

Navigating individual accountability

An overview of key jurisdictions
in financial services



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Introduction

The UK Senior Managers and Certification Regime (“SMCR”), came into force from 2016 in the UK. Broadly similar individual accountability regimes have since been introduced in a number of other countries:

- **Hong Kong:** The Manager-in-Charge regime (from 2016, introduced by the Hong Kong Securities and Futures Commission); also, the Management Accountability Initiative (from 2017, introduced by the Hong Kong Monetary Authority)
- **Australia:** The Banking Executive Accountability Regime (“BEAR”), from 2018. There are currently legislative proposals to replace the BEAR with a more comprehensive Financial Accountability Regime (“FAR”)
- **Singapore:** Guidelines on individual accountability and conduct (from 10 September 2021)
- **Ireland:** A new individual accountability framework, including a Senior Executive Accountability Regime (“SEAR”) has been proposed. The General Scheme for this proposed new legislation was published in July 2021
- **Malaysia:** Proposals on “Responsibility Mapping” were published in December 2019. They have not yet been adopted

Each of these new or proposed individual accountability regimes is broadly similar, in that they each provide for some form of requirements in relation to (i) identification of responsibilities within a firm for which an identified senior individual is to be individually accountable; (ii) documenting what each of these individuals are responsible for and mapping the responsibilities across the organisation, to ensure there are no unnecessary gaps/overlaps in senior-level individual accountabilities for the main aspects of the firm’s operations.

Some of these jurisdictions have also codified new individual conduct rules. The various jurisdictions have differing arrangements regarding potential sanctions against individuals.

Clarifying individual roles and responsibilities within financial services firms is, in any event, an aspect of good corporate governance. Thus, for example, the 2015 Basel Corporate Governance Principles for Banks provide that regulatory supervisors should establish guidance or rules requiring banks to have robust corporate governance in place, including “a clear allocation of responsibilities, accountability and transparency among the members of the board and senior management and within the bank.” Also, in its 2018 document “Strengthening governance frameworks to mitigate misconduct risk: A toolkit for firms and supervisors” (“FSB 2018 Report”), the international body the Financial Stability Board recommended strengthening individual responsibility and accountability in financial services firms as a tool to mitigate misconduct risk.

In this briefing note, we compare some of the key aspects of the new individual accountability regimes in the above jurisdictions. Financial regulators regularly look to best practice in other jurisdictions, including in relation to initiatives in relation to individual accountability. This briefing note will therefore be of particular interest to financial services firms looking to understand latest developments in individual accountability internationally.



Overview

UK

A 2013 Parliamentary Commission on Banking Standards report recommended, inter alia, the introduction of a new individual accountability regime. This recommendation was implemented in the UK by way of the SMCR, which came into force from 7 March 2016¹. Initially, the SMCR was aimed at most Prudential Regulation Authority (“PRA”) authorised firms (including banks), but it has since been progressively extended and, from 9 December 2019, it applies to all firms authorised to provide financial services in the UK.

Ireland

In July 2018, the Central Bank of Ireland (“CBI”) published a report, setting out the conclusions of its review of the culture of the five retail banks in Ireland. This report noted that the CBI’s current powers were not sufficient and that “without a strengthened Individual Accountability Framework, the likelihood of profound cultural change in the regulated financial services sector is reduced”. The CBI recommended that legislation be developed to introduce a new Individual Accountability Framework. In July 2021, the Irish government published the general scheme of the Central Bank (Individual Accountability Framework) Bill 2021, which sets out an individual accountability framework modelled on the SMCR².

Hong Kong

On 16 December 2016, with the SMCR in mind, the Securities and Futures Commission (“SFC”) published a circular and introduced a new Manager in Charge of Core Functions (“MIC”³) regime, which covers all financial intermediaries (eg securities brokers, dealers, traders, asset managers, etc.)

licensed by the SFC (“LCs”). The MIC regime came into force in October 2017, with the aim to “heighten the accountability of the senior management” of LCs and to “promote awareness of senior management obligations under the current regulatory regime”.

Banks in Hong Kong are regulated by the Hong Kong Monetary Authority (“HKMA”). Insofar as their business includes acting as financial intermediaries, which is subject to regulation by the SFC, banks need to be separately registered with the SFC (these banks are described as “Registered Institution” (“RI”). On 16 October 2017, the day the transition period for the full implementation of the MIC regime expired, the HKMA issued a circular⁴ addressed to all banks in Hong Kong, together with a FAQ document⁵, to “elucidate the expectations” of the HKMA regarding management accountability at RIs for conducting or supervising the conduct of their financial intermediaries businesses. This has been described by the HKMA as the Management Accountability Initiative (“MAI”). Despite the background, the MAI makes only cursory reference to the MIC regime and is in the form of frequently asked questions, and may be interpreted as an attempt by the HKMA to reconcile the MIC regime with the existing reporting and other obligations already imposed on banks generally by the Banking Ordinance and various Supervisory Policy Manuals. Overall, the MAI aims at making senior management of RIs similarly accountable for their own conduct as their counterparts in LCs under the MIC regime.

