

Response to feedback received Employee Screening

Introduction

The Bank issued today the policy document on *Employee Screening* for financial institutions. This policy document incorporates the proposals from the Exposure Draft issued in October 2017, and has taken into consideration feedback received during the consultation period.

The Bank received written responses from 81 respondents during the consultation period. Key comments received and the Bank's responses are set out in this document. Other comments and suggestions for clarification have been incorporated in the policy document or are otherwise addressed in the *Frequently Asked Questions*.

Bank Negara Malaysia
9 March 2018

1. Scope of individuals subject to screening

Feedback received

The operational burden of screening is not commensurate to the risk posed by individuals in functions that are auxiliary in nature. The attrition rate for this category of staff was also highlighted as an exacerbating factor.

Respondents also expressed concerns over the inclusion of individuals engaged under agency arrangements and contracts for service, as it may entail an extension of financial institutions' internal due process to these categories of individuals.

The Bank's view

- 1.1 The proposal in the exposure draft to include all individuals engaged by financial institutions within the scope of the policy was on the premise that instances of misconduct are not limited to certain categories of staff. However, the Bank intends to apply the screening requirements in a manner that is proportionate.
- 1.2 Recognising the operational burden of screening for certain categories of staff, the policy document narrows the scope of employees to be subject to the screening process. The Bank's priority at this juncture is to focus on functions which have a greater propensity to cause financial or reputational harm to a financial institution. To this end, individuals to be employed into auxiliary functions will be excluded from the screening. A list of functions which fall within this category can be found in Appendix 1 of the policy document.
- 1.3 The final policy also generally excludes individuals engaged under agency arrangements or contracts for service. However, it is important that financial institutions maintain some degree of screening in respect of these individuals for vigilance on conduct risks. For commissioned dealer's representatives (commonly known as remisiers) specifically, the policy recognises that the Securities Commission Malaysia's (SC) published list of enforcement actions provides a key reference point for their conduct history. Therefore, notwithstanding that commissioned dealer's representatives are not engaged under a contract of service, the Bank requires any financial institution that engages them to screen such individuals against the SC's list of enforcement actions, and to obtain the individuals' statutory declarations in accordance with paragraphs 9.1(a) and (b) of the policy document.

2. Scope of disclosures in employment references

a. *Financial institutions' legal risk*

Feedback received

Respondents highlighted concerns that the requirement to disclose any internal disciplinary proceedings that an individual has been subject to during his/her employment with the financial institution, irrespective of whether such proceedings have been concluded, may expose the financial institution to legal risk, such as claims of defamation or loss of employment opportunity.

The Bank's view

- 2.1 The final policy document preserves the scope of disclosures for employment references proposed in the exposure draft. The Bank considers that transparency over an individual's past disciplinary cases, irrespective of whether they are completed by the time the individual left the financial institution's employment, is important to provide hiring financial institutions a complete picture of the individual's conduct history and support informed character assessments of the individual. With regard to concerns over legal risks, the Bank's final stance was informed by considerations that the legal risk could be mitigated by the following:
- a. An applicant's written consent will be obtained as a prerequisite to hiring, authorising inquiries into, and disclosures of, the individual's conduct histories. All individuals intending to be employed in the financial sector are required to assent to full disclosures of their past conduct; and
 - b. Mandatory disclosures in references are confined to factual information (i.e. not subjective expressions of opinion). This is supplemented by an expectation that financial institutions must ensure that references are true, accurate and supported by documented facts. This is expected to mitigate challenges on grounds of accuracy in addition to other safeguards the financial institutions may have in place.

b. *Individuals' interests*

Feedback received

Employment reference checks may have implications on an individual's job-seeking process, particularly where the individual is job-seeking while currently employed. Disclosures of unconcluded disciplinary proceedings, in particular, may prejudice an individual's employment opportunities.

The Bank's view

- 2.2 To accommodate individuals who seek to maintain the confidentiality of the job-seeking process from their current employers, the final policy allows financial institutions to make an offer for employment prior to receiving a reference from the individual's current employer. However, the offer must be conditional upon the receipt of such reference and the hiring institution's discretion to withdraw such offer thereafter. This is clarified in paragraph 8.5 of the policy document.
- 2.3 The Bank is of the view that information pertaining to past disciplinary proceedings is crucial to provide hiring institutions a complete picture of the individual's conduct history to support informed hiring decisions. On this note, the Bank would like to reiterate that the policy aims to support the ability of financial institutions to make informed hiring decisions. It is not intended that financial institutions rely solely on the results of screening in making an assessment of a candidate for employment. Rather, screening should only be relied on as a signal on the need for greater scrutiny, and forms part of a broader range of considerations. Where an individual's references reveal findings or potential findings of misconduct, a financial institution should, as part of a more robust due diligence, make further enquiries to understand the nature of the incident to inform its character assessment of the individual. The Bank also wishes to emphasise that final employment decisions, subsequent to the completion of the screening process, remain within the full discretion of financial institutions.

3. Obligation to update

Feedback received

Implementing the obligation to inform the individual, and his/her current employer, of any updates to a reference previously provided poses operational challenges to financial institutions. These include identifying and contacting the individual or his/her current employer.

The Bank's view

- 3.1 The proposals in the exposure draft were premised on the basis of ensuring that the individual and his/her current employer are well informed of developments or outcomes of any disciplinary proceedings the individual may be subject to. However, given the operational challenges, the final policy document will require financial institutions to maintain updated records of an individual's employment references for the purpose of ensuring that any future reference provided by such financial institutions, at the request of an individual or his/her current and future employers, will be based on updated records.
- 3.2 In the event an update to an employment reference incorporates information that is assessed by the financial institution to be significant, the financial institution is encouraged to share such information with the individual's current employer (which is a financial institution) to facilitate their management of misconduct risk. In such case, the financial institution should also notify the individual of such an update.

4. Statutory declarations

Feedback received

The existing practice of self-declaration is sufficient, as falsified information on such a declaration is generally a basis for financial institutions to take action against the individual. The criminal penalty associated with statutory declarations may have a deterrent effect on individuals joining the financial industry.

The Bank's view

- 4.1 The final policy retains the requirement with respect to statutory declarations in view that the significance of, and reliability on, the declaration in making hiring decisions warrant the penal consequences of providing a false statutory declaration. This is crucial to ensure the effectiveness and integrity of the screening process.