representative. Intermediary parties such as aggregators have an interest in background checks. Lenders also take an interest in who licensees are appointing. It is important the reference checking protocols aren't thought of solely as a two-party process (i.e. referee licensee and recruiting licensee).
- D. We see opportunity to consider a short-track / green light process whereby a referee licensee could meet their obligations by confirming the representative has no adverse issues and receives an unqualified positive reference.

Our responses to individual questions are provided in the following pages.

Yours faithfully

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Proposal and Questions – Section B

Proposal	Questions	FBAA Response
<p>B1 We propose to require a recruiting licensee to take reasonable steps to obtain a reference about a prospective representative from:</p> <p>(a) if the prospective representative is a representative of a current licensee and, when a request for a reference is made, has been a representative of that licensee for:</p> <p>(i) 12 months or more—that licensee; or</p> <p>(ii) less than 12 months—that licensee and the most recent former licensee (if any) in the five years before a request for a reference;</p> <p>(b) if the prospective representative is not a representative of a current licensee, but was a representative of the most recent former licensee for:</p> <p>(i) 12 months or more in the five years before a request for a reference—that licensee;</p> <p>(ii) less than 12 months—the two most recent former licensees (if applicable) in the five years before a request for a reference; and</p> <p>(c) if the prospective representative is a current licensee—that licensee (i.e. themselves).</p> <p>Note 1: A 'former licensee' is a licensee for which an individual described in s912A(3A) of the Corporations Act or s47(3A) of the National Credit Act was a representative for any period in the five years before a request for a reference but who is no longer a representative of that licensee.</p> <p>Note 2: If a prospective representative is a representative of two or more current licensees, the referee licensee must request a reference from each of these current licensees.</p>	<p>B1Q1 Do you agree with our proposal? If not, why not?</p> <p>B1Q2 Do you think the obligation should be limited to obtaining a reference from the current licensee or—if a prospective representative is not currently with a licensee—their most recent former licensee in the five years before a request? If so, please give reasons why.</p> <p>B1Q3 Do you think the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request? If so, please give reasons why.</p> <p>B1Q4 If the prospective representative is a current licensee, do you think the recruiting licensee should be obliged to obtain a reference from them? If not, why not?</p> <p>B1Q5 Do you think a recruiting licensee should be able to obtain from a current or most recent former licensee previous references provided to them under the ASIC protocol? If so, should a recruiting licensee still be required to obtain a reference directly from the additional licensee(s) about the prospective representative?</p>	<p>The FBAA supports this proposal. The timeframes selected for the period of time a representative has been with their former licensee(s) is reasonable.</p> <p>Ability to obtain earlier references from previous licensee</p> <p>Where a recruiting licensee is recruiting a representative who has not been with their previous licensee for more than 12 months and must also obtain a reference from the licensee prior to the most recent licensee, this obligation should be capable of being satisfied by obtaining a copy of the reference provided to the referee licensee by the licensee before them. The recruiting licensee should not be obligated to directly approach any licensee prior to the most recent licensee for a “fresh reference”, although they may choose to do so. We make this recommendation on a number of bases:</p> <p>It is more efficient for a recruiting licensee to obtain references from the referee licensee including copies of any references the referee licensee obtained when they appointed the representative (within the relevant timeframe).</p> <p>The references in the possession of the referee licensee are contemporaneous – that is, they were provided by each former licensee within a reasonable period of time after the representative had left their</p>

		<p>business.</p> <p>Any reference provided by a referee licensee to the next recruiting licensee is likely to be more detailed and meaningful than a reference provided to a later recruiting licensee where the representative may have left the former licensee years prior. It is unlikely a newly obtained reference from a licensee that provided an earlier reference for a former representative will be more informative than the reference prepared previously. In most cases it is likely to be the same reference(s) provided to the other recruiting licensee at the time they recruited the representative.</p> <p>The representative's references follow them throughout their career.</p>
<p>B2 A recruiting licensee may give consent to a corporate representative to sub-authorise an individual or class of individuals as a representative of the licensee under s916B(3) of the Corporations Act or s65(4) of the National Credit Act. For reference checking purposes, we propose that the recruiting licensee is taken to be considering authorising each individual as a prospective representative of the licensee. Therefore, the recruiting licensee must take reasonable steps to conduct reference checking in accordance with the protocol for each sub-authorised individual.</p>	<p>B2Q1 Do you agree with our proposal? If not, why not?</p>	<p>The corporate authorised representative should be able to obtain and consider references on behalf of the licensee. The licensee will still have ultimate accountability and will need adequate processes and procedures in place to ensure the corporate authorised representative is obtaining and properly considering references.</p> <p>We believe this is consistent with the way in which other obligations between licensees and corporate authorised representatives are managed.</p>
<p>B3 We propose that: (a) before requesting a reference from a referee licensee, a recruiting licensee must seek a prospective representative's written consent, using the template consent form, to:</p>	<p>B3Q1 Do you agree with our proposal? If not, why not? B3Q2 Do you think ASIC should prescribe a consent form? If not, why not? B3Q3 Should the template consent form prescribed by ASIC</p>	<p>We support this proposal.</p> <p>We do not believe further information is required to be given to the prospective representative. It is important</p>