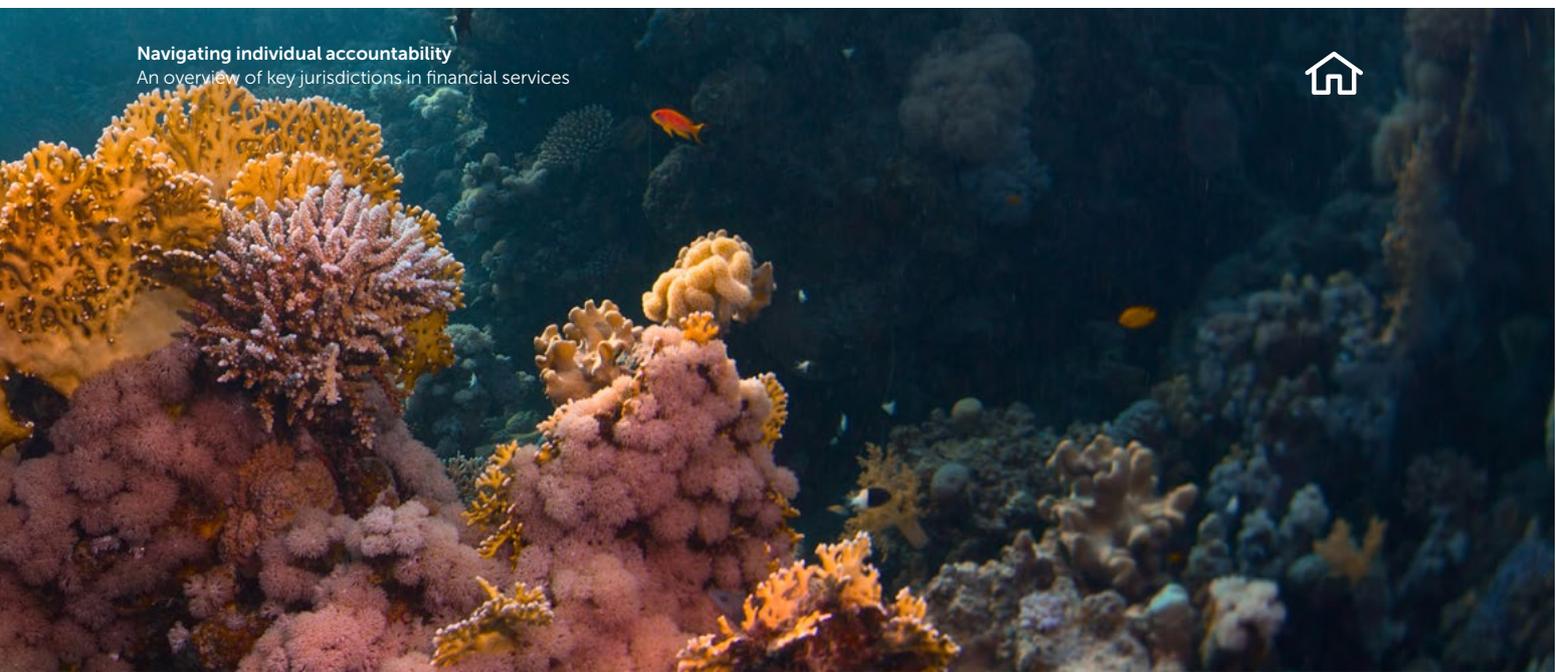
1 Part 4 of the Financial Services (Banking Reform) Act 2013 amended Part V of the Financial Services and Markets Act 2000 to provide the legislative framework for the SMCR in the UK.

2 See: <https://assets.gov.ie/180083/8175a004-8e41-4e76-b09d-d6ee8ab72506.pdf>.

3 see: “Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management”, 16 December 2016; available at: <https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/intermediaries/licensing/doc?refNo=16EC68>.

4 Circular letter from the HKMA, 16 October 2017; available at: <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2017/20171016e1.pdf>.

5 Management accountability at registered institutions, frequently asked questions: <https://www.hkma.gov.hk/media/eng/doc/key-information/guide->



Singapore

In September 2020, the Monetary Authority of Singapore (“MAS”) issued Guidelines on individual accountability and conduct (“Guidelines”)⁶, together with a set of FAQs⁷. The Guidelines are effective from 10 September 2021. The Guidelines, which are to apply to essentially all financial institutions regulated by MAS, note that “embedding a strong culture of responsibility and ethical behaviour in [financial institutions] requires individual accountability on the part of senior managers and a supportive governance framework”.

The Guidelines set out five “outcomes” relating to accountability and conduct that regulated financial institutions are expected to achieve. The aim of the Guidelines is to set out a framework for firms rather than detailed prescriptive rules.

Malaysia

In December 2019, the Central Bank of Malaysia, Bank Negara Malaysia (“BNM”), issued a draft “Responsibility Mapping” document (“Proposals”), setting out proposed requirements and expectations to be introduced by the BNM in relation to individual accountability⁸. The proposals have not yet been adopted and they are intended to come into force one year after formal adoption. They are aimed at complementing existing governance arrangements to promote a corporate culture that reinforces ethical, prudent and professional behaviour by individuals in leadership positions because “clarity on the expectations will encourage individuals in these positions to take greater ownership of the areas under their purview and set the appropriate tone from the top”.

