

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?

Belgium

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Members of management should at all times be of good repute and possess sufficient knowledge, skills and experience to perform their duties (article 91, Directive 2013/36/EU; and article 9, Directive 2014/65/EU).

Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must exclusively be natural persons and must at all times have the necessary professional standing and expertise to perform their duties (article 19, Act of 25 April 2014). Since 2023, it is specified that “in particular, these persons must demonstrate honesty, integrity and independence of mind which, in the case of members of the legal administrative body, enable them to effectively evaluate and, if necessary, question the decisions of the actual management and to ensure the effective supervision and monitoring of the management decisions taken” (Art. 19, Act of 25 April 2014).

In addition, they must not have been convicted of any of the offences listed in article 20 of the Act of 25 April 2014. This concerns convictions with a professional ban and violations of financial legislation, company codes and insurance law.

The NBB will verify that these persons meet the conditions listed above. Forms for a new appointment, additional elements during the employment, termination of an appointment or renewal of an appointment are available on the NBB website (www.nbb.be). These forms require information mainly regarding education, past financial services experience, training, any criminal or administrative or civil proceedings or investigations, disciplinary decisions, bankruptcy, insolvency, potential conflicts of interest, and time commitments for the new appointment.

The NBB will assess the ability of the person based on five criteria:

- expertise, covering knowledge, experience and skills;
- professional repute;
- independence of mind;
- time commitment; and
- collective suitability for the board (ie, to verify whether the expertise within the said body is sufficiently guaranteed, given the person's knowledge, experience and skills (NBB Fit & Proper Handbook of 22 December 2022, 2:26, p. 16)).

Concerning "N-1" effective managers (managers who exercise direct and decisive influence over the management of the institution, but who are not members of the management committee) other than branch managers, the supervisory authority does not have to authorise them (NBB Fit & Proper Handbook of 22 December 2022, 2:9, p. 14). This does not mean that these persons must not have the required expertise and professional reputation, but only that the NBB will not conduct an assessment.

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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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03. What documents should be put in place when engaging employees within the financial services industry? Are any particular contractual documents required?



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Regarding anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution, it is necessary to use the forms provided by the NBB to ensure that they are “fit and proper” and are authorised by the NBB (see question 2).

It is also recommended to foresee restrictive covenants in the employment contract, such as confidentiality, other professional activities, non-solicitation, non-competition and intellectual property provisions.

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FINRA

Broker-dealers and investment advisors regulated by FINRA must electronically file FINRA’s Form U4 when registering “associated persons” with FINRA or transferring their registration to another broker-dealer. Broker-dealers must also create and implement written procedures to verify the facts disclosed by prospective employees on the U4.

- “Associated persons” include employees of all levels involved with investment and securities

operations.

- The U4 form requires disclosure of the associated person's background history, including any criminal convictions or civil actions, regulatory proceedings or sanctions, administrative proceedings, financial disclosures (such as bankruptcy), customer complaints, or arbitration awards.

Form U4 also contains an agreement requiring employees to submit to arbitration "any dispute, claim or controversy that may arise between [them and their] firm, or a customer, or any other person..."

Member firms must provide registered employees with an arbitration disclosure when asked to sign a U4.

SEC

SEC-regulated entities require every prospective employee to complete a questionnaire disclosing their identifying information, employment history, and record of any disciplinary actions, denial or suspension of membership of registration, criminal record, or any record of civil action against that employee. FINRA form U4, if completed, fulfils the requirements of this Rule.