<p>(i) collect, use, disclose and store the prospective representative's personal information for the purpose of the recruiting licensee considering their suitability for employment or authorisation as a representative under s912A(1)(cc) of the Corporations Act or s47(1)(ea) of the National Credit Act and the ASIC protocol; and (ii) collect, use, disclose and store their personal information from referee licensees, being one or more of the current and/or former licensees to whom they are or were a representative;</p> <p>(b) a recruiting licensee that has not obtained the written consent of a prospective representative, or has obtained written consent which the prospective representative has subsequently withdrawn in writing, must not request a reference from a referee licensee about the prospective representative; and</p> <p>(c) a recruiting licensee must give a written notice to the referee licensee if the prospective representative has withdrawn their consent after a reference has been requested but before it is given.</p> <p>Note: The template consent form is in Sch 1 of the proposed legislative instrument.</p>	<p>require any further information to be disclosed to the prospective representative so they are better informed in providing consent? If so, what other information should be required?</p> <p>B3Q4 Will this proposed obligation to obtain and provide written consent cause practical problems for licensees during the recruitment process? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.</p>	<p>that the consent form is in plain English and only contains information the prospective representative needs to be aware of. If the form is too long or contains too much information it is likely to diminish the prospective representative's understanding of the form.</p> <p>In an age where privacy consent is regularly sought, representatives would be aware of the implications of giving a privacy consent.</p> <p>The form needs to be capable of being delivered and executed electronically.</p>
<p>B4 We propose that a recruiting licensee:</p> <p>(a) must make a written request, using the template reference request, to a referee licensee to answer the template reference questions about a prospective representative;</p> <p>(b) must give a copy of the written consent from the prospective representative to the referee licensee at the time of making a request for a reference; and</p> <p>(c) may make minor amendments to the form of the template reference request when seeking a reference from a referee licensee,</p>	<p>B4Q1 Do you agree with our proposal? If not, why not?</p> <p>B4Q2 Should the protocol require a request for a reference to include any other information? If so, what other information should be required?</p>	<p>We support the written request form.</p>

<p>provided the request for a reference still includes all the information required by the template. Note: The template reference request is in Sch 2 or Sch 3 to the proposed legislative instrument.</p>		
<p>B5 We propose that a recruiting licensee may make more than one request to a referee licensee for a reference about a prospective representative (with additional requests being covered by the ASIC protocol as if they were the original request for a reference).</p>	<p>B5Q1 Do you agree with our proposal? If not, why not?</p>	<p>We support this proposal.</p>
<p>B6 We propose that a recruiting licensee may seek additional references in accordance with the ASIC protocol from former licensee(s) that employed or authorised a prospective representative in the five years before a request for a reference is made. A former licensee(s) must give answers to the questions in the template reference request.</p>	<p>B6Q1 Do you agree with our proposal? If not, why not?</p>	<p>We support this proposal however refer to our earlier answer wherein we believe a recruiting licensee should not be required to approach former licensees and should be able to obtain references given by former licensees of a representative from the referee licensee.</p>
<p>B7 We propose that nothing in the ASIC protocol limits or prevents a recruiting licensee from requesting additional information about a prospective representative from a referee licensee (e.g. other background checks), provided that the additional information requested does not reduce the scope of any of the questions in the template reference request.</p>	<p>B7Q1 Do you agree with our proposal? If not, why not?</p>	<p>This needs to be limited to a recruiting licensee requesting information in the possession of the referee licensee. It should not amount of a recruiting licensee being able to demand the referee licensee undertake further work to create new material.</p> <p>If a referee licensee informs the recruiting licensee there is no more information to share, that should be the end of the inquiries.</p> <p>We would be concerned if a recruiting licensee could make additional demands on a referee licensee that are unreasonable if such demands could leave a referee licensee open to prosecution for failing to comply</p>