Australia

In July 2017, the Australian government issued a Consultation Paper⁹ on a proposed new Banking Executive Accountability Regime (“BEAR”). This Consultation Paper stated there was “benefit in ensuring consistency as far as possible and practicable” with individual accountability frameworks in other jurisdictions, so the BEAR proposals had “particular regard” to some elements of the SMCR. It also noted, however, that “as the particular circumstances of the Australian banking sector differ to those in the UK, the proposals in this paper do not adopt all elements of the [SMCR].” The new BEAR was adopted in February 2018, on the basis of legislation inserting a new Part IIAA in the Australian Banking Act 1959. It initially applied, from July 2018, only to the four largest Authorised Deposit-taking Institutions (“ADIs”) in Australia. It has, since July 2019, been applied to all ADIs in Australia.

In January 2020, the Australian Government issued a Proposal Paper¹⁰, which set out proposals to replace the current BEAR with a Financial Accountability Regime (“FAR”). Following the release of the Proposal Paper, a draft Financial Accountability Regime Bill¹¹ was released for consultation in July 2021 and, in October 2021, the Financial Accountability Regime Bill 2021 was introduced into Parliament¹². The proposed legislation, if enacted, would have the effect of introducing accountability requirements of a similar nature to BEAR to all entities regulated by the Australian Prudential Regulation Authority (“APRA”) and, in particular, superannuation firms and insurance firms. Unlike the existing BEAR regime which is administered by APRA, the FAR, if enacted, would be administered jointly by APRA and the Australian Securities and Investments Commission (“ASIC”).

[lines-and-circular/2017/20171016e1a1.pdf](#).

6 Guidelines on Individual Accountability and Conduct, MAS, 10 September 2020; available at: <https://www.mas.gov.sg/-/media/MAS/MPI/Guidelines/Guidelines-on-Individual-Accountability-and-Conduct.pdf>

7 “Frequently asked questions (FAQs) on guidelines on individual accountability and conduct”, MAS, 10 September 2020; available at: <https://www.mas.gov.sg/-/media/MAS/MPI/Guidelines/FAQs-on-Guidelines-on-Individual-Accountability-and-Conduct.pdf>.

8 “Responsibility Mapping”, Exposure Draft, 26 December 2019, BNM; available at: https://www.bnm.gov.my/documents/20124/52006/ed_responsibility+mapping_dec2019.pdf/73187c28-8465-fdd2-7fcf-0ddefa2e8bb2?t=1578645662143.

9 “Banking Executive Accountability Regime”, Consultation Paper, July 2017; available at: https://treasury.gov.au/sites/default/files/2019-03/c2017-t200667-BEAR_cp.pdf.

10 Australian Treasury Proposal Paper, 22 January 2020; available at: <https://treasury.gov.au/sites/default/files/2020-01/c2020-24974.pdf>.

11 Draft Financial Accountability Regime Bill; available at: https://treasury.gov.au/sites/default/files/2021-07/c2021-169627_exposedraftlegislation_2.pdf.

12 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6801.



The financial services covered and competent regulator(s)

UK

SMCR progressively extended to apply to all firms authorised to provide financial services in the UK.

It is jointly administered by the Financial Conduct Authority ("FCA") and Prudential Regulation Authority ("PRA").

Ireland

The SEAR aspects (requiring Statements of Responsibilities, prescribed responsibilities, Responsibility Maps and Duty of Responsibility) expected to apply initially to: Credit institutions (excluding credit unions); Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and Insurance Special Purpose Vehicles); Investment firms which underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies/assets; and Third country branches of the above.

The conduct standards (discussed below) will apply to all regulated financial services firms.

The regulator is the CBI.

Hong Kong

The Managers-in-Charge regime covers all financial intermediaries licensed by the Hong Kong Securities and Futures Commission ("SFC").

Banks (AIs) must continue to comply with the requirements imposed by the Banking Ordinance and guidance issued by the HKMA. The activities of banks are regulated by the SFC.

Singapore

Applies to essentially all financial institutions regulated by the Monetary Authority of Singapore.

Malaysia

Proposed to apply to essentially all financial institutions regulated by the Bank Negara Malaysia (Central Bank of Malaysia).

Australia

BEAR applies to all Authorised Deposit-taking Institutions, since July 2019.

Proposed FAR would extend the scope to all entities regulated by the Australian Prudential Regulation Authority ("APRA"). It would be administered jointly by APRA and the Australian Securities and Investments Commission ("ASIC"). The BEAR is currently administered solely by APRA.





Allocation of individual accountability to senior executives: overview

UK

The Financial Conduct Authority ("FCA") or Prudential Regulation Authority ("PRA") may designate a function as a Senior Management Function ("SMF"). SMFs designated by the FCA and/or PRA include those listed below. All SMFs are required to have in place an individual Statement of Responsibilities.

Ireland

It is expected that all individuals in Senior Executive Functions ("SEF") will be required to have an individual Statement of Responsibilities. SEFs are those who are in a Pre-approval Controlled Function ("PCF") role under the current fitness & probity regime in a within-scope of SEAR firm. The CBI will have powers to designate functions as SEF.

Hong Kong

The SFC has identified eight "Core Functions" and required firms to assign a "manager in charge" of each of these functions.