California

California employees must be provided with:

- A notice of workers' compensation rights;
- notice of disability insurance and paid family leave insurance benefits;
- sexual harassment information under the Fair Employment and Housing Act;
- notice of pay information (if applicable);
- commission contract (if applicable);
- notice of rights for victims of crime or abuse; and
- lactation accommodation policy

New York

New York employees must be provided with:

- notice of pay rate and pay days;
- commissions Agreement (if applicable);
- New York Health and Essential Rights Act;
- notice of electronic monitoring;
- New York State Workers' Compensation Board Statement of Rights – Disability Benefits Law;
- New York State Paid Family Leave Statement of Rights;
- New York City Earned Safe and Sick Time Act (City only);
- New York City Stop Sexual Harassment Act fact sheet (City only); and
- New York City Pregnancy Accommodations at Work fact sheet (City only).

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04. Do any categories of employee need to have special certification in order to undertake duties for financial services employers? If so, what are the requirements that apply?



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Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must, at all times, have the necessary professional standing and expertise to perform their duties.

This will be assessed by the NBB through standard forms to complete if there is a new appointment, new elements during employment, termination of appointment or renewal of appointment.

"N-1" effective managers must meet the same criteria, but authorisation by the NBB is not necessary (see question 2).

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For an individual's FINRA registration to become effective, they must pass the Securities Industries Essentials examination. FINRA rules also require registered persons to participate in continuing education courses. Failure to do so may result in a covered person's registration being deemed inactive until the requirement has been satisfied.

California Financing Law requires the licensing and regulation of finance lenders and brokers making and brokering consumer and commercial loans, unless exempt.

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05. Do any categories of employee have enhanced responsibilities under the applicable regulatory regime?



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Specifically, employees holding executive, overall management, oversight or control functions in regulated companies are responsible for ensuring that the companies' organization ensures the continued compliance with applicable financial market laws. Swiss financial market laws do not have enhanced responsibilities for different employee categories. Instead, a person's fitness and propriety are assessed within the context of the specific requirements and functions of a given company, the scope of activities at that company, and the complexity of that company.

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While there are certain responsibilities for financial employees, such as being able to pass applicable certifications (see question 4) or registering with certain entities (see question 6), the American regulatory system does not include statutory delineations that create enhanced responsibilities for certain categories of employees.

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06. Is there a register of financial services employees that individuals will need to be listed on to undertake particular business activities? If so, what are the steps required for registration?



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There is no list of financial services employees as such, but the NBB will assess, among others, the experience and the credibility of the person when granting the “fit and proper” authorisation.

This concerns anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution (see question 2).

However, it should be noted that financial services institutions approved by the NBB are listed on its website. Moreover, banking and investment services intermediaries must be registered and file through an online application to the FSMA (www.fsma.be) documents attesting, inter alia, their knowledge, clean criminal record, and professional liability insurance.

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FINRA

Broker-dealers and Investment Advisors regulated by FINRA must file FINRA’s Form U4 when registering associated persons with FINRA or transferring their registration to another broker-dealer. Broker-dealers must also create and implement written procedures to verify the facts disclosed by prospective employees on the U4.

“Associated persons” include employees of all levels involved with the investment and securities operations, including:

- partners;
- officers;
- directors;
- branch managers;
- department supervisors;
- investment bankers;
- brokers;
- financial consultants; and

- salespeople.

The U4 form requires disclosure of the associated person's background history, including any criminal convictions or civil actions, regulatory proceedings or sanctions, administrative proceedings, financial disclosures (such as bankruptcy), customer complaints, or arbitration awards.

SEC

Investment advisers must register with the SEC under the Advisers Act. They must submit Form ADV using the Investment Adviser Registration Depository (IARD), an internet-based filing system maintained by FINRA.

SEC-regulated entities require every prospective employee to complete a questionnaire disclosing their identifying information, employment history, and record of any disciplinary actions, denial or suspension of membership of registration, criminal record, or any record of civil action against that employee. FINRA form U4, if completed, fulfils the requirements of this Rule.

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08. Are there particular training requirements for employees in the financial services sector?

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To keep the “fit and proper” authorisation, the concerned persons must ensure that they follow the relevant training.