<p>B8 We propose that where a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give—within 10 business days of the request, or a longer period where agreed between the recruiting licensee and referee licensee, but no more than 20 business days:</p> <p>(a) all information that they are aware of and reasonably consider to be relevant to answer the questions in the template reference request;</p> <p>(b) a response that is complete, accurate and based on documented facts; and</p> <p>(c) a response in writing to all the questions in the template reference request, and—if a question cannot be answered—a written explanation as to why the question cannot be answered.</p>	<p>B8Q1 Do you agree with our proposal? If not, why not?</p> <p>B8Q2 Should we allow verbal responses to be given under the ASIC protocol? If so, why? How would the licensees manage the potential risks associated with the provision of verbal references?</p> <p>B8Q3 Are there other ways to facilitate references being given by referee licensees under the protocol? If so, please explain.</p>	<p>with its obligation to provide information under the protocol.</p> <p>We agree with this proposal.</p> <p>We support the idea of verbal reference but recognise they can present difficulties around record keeping, evidence of compliance with obligations and also give rise to increased risk of mis-transcription resulting in the recruiting licensee recording a version of the reference that differs to the intended reference provided verbally from the referee licensee.</p> <p>If verbal references are permitted we believe the recruiting referee should reduce the verbal reference to a file note and provide a copy to the referee licensee. The recruiting referee would need to make a file note of a verbal reference in all cases so it would be unlikely to impose any additional burden on them.</p>
<p>B9 We propose that:</p> <p>(a) a referee licensee must update a reference given to a recruiting licensee if the initial reference includes information about or refers to:</p> <p>(i) outstanding compliance audit issues identified in the last or previous audits for the prospective representative;</p> <p>(ii) unresolved client complaints recorded in relation to the prospective representative; or</p> <p>(iii) an ongoing investigation by the referee licensee in relation to the prospective representative; and</p> <p>(b) a referee licensee must give the recruiting licensee an updated reference by including updated answers to the questions in the template reference request:</p>	<p>B9Q1 Do you agree with our proposal? If not, why not?</p> <p>B9Q2 Is the proposed six-month timeframe for an updated reference appropriate? If not, what timeframe would be appropriate?</p>	<p>The objective behind the proposal is logical but this may be difficult to mandate. We can see this being an aspect that is potentially easy to overlook.</p> <p>If anything, this should operate as a recruiting licensee obligation and not a referee license obligation.</p> <p>A referee licensee has usually severed their relationship with the outgoing representative. Having given a reference and no longer having dealings with that representative, the referee licensee may fail to recall that it had provided a reference. In larger organisations , roles are</p>

<p>(i) as soon as reasonably practicable following resolution of a matter mentioned in paragraph (a)(i), (ii) or (iii); or (ii) where the matter has not been resolved within six months of the date on which the initial reference was given by the referee licensee—at the end of that six-month period.</p>		<p>often separated geographically and by function and those dealing with the resolution of matters involving the departed representative may be a long way removed from those providing references. Licensees would require additional systems to track active references to know which ones to update and to whom the information must be given.</p> <p>We believe this will work better as an obligation on a referee licensee to provide an update <u>if requested</u> by the recruiting licensee. The recruiting licensee is better placed to set monitoring reminders to follow up unresolved issues with newly recruited representatives. The recruiting licensee has more to gain from updating this information and needs to make a decision about whether information in the reference is material to their decision to appoint the prospective representative and needs to be followed up.</p>
<p>B10 We propose that the obligations do not apply to a referee licensee where any of the following apply: (a) the recruiting licensee’s licence has been suspended or cancelled; (b) the recruiting licensee has notified the referee licensee in writing that they no longer propose to employ or authorise the prospective representative; (c) the prospective representative is no longer employed by the recruiting licensee; or (d) the prospective representative has withdrawn their consent.</p>	<p>B10Q1 Do you agree with our proposal? If not, why not?</p>	<p>These are logical exclusions to the obligations.</p> <p>We reiterate that the recruiting licensee should carry the majority of the obligations when it comes to seeking out references and updating information.</p>
<p>B11 We propose that a licensee may authorise an agent to collect, use, disclose or store personal</p>	<p>B11Q1 Do you agree with our proposal? If not, why not? B11Q2 Will this requirement</p>	<p>We agree with this proposal.</p> <p>A question arises as to whether</p>