The HKMA requires banks to identify at least one individual as principally responsible for the overall management of the whole business and at least one individual principally responsible for managing each of the businesses or functions listed in paragraphs 2 to 8 of the Fourteenth Schedule to the Banking Ordinance (outlined further below).



Singapore

The MAS 2020 Guidelines state that regulated firms must identify senior managers who have responsibility for functions that are core to the management of the firm's affairs, including but not limited to functions prescribed by MAS as "core management functions".

Malaysia

The Central Bank of Malaysia's Proposals provide that the Board of a regulated firm is responsible for overseeing an effective process for identifying and assigning "responsibility areas" to individuals. The CEO is responsible for ensuring the "responsibility areas" of the firm are comprehensively identified and cover all functions integral to the conduct of the operations and affairs of a financial institution. The Proposals do not specify what any of the "responsibility areas" are.

Australia

An individual is deemed to be an "accountable person" if the individual has actual or effective senior executive responsibility for the management and control of the firm or of a significant or substantial part or aspect of the operations of the firm. As set out in the applicable legislation, an "accountable person" includes those in the roles set out in following pages. APRA may prescribe further "accountable person" roles.

An Accountability Statement must be in place for each "accountable person".



Allocation of individual accountability to senior executives: designated roles

UK

Board - Chair of Board; Chairs of Risk; Audit; Remuneration, Nomination Committees; Executive Director; Senior Independent Director. Other Non-executive Directors on the Board not designated as SMF.

Senior executive - Includes: Chief Executive Officer; Chief Finance Officer; Chief Operations Officer; Head of key business area (PRA-regulated firms only).

Other functions, whilst not explicitly designated as a SMF, may fall within SMF18 ("Other overall oversight function") in light of the various prescribed responsibilities eg, Head of HR.

Internal controls - Compliance Oversight; Money Laundering Reporting function; Head of Risk; Head of Audit.

Ireland

Board - Board member.

Senior executive - Expected to include: Chief Executive Officer; Chief Finance Officer; Head of Retail Sales; Chief Operating Officer; Chief Information Officer.

The CBI will have powers to designate roles as SEF role.

Internal controls - Head of Compliance; Head of Compliance with responsibility for AML and CTF; Chief Risk Officer; Head of Internal Audit.

Hong Kong

The SFC has identified as Managers-in-Charge of a Core Function, individuals who are principally responsible (alone or with others) for the following senior executive management roles:

Overall Management Oversight; Key Business Line; Operational Control and Review; Finance and Accounting; Information Technology.

With regard to the HKMA, one or more individuals must be identified as principally responsible for each of the following lines of business: retail banking; private banking; corporate banking; international banking; institutional banking; treasury; or any other business which is material to the institution.

Board - Whilst the SFC has expressly stated that all directors are considered to be part of the "senior management" of a firm, the "core functions" that must be allocated to one or more individuals are executive functions (so would not be allocated to a non-executive director).

The HKMA has indicated that, whilst an executive board director could be identified as individually responsible for a relevant part of the business under the Banking Ordinance, it does not expect non-executive directors to have day-to-day management responsibility so should not be regarded as "management" for the purposes of the HKMA guidance.



Internal controls - Under the Managers-in Charge regime, there are the following Core Functions of:

Compliance; AML and CFT; Risk Management.

The internal audit function is included as a Core Function under "Operational Control and Review" (see section above).

In relation to the HKMA, under the 14th Schedule of the BO, there are the following affairs:

Accounting systems; Risk; Money laundering; Computer systems; Internal audits or inspections; Compliance.

Singapore

Board - Board directors are considered senior managers under the MAS Guidelines, only to the extent that they are employed in the capacity of an executive function within the financial institution.

Senior executive - Chief Executive Officer; Chief Financial Officer; Chief Operating Officer; Chief Information Officer; Chief Data Officer; Chief Information Security Officer; Chief Regulatory Officer; Head of Business Function; Head of Actuarial; Head of HR.

Internal controls - Head of Compliance; Head of Financial Crime Prevention; Chief Risk Officer; Head of Internal Audit.

