

28 January 2021

Email: [referencechecking@asic.gov.au](mailto:referencechecking@asic.gov.au)

██████████  
Commissioner  
Australian Securities and Investments Commission  
100 Market St  
Sydney NSW 2000

Dear ██████████

## **CONSULTATION PAPER 333: REFERENCE CHECKING AND INFORMATION SHARING**

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms which provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA has for over a decade been prominent in calling for a ‘bad apples’ framework to address the issue of advisers who have engaged in misconduct moving freely throughout the industry from employer to employer without any details of their previous record being available to investors or to licensees.

On 18 November 2020 we wrote to you expressing significant concern over the draft Bill that proposed compelling the hiring licensee to request information from the adviser’s current employer and recommending a central register of the information, which would be an extension of the ASIC Financial Adviser Register (FAR), as the preferred approach to information sharing and reference checking.

We provide more detail on our recommended model later in this submission.

The concerns that SAFAA has raised with ASIC and Treasury about the current approach of requiring recruiting licensees to contact an adviser’s current firm are concisely identified in the Standards Australia handbook for guidance on the timing of reference requests referred to in ASIC’s draft Information Sheet. The handbook was developed with a panel of industry representatives that included SAFAA (formerly Securities and Derivatives Industry Association) and was carefully drafted to provide recruiting licensees with discretion as to when, in the recruitment process, they could request a reference from an adviser’s current or former employer. The handbook recommends taking a risk-based approach to contacting an adviser’s current employer and specifically refers to misgivings an applicant may have about a firm contacting their current employer.

At page 9, the handbook states:

*Each Organization needs to decide how it will balance—*

- *its desire to obtain the most conclusive and up-to-date information about an Applicant for an Entrusted Person position; and*

- *any reservations an Applicant may have, particularly about contact with their current Organization.*

Page 13 of the handbook (see below) explicitly refers to conditional appointments of employees and contractors allowing for the offer to be subject to a three-month probationary period (for employees) or conditional period (for contractors) by which time reference checking can be completed.

### ***2.8 Conditional Appointment of Employees and Contractors***

*If an Organization does not receive all Reference Checking Information about an Applicant before it wants that person to start work, it could consider deferring the start date. This allows more time to collect and check the information before a decision is made to offer an Appointment, and avoids the issue of dismissal (in the case of employees).*

*Commercial practice may mean the Organization needs an Applicant to start work before it receives all Reference Checking Information. In these circumstances, the Organization could consider the following process for conditional Appointment of employees and/or contractors.*

| <b>Employees</b>  | <b>Contractors</b>   |
|---|--|
| <ul style="list-style-type: none"> <li>The offer of Appointment should be in writing and subject to a three-month probationary period (by which time Reference Checking should be completed).</li> </ul>  | <ul style="list-style-type: none"> <li>The offer of Appointment should be in writing and subject to a three-month conditional period (by which time Reference Checking should be completed).</li> </ul>  |
| <ul style="list-style-type: none"> <li>Clearly communicate in writing the terms of the probationary period and conditions of employment before the offer is made to the Applicant, and in particular, that— - Reference Checking will continue during the three-month probationary period; - unsatisfactory Reference Checking Information about the Applicant’s ability to perform the role may lead to disciplinary action, including dismissal; and - formal confirmation of the Appointment is dependent upon successful completion of the Reference Checking process.</li> </ul> | <ul style="list-style-type: none"> <li>Clearly communicate in writing the terms of the conditional Appointment before the offer is made to the Applicant, and in particular, that— - Reference Checking will continue during the three-month conditional period; - unsatisfactory Reference Checking Information that impacts on the skills, experience or qualifications of the Applicant to perform the services required may lead to termination of the Appointment; and - formal confirmation of the Appointment is dependent upon successful completion of the Reference Checking process.</li> </ul> |
| <ul style="list-style-type: none"> <li>During the three-month probationary period, the Organization should decide whether or not it wants to keep the person on (regardless of whether it receives, or expects to receive, any additional Reference Checking Information).</li> </ul>   | <ul style="list-style-type: none"> <li>During the three-month conditional period, the Organization should decide whether or not it want to keep the person on (regardless of whether it receives, or expects to receive, any additional Reference Checking Information).</li> </ul>  |
| <ul style="list-style-type: none"> <li>Organizations covered by the Federal workplace relations regime may also be able to use the “qualifying period of employment” set out in the Workplace Relations Act 1996 (Cth) to conduct Reference Checking of new employees.</li> </ul>   |  |

The handbook provides a sensible solution to the issue we have raised that enables a recruiting licensee to request information without jeopardising the applicant’s position.

If ASIC proceeds with the current version of the protocol rather than take up our suggestion of a central register, SAFAA urges ASIC to consider the issues raised in the Standards Australia handbook and allow greater flexibility in its model to recruiting licensees in the timing of their reference requests.

## Benefits of a centralised register

We consider the concerns we have with the proposed model highlight the advantages of a centralised source of information about the compliance record of an adviser, capable of being checked not only by prospective employers but also potentially by members of the public, who may be looking to see for themselves whether there is any issue with an adviser whom they are looking to entrust with their investment.