<p>information on their behalf for a reference check of a prospective representative in accordance with the ASIC protocol if a prospective representative consents to an agent being used for this purpose. A licensee is responsible for the acts and omissions of its agent in relation to the ASIC protocol.</p>	<p>cause any practical problems for carrying out a reference check? If so, please outline these problems. B11Q3 Do you think a prospective representative must consent to a recruiting licensee using an agent to collect, use, disclose or store personal information on their behalf to undertake a reference check under the ASIC protocol? If not, why not?</p>	<p>an interested party such as an aggregator would be able to rely on the agent authorisation. In most cases an aggregator would not be acting as an agent of the recruiting licensee but would be acting in their own interests. Further modifications may be required to the protocol if the scope of the agent provision does not cover aggregators and other parties that may have a vested interest in the appointment of a representative by a licensee.</p> <p>The consent given by the representative can include consent to use agents as a matter of course. This is not a contentious issue that requires separate treatment to the primary consent given by the representative to the referring and recruiting licensees. It would be impractical to permit a representative to decline permission for a recruiting licensee to use an agent if a recruiting licensee requires consent to use agents as part of their recruitment process. By separating this out in the consent form it may give a prospective representative the idea that they can give consent to some but not all parts which would then impact their opportunity.</p>
<p>B12 We propose that information collected by a licensee or their agents in accordance with the ASIC protocol must: (a) only be collected, used, disclosed or stored for the purpose of reference checking and information sharing in accordance with the protocol; and (b) not be collected, used,</p>	<p>B12Q1 Do you agree with our proposal? If not, why not?</p>	<p>We agree with this proposal.</p>

<p>disclosed or stored for a purpose other than that for which it was collected, unless the prospective representative has consented or another exception under the Privacy Act applies.</p>		
<p>B13 We propose that a recruiting licensee that is given a reference or an updated reference about a prospective representative in accordance with the ASIC protocol may give a copy of the reference or updated reference to the prospective representative. We note, however, there will be circumstances where the recruiting licensee may not want to share information, such as information about an ongoing investigation.</p>	<p>B13Q1 Do you agree with our proposal? If not, why not? B13Q2 Should the protocol require a recruiting licensee to provide the prospective representative with the reference obtained from a referee licensee(s)? If so, please give reasons why. B13Q3 Should the reference only be provided to the prospective representative with the consent of the referee licensee(s)? If so, please give reasons why. B13Q4 What other mechanisms could be included to ensure fairness for the prospective representative?</p>	<p>We agree that a recruiting referee can provide a copy of the reference to the prospective representative where the referee licensee has given permission.</p> <p>The issue of contentious references (references that result in the representative not being appointed) is more complex. On the one hand a prospective representative should be entitled to know what is said about them – especially where the information adversely impacts their chances of being appointed.</p> <p>While the defence of qualified privilege applies, this does not prevent action being brought at first instance. A licensee will spend time and money running a defence of qualified privilege even if they ultimately succeed. Avoiding the risk of defamation action is the best defence and licensees will be more careful with their words if they cannot prevent the reference being shared.</p> <p>On balance we believe a reference should not be shared with the prospective representative. The position adopted by the ABA is the preferred position.</p> <p>An alternative to sharing the complete reference could be a provision to allow the referee</p>