Malaysia

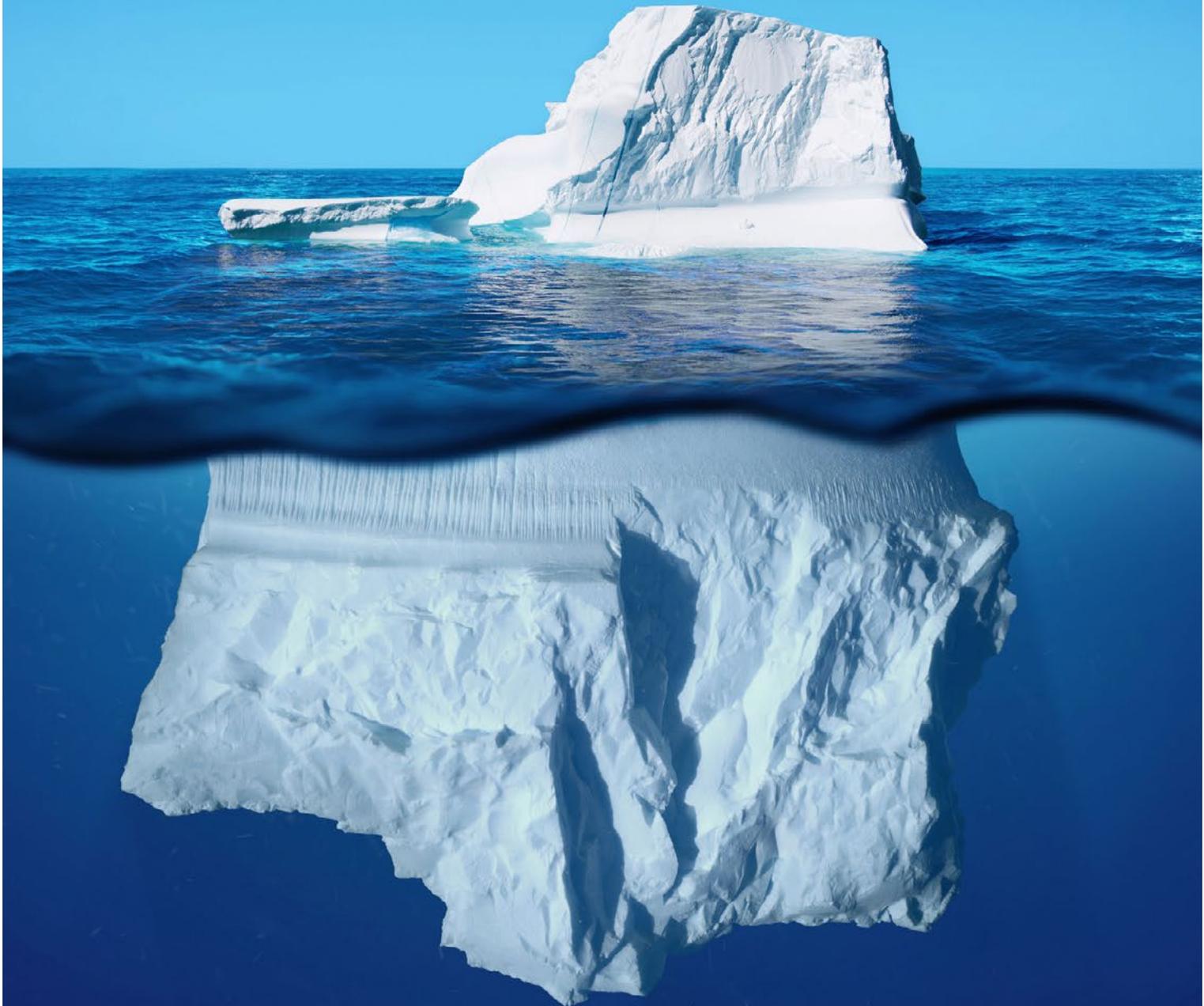
There has not been an explicit designation of roles.

Australia

Board - Board member.

Senior executive - Chief Executive Officer; Chief Finance Officer; Chief Operations Officer; Head of IT; Head of HR. Further "accountable person" roles may be added under the FAR proposals, including: senior executive responsibility for management of the entity's dispute resolution function (internal and external); senior executive responsibility for end-to-end management of a given product or product group. Senior executive responsibility for compliance; Risk; AML.

Internal controls - internal audit. Senior Executive.





SMCR-type prescribed responsibilities?

UK

The FCA and PRA also have powers to specify “prescribed responsibilities”, which must (depending on the size of the firm) be allocated to an SMF. The range of prescribed responsibilities includes responsibilities for:

- the firm’s performance of its obligations under the SMCR
- the firm’s policies and procedures for countering the risk that the firm might be used to further financial crime
- leading the development of, and monitoring the effective implementation of, policies and procedures for the induction, training and professional development of all members of the firm’s governing body
- monitoring the effective implementation of policies and procedures for the induction, training and professional development of all other SMFs and key function holders
- safeguarding the independence of, and oversight of performance of, the Compliance, Risk and Audit functions
- compliance with the requirements of the regulatory system about the management responsibilities map
- acting as the firm’s whistleblower’s champion

Ireland

The CBI will have powers to prescribe responsibilities for firms that must be allocated by the firm to individuals carrying out a SEF.

Hong Kong

No equivalent of SMCR “prescribed responsibilities”

Singapore

No equivalent of SMCR “prescribed responsibilities”.

Malaysia

No equivalent of SMCR “prescribed responsibilities”.

Australia

No equivalent of SMCR “prescribed responsibilities” (the above-outlined are prescribed responsibility roles, rather than prescribed activities to be allocated, as under the SMCR).



Accountability statements/ responsibility mapping required?



Under the SMCR, a Statement of Responsibilities is required to be in place for all individuals in an SMF, setting out the aspects of the regulated firm's business for which the individual is to be accountable.

Separately, under the SMCR larger, so-called "enhanced firms", are required to have a Management Responsibilities Map in place, that sets out their management and governance arrangements and all

responsibilities described in the Statements of Responsibility of all SMFs, to show how responsibilities within the firm are allocated across the firm.

Some version of the Statement of Responsibilities/Management Responsibilities Map requirements also exist in the other jurisdictions discussed in this document.

Ireland

Statement of Responsibilities will be required for all in SEF. All in-scope firms (ie within scope of SEAR) will also be required to have a Management Responsibility Map, documenting key management and governance arrangements in a comprehensive, accessible and clear single source of reference.

