

Employment in Financial Services

Contributing Editor

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02. Are there particular pre-screening measures that need to be taken when engaging a financial services employee? Does this vary depending on seniority or type of role? In particular, is there any form of regulator-specified reference that has to be provided by previous employers in the financial services industry?

Switzerland

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Under Swiss civil law, there is no requirement to apply pre-screening measures. However, while not a statutory requirement under Swiss financial market laws per se, companies subject to these laws apply pre-screening measures to ensure that a prospective financial services employee meets the requirements set forth by these laws. In particular, regulated companies such as banks, securities firms, insurance companies, fund management companies, managers of collective investment schemes and asset managers are required to obtain authorisation from the Swiss Financial Market Supervisory Authority (FINMA) relating to strategic and executive management and each change thereto.

As a general rule, the higher the responsibility or position of a person, the more requirements financial services employees may need to fulfil. Persons holding executive or overall management functions (eg, a member of the board or members of the senior management) are required to fulfil certain requirements set forth by the applicable Swiss financial market regulations. Such requirements may include providing current CVs showing relevant work experience and education as well as excerpts from the debt and criminal register. It may also include providing various declarations (eg, concerning pending and concluded proceedings, qualified participations and other mandates). Furthermore, financial services employees holding certain control functions (eg, compliance officer, risk officer and their deputies) may also be required to prove that they are suitable for the position by providing, for example, a current CV showing relevant work experience and education.

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United States

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In addition to the standard hiring measures that must be taken when engaging an employee, several additional steps must be taken when engaging financial services employees in the United States. Generally, financial services employees must pass certain screening and disclosure steps, including:

- background checks;
- criminal background disclosures; and
- fingerprinting.

Broker-dealers and investment advisors must register with FINRA (see below).

Background checks

FINRA-regulated entities must investigate each person they plan to register with FINRA to ensure that they meet FINRA Form U4 requirements regarding that person's history of formal charges and indictments.

If the applicant has previously registered with FINRA, broker-dealers must also review an applicant's most recent Form U5 or be able to demonstrate to FINRA that it has made reasonable efforts to review Form U5 but has been unable to do so. If the applicant has previously registered with a CFTC-registered firm, the broker-dealer must review CFTC Form 8-T.

Bank employees must undergo a background check. Certain criminal conduct may statutorily disqualify an applicant from employment. For example, federal law prohibits any person convicted of a criminal offence involving dishonesty or breach of trust (or who has entered into a pre-trial diversion or similar programme regarding such an offence) from serving as a director, officer, or employee of an FDIC-insured bank without the FDIC's consent. Banks must conduct reasonable inquiries into an applicant's background to avoid hiring persons barred from employment by this law. Banks may be protected from claims of disparate impact (under state "ban-the-box" laws) when terminating or withdrawing offers from disqualified employees under this law. Both California and New York explicitly provide such carve-outs. However, these are position-specific rather than employer-specific, and employees with positions not subject to FINRA or other statutorily required background checks or disqualifiers based on criminal history may still be subject to state or local "fair chance" or ban-the-box laws. Therefore, as a best practice, non-bank financial services employers should avoid relying on these exceptions for all of their employees. Relatedly, the FDIC does not consider "de minimus" criminal violations disqualifying, including minor offences by young adults, bad cheques for less than \$1,000 and simple theft of less than \$500.

Fingerprinting

Entities covered by the SEC are also subject to fingerprinting requirements. Every member of a national securities exchange, broker, dealer, registered transfer agent, registered clearing agency, registered securities information processor, national securities exchange, and national securities association must ensure that each of its partners, directors, officers, and employees are fingerprinted and must submit such fingerprints, or cause the same to be submitted, to the Attorney General of the United States for identification and appropriate processing. Employees who will not be selling, keeping, or handling securities or supervising those who do are exempt from this requirement.

While New York generally prohibits fingerprinting, there is an exception where, as here, fingerprinting is statutorily required.

California Financing Law requires fingerprinting for certain individuals seeking to license in California.

Please note, during the COVID-19 epidemic, the SEC temporarily paused the fingerprinting requirements. This pause was lifted in September 2022.

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09. Is there a particular code of conduct and/or are there other regulations regarding standards of behaviour that financial services employees are expected to adhere to?



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Depending on the regulatory status of the employing entity and, as the case may be, on the exact activities of a financial service employee, a financial service employee needs to adhere to certain code of conduct rules (eg, regarding transparency and care, documentation and accountability).

Supervised companies in Switzerland are, in principle, required to set up an organisation that ensures the compliance with Swiss financial market laws and its statutory code of conduct rules. For this purpose, among others, companies are required to issue regulations that their employees must follow.

Under Swiss financial market laws, code of conduct rules are generally based on abstract statutory rules and concretized by recognised privately organised associations.

In particular, several professional organisations (eg, the Swiss Bankers Association or the Asset Management Association) and self-regulated organisations issue their own set of code of conduct rules that members are required to follow.

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United States

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Employees in some states, including California and New York, are required to receive periodic sexual harassment training.

Employers are also required to implement anti-discrimination and anti-harassment policies that:

- contain information about where and how employees can report improper conduct;
- prohibit retaliation for reporting or opposing improper conduct, or participating in an investigation regarding misconduct; and
- comply with state and local provisions that require employer policies to contain certain provisions (eg, New York, Los Angeles and San Francisco).

New York law prohibits employers from mandating confidentiality or non-disclosure provisions when settling sexual harassment claims (though it allows such provisions where it is the employee's preference to include them).

California law prohibits employers from mandating confidentiality or non-disclosure provisions in employment agreements, settlement agreements, and separation agreements that are designed to restrict an employee's ability to disclose information about unlawful acts in the workplace, including information pertaining to harassment or discrimination or any other conduct the employee has reason to believe is unlawful.

FINRA and the SEC both have requirements and recommendations for social media use.

FINRA requires that broker-dealers retain records of social media communications related to the broker-dealer's business made using social media sites and adopt policies and procedures designed to ensure that their employees who use social media sites for business purposes are appropriately supervised and trained, and do not present an undue risk to investors.

The SEC similarly requires that social media use complies with all federal security laws, including antifraud, compliance, and recordkeeping provisions.

Banking regulators provide guidance stating that each financial institution is expected to carry out an appropriate risk assessment that takes social media activities into consideration.

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