Regarding the prevention of money laundering, financial institutions must ensure that personnel whose function requires it is aware of the legislation, knows the internal policies, is aware of the internal reporting procedure and receives special continuing education programmes (article 11, §1, Act of 18 September 2017).

At a sectoral level, JC Nos. 310 and 341 provide for an individual right to five days of training per year per full-time equivalent employee.

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All employees in some states, including California and New York, are required to receive periodic sexual harassment training. Additionally, employees may be required to pass certain skills tests before registering with regulators or engage in continuing education programmes (most notably FINRA, see question 4).

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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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The NBB has issued a Fit & Proper Handbook, which was last updated on 22 December 2022.

Besides, Febelfin has adopted codes of conduct and regulations for relations between financial institutions and their customers, which can be considered standard practice in the sector.

Each financial institution may also provide more concrete or more precise quality standards for its clientele.

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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.

10. Are there any circumstances in which notifications relating to the employee or their conduct will need to be made to local or international regulators?

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If a new element occurs that can influence one or more of the five criteria assessing the suitability of a person for the “fit and proper” authorisation (see question 2), the financial institution must file the adequate form with the NBB.

Notification to the NBB is also required in the event of termination or reappointment.

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FINRA members must report to FINRA within 30 calendar days after the firm has concluded, or reasonably should have concluded, that an associated person of the firm or the firm itself has violated any securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organisation.

While there is no requirement to report misconduct to regulators, the SEC routinely gives credit to organisations that voluntarily choose to self-report, which can lead to reduced fines, non-prosecution agreements, deferred prosecution agreements, waivers of disqualification following regulatory or criminal actions, or more organisation-friendly language in settlement documents. However, such disclosed information may later be discoverable by private plaintiffs.

The SEC has issued guidance that a failure to self-report significant misconduct can lead to more severe penalties.

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11. Are there any particular requirements that employers should implement with respect to the prevention of wrongdoing, for example, related to whistleblowing or the prevention of harassment?

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EU Directive 2019/1937 on whistleblowing has been transposed in Belgium by the Act of 28 November 2022. Financial services are included in its material scope (article 2, 1°, b)). In general, companies with more than 250 employees had to create an internal whistleblowing system by 15 February 2023. For companies with between 50 and 250 employees, the deadline was 17 December 2023. However, these thresholds do not count for legal entities who are active in financial services, therefore they needed to install an internal whistleblowing system no matter their employee count and respect the deadline of 15 February 2023 (article 57, §3). The FSMA will have to verify whether the financial institutions are respecting their whistleblowing obligations (article 36). Furthermore, persons who report violations relating to financial services receive better protection and are awarded higher lump sum compensation if they are the victim of a retaliation measure (six months gross remuneration; article 27, §3).

Regarding the prevention of money laundering, financial institutions were already required to provide a procedure to enable their personnel, agents or distributors to report a violation of the legislation, through a specific, independent and anonymous channel (article 10, Act of 18 September 2017).

The employer must ensure the wellbeing of its employees, which includes the prevention of harassment. If harassment has occurred, they must provide appropriate support, including remediating measures, protection against dismissal and investigation by a prevention advisor specialising in psychosocial risks (Wellbeing Act of 4 August 1996, Wellbeing Code of 28 April 2017). The procedure must be detailed in the work rules of the financial institutions.

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Whistleblowing in the United States is governed by two main statutory sources, the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Act (Dodd-Frank).

SOX protects whistleblowers who report violations of securities laws to:

- federal regulatory bodies or law enforcement;
- members of Congress or congressional committees; or
- supervisors or persons authorised by the employer to investigate, discover, or terminate misconduct.

Dodd-Frank generally only protects whistleblowers who report violations of the securities or commodities laws to the SEC or CFTC. However, it also prohibits employers from discriminating against financial services employees for objecting or refusing to participate in any activity that would be a violation of securities law (note that Dodd-Frank prohibits mandatory arbitration of retaliation claims under the Act).