Hong Kong

The SFC expects that a licensed corporation should adopt a formal document, approved by the Board, clearly setting out the management structure of the corporation, including the roles, responsibilities, accountability and reporting lines of its senior management personnel. Where a licensed corporation designates more than one individual to be the [Manager-in-Charge] of a particular Core Function, the Board should ensure that the aforesaid document contains sufficient details regarding the specific responsibilities of each [Manager-in-Charge] concerned.

HKMA: Regulated firms are required to submit forms describing relevant job titles and organisational structure for all individuals identified as part of "management". "The forms and organisation chart should indicate clearly the lines of responsibility and accountability for the conduct of [regulated] business as well as the overall management of the whole business of the regulated entity.

Singapore

The MAS Guidelines state that, as part of its internal governance framework, firms should clearly articulate the roles and responsibilities of its senior managers and their overall management structure. Firms are expected to maintain accurate and comprehensive records of these arrangements. MAS will not typically require regular submissions from firms on the roles and responsibilities of senior managers. As part of on-going supervision, MAS may review the effectiveness of Firm's governance frameworks, including the relevant policies, systems, and documentation, as well as senior managers' understanding of their areas of responsibility.

Malaysia

The BNM Proposals state that the CEO must maintain a complete and up-to-date register of each individual's responsibilities, covering the individuals' responsibility areas across the institution and, where relevant, the group. The Board is required to oversee and ensure an effective process for responsibility mapping.

Australia

Under BEAR, Accountability Statements are required for all Accountable Persons. Accountability mapping is also required for all ADIs. Under the FAR proposals, Accountability Statements and Accountability Maps would be required and to be notified to the regulator by all firms that meet the "enhanced" notification threshold, but not the "core" notification threshold (details of thresholds to be determined by the Minister).



Individual conduct rules

UK

SMCR: There are two tiers of individual conduct rules. The first tier applies to essentially all staff (other than ancillary staff) of regulated firms, including those in SMF and the additional second tier applies only to those in SMF roles.

First tier:

Rule 1: "You must act with integrity."

Rule 2: "You must act with due skill, care and diligence."

Rule 3: "You must be open and cooperative with the FCA, the PRA and other regulators."

Rule 4: "You must pay due regard to the interests of customers and treat them fairly."

Rule 5: "You must observe proper standards of market conduct."

Second tier:

SC1: "You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively."

SC2: "You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system."

SC3: "You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee the discharge of the delegated responsibility effectively."

SC4: "You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice."

Ireland

Proposed Common Conduct Standards for all in a Controlled Function role (essentially, all in customer-facing roles or with ability to exercise significant influence over affairs of the firm; includes all in more senior, PCF, role):

- act honestly, ethically and with integrity
- act with due skill, care and diligence
- be cooperative with the Central Bank and other regulators or authorities and deal with them in good faith and without delay
- act in the best interests of customers and treat them fairly and professionally
- observe proper standards of market conduct

Proposed Additional Conduct Standards for persons in PCF roles "and other persons who exercise significant influence on the conduct of" a regulated firm; they must:

- ensure that the business of the firm for which the individual is responsible is controlled effectively
- ensure that the business of the firm for which the individual is responsible complies with relevant regulatory requirements
- ensure that any delegation of tasks for which the individual is responsible is to an appropriate person and that they oversee the discharge of the delegated task effectively;
- disclose promptly, proactively and appropriately any information of which the Central Bank would reasonably expect notice
- participate effectively in collective decision-making

In any enforcement action against an individual for potential breach of the conduct standards, it would be a defence for the individual to show they "acted reasonably in all of the circumstances of the case". In the case of a defence to a breach of the Additional Conduct Standards, the individual would also have to "provide a non-exhaustive list of matters that may be relevant to assessing whether [the] person acted reasonably."



Hong Kong

The existing codes of conduct will continue to govern individual conduct generally. That is, the new regimes introduced by the SFC and the HKMA do not introduce/codify any additional specific individual conduct rules.

Singapore

The Guidelines note that various legislation and guidelines already exist, setting out conduct requirements. Also, the Guidelines state that, to augment the existing regulatory regime and underscore MAS expectations on regulated firms' responsibility for fostering sound conduct standards, the Board and senior management should ensure that a framework is in place which addresses the following: the standards of conduct expected of all employees, including but not limited to standards on honesty and integrity, due care and diligence, fair dealing (treating customers fairly), management of conflicts of interest, competence and continuous development, adequate risk management and compliance with the applicable laws and regulations.

Malaysia

The BNM Proposals state that the individuals to whom responsibilities are allocated are accountable for the management and conduct of the responsibility areas, including for the staff under their purview. In discharging this responsibility, an individual must exercise sound professional judgment, diligence and due care, adhere to the code of ethics of the financial institution and act with integrity.

In discharging the assigned responsibilities, an individual must act in good faith, and take reasonable steps to ensure that the responsibility area is managed effectively and in line with relevant legal and regulatory requirements. This includes ensuring that his/her staff complies with both the internal policies and regulatory requirements.

Where an individual delegates his/her responsibilities, the delegation must be to an appropriate person and compatible with the inherent risks associated with the specific area of responsibility delegated.