We note that the US has adopted this central repository approach. For many years now FINRA has administered a framework under which licensees and advisers are obliged to file reports of any compliance issues relating to advisers (and other relevant information). If an adviser leaves a firm, a form is required to be lodged indicating whether there are any compliance issues in connection with the departure. The information can also be searched by the public.

As this is a function that FINRA carries out effectively in the US market, we consider that ASIC could do so as an adjunct to the FAR in the Australian market, particularly in light of the government's recent announcement that it is to be new disciplinary body.

The fundamental defect in the proposed framework is that it compels the hiring licensee to request information from the adviser's current employer. There is a real risk that this can expose the adviser to retribution or serious harm from the existing employer, if they were so minded. The fact is that not all employers will look favourably on an adviser seeking to leave their current position. Some employers may adopt a vindictive approach as soon as they become aware, and the adviser may suffer some form of retribution or dismissal. Firms may not always be motivated by ill-will, but in the case of advisers with a client base, a firm may view the prospective departure of an adviser, who may seek to take with them the clients they had been servicing, as a potential threat to their business, requiring steps to minimise any potential threat.

In the case of advisers who are currently not employed, these risks may not be great; however, the likelihood is that more often than not advisers will be looking to move while they are currently in employment. It is natural for any employee to look for opportunities that might be more rewarding, and it is also not uncommon for approaches to be initiated by other licensees looking to attract good advisers to change firms.

A central register avoids the problems that we have identified with the compulsory reference checking framework proposed in the draft Bill and the protocol.

We also have the following detailed comments on the draft protocol and the draft template reference request in the event ASIC proceeds with the current proposed model.

## Detailed comments

### Protocol

#### **Obligation to give reference within 10 business days**

As currently drafted Referee Licensees must respond in writing to a Recruiting Licensee's request for a reference within 10 business days, unless both parties agree to a longer period (up to a maximum of 20 business days).

Assuming an obligation to provide information dating back five years (see our point about compliance audits below), SAFAA considers that compliance with these time frames may be challenging, in particular where the responses are prepared by multiple individuals across disparate teams (e.g. Compliance, HR, Risk Management) whose primary functions relate to matters other than preparing responses to reference requests. We recommend the timeframe for the response to be provided should be set as 20 business days (rather than 10 business days) unless otherwise agreed by both parties up to a maximum of 25 business days.

## **Template reference request**

### **Details of the representative**

We note that the Referee Licensee will only be obliged to give the statutory reference where there are reasonable grounds to believe that the person will be providing personal advice to retail clients about relevant financial products. So as to minimise the incidence of reference requests being sought in situations where there is no obligation to provide a reference (e.g. wholesale only financial advisers, support staff, etc.), we recommend that the protocol specifically place the onus on the Recruiting Licensee to confirm that the person will be employed in a qualifying role. The manner of that confirmation could be achieved through the addition of a declaration on the draft template reference request completed by the Recruiting Licensee.

### **Question 2 — Compliance audits**

The current draft template reference request seeks information on the representative's last compliance audit undertaken suggesting that a Referee Licensee only needs to give information regarding the most recent compliance audit, which may have occurred any time in the past five years. In the absence of a full five-year history (where available), we believe the most recent compliance audit on its own is unlikely to contribute to an informed decision by the Recruiting Licensee regarding a candidate's suitability for hire. Accordingly, where a full history exists, we believe the full history up to the maximum of five years should be provided by the Referee Licensee.

### **Question 3 Conduct of the representative**

Question 3(b) of the draft template reference request *Conduct of the representative* seeks to discern information about representative conduct in general. While we consider the information request is reasonable, the wording of the question could be improved. The current wording is not entirely clear and could potentially lead to very limited disclosures if the Referee Licensee applies a narrow interpretation. For example: The question asks whether the person's conduct '*in relation to financial services laws or credit legislation*' concerns involvement in dishonesty, unprofessional conduct etc. This wording could lead the Referee Licensee to focus on whether the representative's conduct was concerned only with breaches of law and not disclose matters of other concern such as breaches of internal rules, procedures, or codes of conduct.

In the draft Information Sheet specific to 'Conduct', ASIC has stated that '*the conduct need not amount to a contravention of the law for you to refer to it in response to the template reference request*'. Accordingly, we recommend the question on the reference template be amended in a manner to specifically include other breaches and not just those relating to financial services laws or credit legislation.

#### **Question 4 Ongoing matters**

Question 4(a) of the draft template reference request refers to inquiries or investigations in progress at the time of the requested reference. Referee Licensees will find it challenging to respond to this question as ongoing reviews into a representative are likely to be highly sensitive and employers will be hesitant to report on them, in particular to a Recruiting Licensee who is quite likely to be a competitor. For that reason, we do not consider it is reasonable to require the Referee Licensee to disclose full details of such matters as is currently proposed. We recommend that the question should:

- (1) be limited to disclosure of ongoing matters which – when concluded – might trigger a ‘conduct’ report; and
- (2) be confined to an obligation to report the existence of such matters (with an obligation to provide an update on conclusion of the review).

#### **Conclusion**

SAFAA is happy to discuss these issues with ASIC at greater length to ensure that the new protocol deals with ‘bad apples’ for once and for all, protects consumers from harm and also treats advisers fairly.

Yours sincerely

Judith Fox  
**Chief Executive Officer**