Whistleblowers in the banking industry are also protected under both federal and applicable state laws for reporting violations of banking law to the US Department of Justice.

Under Dodd-Frank and banking laws, employees may be offered a bounty for whistleblowing activities that results in successful enforcement actions.

Employment Discrimination and Sexual Harassment Claims are not subject to mandatory FINRA arbitration, though the claims may be arbitrated if all parties agree.

Californian employers with at least five employees globally must implement policies and provide training on the prohibition of harassment, discrimination, and retaliation in the workplace.

12. Are there any particular rules or protocols that apply when terminating the employment of an employee in the financial services sector, including where a settlement agreement is entered into?



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If the person concerned is subject to “fit & proper” authorisation from the NBB (see question 2), a form must be filed with the NBB to inform it of the termination.

Furthermore, the settlement agreement cannot include payments that would not respect the caps for remuneration and termination indemnities (see question 7).

Finally, job security clauses have been negotiated at a sectoral level, meaning a specific procedure must be followed for individual or collective dismissal under JC No. 310, with a sanction of six to nine months’ remuneration.

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Form U5, the Uniform Termination Notice for Securities Industry Registration, is used by broker-dealers to terminate the registration of an associated person with FINRA and in other applicable jurisdictions and self-regulatory organisations. A FINRA member firm must file Form U5 within 30 days of an employee’s termination. This form includes the reason for an employee’s departure and must include a detailed description of the reasons for termination. Employee appeals related to the content of the U5 are arbitrated before FINRA (eg, if an employee challenges their termination).

Payments to retiring employees

FINRA prohibits paying commissions to unregistered persons, except for retired representatives receiving trailing commissions where a bona fide contract was entered into between the broker-dealer and the retiring employee.

California

California law prohibits the use of non-disclosure provisions in settlement 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. Provisions protecting the identity of a claimant are permitted where requested by the claimant. California law also prohibits “no-rehire” provisions in settlements of employment disputes, with limited exceptions for employees whom the employer, in good faith, determined engaged in sexual harassment or sexual assault, or any criminal conduct.

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13. Are there any particular rules that apply in relation to the use of post-termination restrictive covenants for employees in the financial services sector?

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There are no specific rules for the financial services sector, except that they cannot have an effect that does not respect the caps for remuneration (see question 7).

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The enforceability of restrictive covenants varies greatly depending on applicable state law. Many states impose specific requirements or limitations on enforceable covenants.

FINRA-regulated firms must comply with additional regulations:

- FINRA rules prohibit interference with a customer's choice to follow a former representative during a change in employment where there is no existing dispute with the customer about the account. The FINRA-registered agent must help transfer a customer's account in the event of such a customer request. Note that this only explicitly affects requests by customers and not solicitation by a representative. A non-solicit provision might be upheld whereas a non-compete might not.
- Broker-dealer firms that are signatories to the Protocol for Broker Recruiting are subject to additional requirements. Under this protocol, a departing employee may be permitted to take certain information regarding clients they serviced while at the firm to a new employer and use that information to solicit clients. Non-signatories are not bound to this protocol and can sue departing brokers for violating the terms of otherwise enforceable covenants.

Non-competes and so-called garden leave provisions are regularly included in termination documents. The enforceability of these covenants vary based on jurisdiction, with courts evaluating provisions based on duration and geographic scope.

New York

New York law disfavours non-compete agreements as a general rule. However, such agreements may be enforceable if the restrictions are reasonable and are intended to protect a legitimate interest. A court can enforce a non-compete only if the covenant:

- is no greater than required to protect an employer's legitimate interests;
- does not impose undue hardship on the employee;
- does not cause injury to the public; or
- is reasonable in duration and geographic scope.

California

California law does not allow post-employment non-compete or non-solicit agreements except agreements involving the sale or dissolution of a business. California law protects employer confidential information and prohibits current or former employees from using employer confidential information in the solicitation of employees.

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