The BNM expects the individuals to deal with the BNM and relevant regulatory authorities in an open and constructive manner.

Australia

Accountable Persons must conduct their responsibilities as an Accountable Person:

- (a) by acting with honesty and integrity, and with due skill, care and diligence; and
- (b) by dealing with APRA in an open, constructive and cooperative way; and
- (c) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the ADI.

Under the proposed FAR legislation, an additional conduct requirement is to be imposed on Accountable Persons to take "reasonable steps" to conduct the responsibilities of their position in such a way as to prevent matters arising that would (or would be likely to) result in a material contravention by their firm of specified financial services legislation.



“Duty of responsibility”

UK

A person in SMF can be sanctioned if a breach occurs in their area of individual responsibility and they did not take “such steps as a person in the senior manager’s position could reasonably be expected to take to avoid the contravention occurring (or continuing).” This is known as the duty of responsibility.

Ireland

A similar duty to SMCR is proposed which is expected to apply to all in a SEF.

Hong Kong

Under Part IX of the SFO, the SFC may exercise its disciplinary powers to sanction a regulated person if the individual is, or was at any time, guilty of misconduct or is considered not fit and proper to be or to remain the same type of regulated person.

A “regulated person” means a person involved in the management of a regulated firm.

When a firm is or was guilty of misconduct as a result of the commission of any conduct occurring with the consent or connivance of, or attributable to any neglect on the part of a person involved in the management of the business of the firm, then that person is also guilty of misconduct.

Singapore

MAS intends the regime to ensure that individuals are accountable for any (i) misconduct, (ii) lapses in risk management and controls, or (iii) breaches in legal or regulatory requirements that have the potential to (a) cause widespread disruption to the FI’s day-to-day operation, services, or activities, and/or (b) significantly impact the FI’s customers and other stakeholders, or (c) the safety and soundness of the financial system in Singapore.)

Malaysia

An individual must act in good faith, and take reasonable steps to ensure that the responsibility area is managed effectively and in line with relevant legal and regulatory requirements. This includes ensuring that his/her staff complies with both the internal policies and regulatory requirements.

BNM looks to financial institutions to ensure that a material failure by responsible individuals is met with appropriate consequences.

Australia

APRA may disqualify a person from being or acting as an accountable person if APRA is satisfied that (i) the person has not complied with his or her accountability obligations under section 37CA of the Banking Act 1959, and (ii) having regard to the seriousness of the non-compliance, the disqualification is justified.

The accountability obligations of an accountable person includes taking reasonable steps in conducting responsibilities of his or her position as an accountable person to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the ADI.

Under the proposed FAR legislation, an additional conduct requirement is to be imposed on Accountable Persons to take “reasonable steps” to conduct the responsibilities of their position in such a way as to prevent matters arising that would (or would be likely to) result in a material contravention by their firm of specified financial services legislation.



Prior regulatory approval of senior managers required?

In the UK, prior regulatory approval is required for an individual to hold an SMF role. Similarly, in Ireland, prior regulatory approval is required for an individual to hold a pre-approval controlled function (“PCF”) role under the current fitness & probity regime. By contrast, in Australia, whilst the BEAR is quite similar to the SMCR, differences between the regimes include the fact that, under BEAR, no regulatory approval is required for an individual to hold an Accountable Person role (the individual is simply required to be registered with APRA).

In this regard, Wayne Byres, then chairman of APRA stated to an Australian Parliamentary Committee in 2016:

“A significant and highly resource intensive part of the UK regime is, in fact, that the regulator approves senior appointments. To me, that actually undermines the accountability for appointments. The appointment should be the responsibility of the organisation. The regulator should have responsibility to veto or remove but once you have an appointment that the regulator has approved, and that individual, subsequently, proves that they should not have been in that position, well, who is at fault? Is it the organisation that appoints them or is it the regulator that allowed them there? I think it muddles the accountability. I would not advocate that sort of thing¹.”

There is no requirement for prior regulatory approval for appointment to a senior role in a regulated financial services firm in Singapore or Malaysia.

In Hong Kong the SCF has, since 2003, required firms licenced with it to appoint two Responsible Officers (“ROs”) in the firm, who are responsible for good governance and proper behaviour. ROs require prior SFC approval under the SFC fitness & probity regime, to take up their role. In practice, licenced firms often did not appoint sufficiently senior individuals to the roles of ROs, allowing “the controlling minds of the firm [to] stay in the shadows in the hope of evading regulatory scrutiny².” Under the MIC regime, the MIC of the overall management oversight function and those in charge of key business line functions are expected to be ROs ie, requiring prior SFC approval.

For banks (Authorised Institutions) in Hong Kong, Directors, Chief Executive, Alternate Chief Executive and “Executive Officers” would require prior approval from the HKMA.

¹ Mr Wayne Byres, Chairman of APRA, Committee Hansard, 14 October 2016; available at: https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/commrep/558cbc94-fa24-488d-aafd-2f9fc07b540e/&sid=0001

² “Manager-In-Charge initiative: Fostering accountability and a compliance culture”, J. Leung, SFO, speech, 19 January 2017; available at: https://www.sfc.hk/web/EN/files/ER/PDF/Speeches/Julia_19012017.pdf



Regular review required by regulated firms of compliance by individuals with fitness & probity requirements/ certification?