		licensee to prepare a concise summary of the key issues conveyed in the reference or the recruiting licensee to provide a short statement as to the aspects of the reference that were material to their decision. This may not completely address the risk of defamation action.
B14 We propose to prohibit a licensee from entering into any arrangement or agreement with any individual that limits the licensee's ability to collect, use, disclose and store information under the ASIC protocol.	B14Q1 Do you agree with our proposal? If not, why not?	We support this proposal.
B15 We propose that licensees must have in place adequate arrangements to ensure they can be easily contacted by recruiting licensees for reference checking and information sharing under the ASIC protocol.	B15Q1 Do you agree with our proposal? If not, why not? B15Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these and any possible solutions.	We support this proposal.
B16 We propose that a licensee must keep, for five years, written records that are complete and accurate and that demonstrate compliance with the obligations of the ASIC protocol. This includes, but is not limited to, written records of: (a) consents given, requested, refused or withdrawn; (b) references requested by a recruiting licensee; (c) references and updated references given by a referee licensee; (d) any agreement with any agent in relation to reference checking and information sharing under the protocol; and (e) any policies and processes for handling personal information of individuals obtained under the protocol.	B16Q1 Do you agree with our proposal? If not, why not? B16Q2 Should licensees be required to keep any other records relating to reference checking and information sharing? If so, what other records should be kept?	These obligations should be recruiting licensee obligations only. These records will form part of the engagement process supporting the appointment of a particular representative (i.e. part of the HR /on-boarding file of the representative). We do not support obligations being imposed on referee licensees because it duplicates the records being kept by the recruiting licensee. The referee licensee has little to gain from keeping records of references requested, refused or withdrawn. Even with respect to references given, while many licensees may choose to retain copies of references given, it should not be a compliance obligation. The recruiting licensee has an obligation to retain a copy of all references

		<p>obtained. We cannot see any purpose for a referee licensee to have to keep these records.</p> <p>For large licensees with many representatives, the administrative obligations of tracking requests, producing references and keeping all records will require significant additional resources. For smaller licensees, the risk will be that they infrequently give references and simply forget to record all relevant records. The potential non-compliance risk is greater than any conceivable harm caused by not retaining a copy of the records. The most important record, being the reference itself, will be kept by the recruiting licensee.</p> <p>The additional record keeping requirements create an unnecessary additional compliance burden.</p>
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Proposal and Questions – Section C

Proposal	Questions	FBAA Response
<p>C1 In the template reference request in Sch 2, we propose to prescribe questions about the prospective representative's background. The questions are explained in Table 4.</p>	<p>C1Q1 Do you agree with our proposed questions? If not, why not?</p> <p>C1Q2 Can you suggest any additional or alternative questions?</p>	<p>We have suggested changes to the some of the obligations which would necessitate changes to the questions as they are currently written.</p> <p>A checklist is more helpful where it provides specific obligations to check off rather than asking if an obligation has been met then referring the licensee to further explanations.</p> <p>For example, the final question that asks about whether records have been kept would be more helpful if it listed the</p>

		records required to be kept. [NB Whilst providing this example, our submission does not support the obligation on the referee licensee to retain information. The example is provided only to elucidate the point].
C2 In the template reference request in Sch 2, we propose to prescribe questions about compliance audits of a prospective representative in relation to that representative's previous activity as a financial adviser or mortgage broker. These questions are explained in Table 5.	C2Q1 Do you agree with our proposed questions? If not, why not? C2Q2 Can you suggest any additional or alternative questions?	We agree with the questions. It is important to enable the referee to pass through this reference process quickly where there are no adverse issues to identify and question 2(b) (ii) appears to allow for this.
C3 In the template reference request in Sch 2, we propose to prescribe questions about the conduct of the prospective representative. These questions are explained in Table 6.	C3Q1 Do you agree with our proposed questions? If not, why not? C3Q2 Can you suggest any additional or alternative questions?	In relation to 3(c), it should be sufficient for a licensee to provide a summary of the details of relevant assessments, investigations etc. The current drafting is too strong and reads like a statutory notice requesting details "including but not limited to" <u>all</u> internal assessments etc. We suggest changing the wording to providing a summary of all material internal assessments, external notifications or complaints.
C4 In the template reference request in Sch 2, we propose to prescribe questions about ongoing matters to do with the prospective representative. These questions are explained in Table 7.	C4Q1 Do you agree with our proposed questions? If not, why not? C4Q2 Can you suggest any additional or alternative questions?	We support these questions.

Proposal and Questions – Section D

Proposal	Questions	FBAA Response
D1 We propose to issue an information sheet that: (a) contains guidance on the obligations for referee licensees	D1Q1 Do you agree with our proposal? If not, why not? D1Q2 Can you suggest any further or additional guidance that should	We support an information sheet summarizing the obligations once they are

<p>and recruiting licensees when obtaining, giving or updating a reference; and (b) includes a high-level overview of the questions in the template reference request, along with general guidance on answering the questions. See Attachment 2 to this paper.</p>	<p>be included in the information sheet?</p>	<p>settled.</p>
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End FBAA submission