

Response of the Institute of Business Ethics to the Banking Standards Board Consultation on the Certification Regime: Certification Risks and Issues

General comment

The Institute of Business Ethics was founded 30 years ago to promote high standards of business behaviour based on ethics. We are an educational charity funded by business and focus on providing practical help to all types of business in dealing with what are often difficult issues. Given this objective we support the work the BSB is doing to raise standards of behaviour on banking, and are happy to respond to this consultation.

The certification process has a number of different facets, including competence and training as well as behavioural aspects. Given the nature of our expertise, our response concentrates on the latter, which is a particularly difficult area because of the judgements involved in the decision whether or not to issue a certificate.

In general we find that the draft guidance offers a useful framework, but needs some additional work on the blurred areas between the decisions to award a certificate, to require mitigation, to require remediation or to deny a certificate. We believe it is important that all employees subject to certification understand in advance which side of the line they might come out and why. We therefore think it is incumbent on firms to elaborate a clear policy, which could be public or at least shared with others in the industry so as to provide some impulse towards consistency with regard to what type of behaviour would require remediation, what would automatically lead to denial of a certificate etc.

Against this backdrop, the examples listed towards the end of the draft guidance seem a little theoretical. Of course it is the case that a highly indebted employee may be driven to take bad decisions, but so may one who is driven by peer pressure or whose personal disposition is to evade regulation, possibly because he or she can get away with it or possibly in order to secure a bigger bonus. There is only loose reference in the examples to conflicts of interest, which have always been one of the most difficult issues facing financial firms.

For this reason we would lay greater emphasis on the incorporation of annual appraisal findings into the judgement, especially if these are conducted on a 360 degree basis. One good indicator of a person's fitness is the view of colleagues both more senior and more junior as well as that of other stakeholders.

Finally, while we recognise that this guidance aims to help firms fulfil their regulatory duty, it is important to remember that the environment in which the employee is working will

make a great difference to outcomes. It is no use – and indeed it is unfair – to find somebody unfit in circumstances where firm-wide or division-wide controls are weak. As part of their policy firms should commit to creating an environment which fosters appropriate behaviour and supports individuals' own efforts to meet the high standards expected of them.

Specific answers

Question 1. Do you think the framework (set out on pages 5-6 of the draft guidance) is useful for understanding the steps involved in an F&P assessment, or are there amendments that would better describe industry good practice?

The framework as set out in the guidance is procedural and offers limited help with substantial issues. It goes without saying that firms should accumulate evidence for their judgement and that they should record the process in case of subsequent challenge. On the basis of this process they will either issue a certificate or decide not to do so.

The substantive questions concern what goes into this process? These issues are only partially dealt with in the separate work on Good Practice on Fitness and Propriety Assessment Principles. What sort of evidence should firms rely on? How much should they rely on judgement and how much on measurable data? What should they do if their judgement is challenged? What concerns are so serious as to warrant denial of a certificate? What should they do about borderline cases?

One of the problems facing firms is that they will not necessarily know whether the criteria they are applying are consistent with those being applied by their peers. This is all the harder because judgement is involved, so the guidance cannot offer hard and fast rules. However, it could establish certain practical benchmarks and provide more detail about the type of evidence that might go into the decision.

One important principle is that those subject to certification should know in advance how the task will be approached. On what basis they will be judged? What shortcomings would automatically result in a denial of certification? What are the types of risk that might be subject to mitigation under continuing, conditional certification? And what avenues would be open for challenging a judgement that they regarded as unfair? Firms should have a policy, accessible to employees and possibly also to others within the industry. This would help avoid arbitrary decisions, ensure consistency and enable firms to learn from each other. The BSB could perhaps play a useful intermediary role in this regard.

The right of appeal is important. We welcome the reference to this in the guidance, but emphasise that the process should be clearly spelled out at firm level.

Question 2. Are the four options set out on pages 9-13 of the draft guidance the right ones? Are there others that should be added, or should any of these four be amended or deleted?

Question 3. Do you agree with the explanations and definitions of these different options?

The options are based around a simple decision tree leading to decisions whether to maintain certification, mitigate risk, remediate problems or a recognition that remediation is not possible. In the first three cases a certificate would be issued. In the fourth case a certificate would be denied. These options are clear enough, but the challenge lies in the blurred areas between the different decisions. The draft guidance only goes some of the way to showing where the actual boundaries lie. This reinforces the recommendation above that firms should have a clear policy.

In the section dealing with mitigation of risk, for example, it appears that one type of risk arises when a person is new to certification and may not know exactly what is expected of them. This calls for training as a condition of the certification process. However, the document also refers to wider, more structural risks related to the nature of the activity being undertaken which it says are more likely to be mitigated at firm or department level.

This appears to relate to the nature of the responsibilities being undertaken by the employee in question. Putting an inexperienced employee in charge of a high risk activity without proper support is unwise to say the least, but if it happens it is not the fault of the employee concerned and should not affect certification. As part of their policy on certification, firms should give an undertaking that training and appropriate controls are in place at the firm level. The obligation on the individual should then be to understand them and his or her obligations with regard to implementation.

By and large, the remediation category is a half-way stage between mitigation and denial of a certificate. If an employee fails repeatedly either to resolve a conflict of interest or to fulfil reporting and other requirements under the firm's controls system, then a period of "probation" might be called for. The same applies to breaches of regulation and policy with regard, for example, to the fair treatment of customers. The firm's policy should be clear about the circumstances in which a mitigation solution will be escalated to remediation and ultimately, if the problem is not corrected, to denial. Each firm should be clear about the issues which will lead to each of these outcomes.

How do these options reflect your current approach to or experience of F&P assessments? Are there any aspects which would be new to your firm? If so which would be the most challenging?

This is not relevant to us as we are not a bank.

Question 5. Are the illustrative examples in the draft guidance useful and appropriate? Are there others that would provide additional, better or more relevant examples of: (a) the factors to consider when evaluating information that may call into question an individual's F&P; (b) maintaining F&P; (c) mitigating certification risks; (d) remediating certification issues; (e) where remediation is not possible?

These examples are generally helpful though not sufficiently wide-ranging or detailed to give individuals a clear idea of where they stand. The examples include some which reflect the individual's circumstances, such as their level of personal indebtedness or a connection with an employee at another institution or division, they are less clear about behavioural expectations. A breach of a firm's code of behaviour, even if it does not have regulatory consequences, should be a factor. Wilful and repeated breaches should lead to denial of certification as well as ultimately to dismissal. Wilful breaches of regulation should also be a factor. Compliance with internal controls should be another, as should failure to undertake prescribed training. In each case firms should have a clear policy on escalation.

Question 6. Is the guidance on the role of individuals in maintaining their F&P appropriate or are there other factors we should take into account?

This looks right to us. It is important to encourage individuals to be aware of the expectations are F&P and to seek to match or, even better, to exceed them. This should be built into the reward structure.

Question 7. Is there anything in the guidance, either in substance or tone, that would result in inappropriate or unnecessary responsibilities being placed on either the firm or the individual?

One issue is the reference to “wider certification risks” in the mitigation section. It is important that firms do not make employees responsible for risks over which they have no or limited control. Where the risks are structural and related to the role rather than the individual, the firm should commit to putting mitigation in place as our answer to question 4 suggests. A certificate should not be denied when the problem lies with the firm, not the individual.