UK

Under the SMCR, regulated firms are required to review the fitness and probity of all their SMFs and all non-executive directors, at least on an annual basis. Further, they must consider whether there are any grounds on which a regulator could withdraw the regulatory approval for the SMFs and, if so, notify the regulator of those grounds.

Separately, the SMCR also introduced a new **certification** regime for staff whose functions are not sufficiently senior to amount to an SMF, but whose functions nevertheless give rise to a risk of “significant harm” to the firm or any of its customers. The FCA and PRA may specify certain functions as “significant harm” functions. The roles that have been specified as “significant harm” functions include “significant management” roles, “material risk-takers” and persons in “client-dealing” roles. Staff covered by this certification regime do not require prior approval from the regulator to carry out their role. They are not permitted to carry out their role, however, unless their firm has certified that they are fit and proper to do so. A firm can only issue such a certificate for a 12 month period. This means that it must review, at least on an annual basis, the fitness and propriety of all staff falling within the certification regime.

Ireland

Under the legislative proposals, a new certification regime is to be introduced, under which all regulated firms will be required to certify, on an annual basis, that all individuals in a controlled function (“CF”) role are fit and proper to perform their functions. CF roles include all PCF roles (more senior roles) and other less senior roles, such as customer-facing roles.

Hong Kong

There are in place legal obligations to the effect that senior managers of regulated firms must remain fit and proper at all times. The MIC and MAI regimes did not impose further or additional requirements that the fitness and probity of senior managers be reviewed and at what interval. Further, there is no equivalent of the SMCR certification regime.

Singapore

Regulated firms are required to have in place “robust standards and processes to assess the fitness and propriety of each senior manager, prior to appointment and on an on-going basis thereafter”. There is no equivalent, though, of the SMCR certification regime.

Malaysia

The Proposals state that “[i]n allocating the responsibility areas, the CEO should conduct the necessary due diligence on the individuals to ensure that they are capable of fulfilling their responsibilities”. There is, however, no specific requirement on regulated firms to review individuals’ fitness and probity on a regular basis and no equivalent of the UK certification regime.

Australia

There is no direct equivalent of the UK certification regime. APRA, however, introduced prudential standard “CPS 520” to implement fit and proper standards, which was most recently updated in 2018¹. In accordance with Prudential Standard CPS 520, institutions regulated by APRA are required to determine whether their senior managers are fit and proper for their role and functions, before appointment to the role. Prudential Standard CPS 520 is clear in specifying that the ultimate responsibility for ensuring that the responsible persons are fit and proper for their roles rests with the board. It also specifies that entities must maintain a fit and proper policy, approved by the board, and assess senior management prior to appointment and on an annual basis thereafter, and document the assessment of their competence and character. Regulated firms are also required to inform APRA of specified events, including where the regulated firm becomes aware of a breach by an Accountable Person of their accountability obligations.

¹ Australian Prudential Regulatory Authority. Prudential Standard CPS 520 (APRA, 2018); available at <https://www.legislation.gov.au/Details/F2018L01390>.



Deferral of remuneration?

UK

The PRA and FCA have issued a policy statement on remuneration ("Policy Statement")¹. The Policy Statement sets out detailed rules in relation to, for example, the proportion of total remuneration that may be composed of variable remuneration and minimum periods that must elapse before a specified portion of the variable remuneration can vest. It also contains various provisions for the non-vesting of variable remuneration or claw-back of variable remuneration that has been awarded, where there is evidence of employee misbehaviour².

Ireland

The CBI applies, in particular, various European Union requirements relating to remuneration and non-payment of variable remuneration in the event of misconduct by staff³.

Australia

The BEAR includes specific requirements relating to the deferral of a proportion of variable remuneration for a minimum period. It also includes a requirement on firms to have a remuneration policy in place that requires that, if an Accountable Person has failed to comply with his or her accountability obligations, the person's variable remuneration is to be reduced "by an amount that is proportionate to the failure".

There are no directly equivalent deferral of remuneration provisions under the regimes in Hong Kong, Singapore and Malaysia.

1 "Strengthening the alignment of risk and reward: new remuneration rules", PRA and FSA Policy Statement, PRA PS 12/15, FCA PS 15/16; available at: <https://www.fca.org.uk/publication/policy/ps15-16.pdf>.

2 See, e.g., "Peer review of the United Kingdom", 14 April 2021, Financial Stability Board ("FSB"), an FSB peer review of financial sector compensation reforms in the UK. Its recommendations include: "The Authorities should review the interaction between the [SMCR] and remuneration framework, including how the interplay between the [SMCR] and remuneration rules/codes reward diligent and proactive risk management." (p. 5); available at: <https://www.fsb.org/wp-content/uploads/P140421.pdf>.

3 See, e.g., the European Banking Authority's "Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013"; available at: <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1314839/1b0f3f99-f913-461a-b3e9-fa0064b1946b/EBA-GL-2015-22%20Final%20report%20on%20Guidelines%20on%20Sound%20Remuneration%20Policies.pdf>.





Addressing the “rolling bad apples” problem/regulatory references

The “rolling bad apples” problem was recognised to be a serious problem in the financial services industry including in a 2018 G20 Financial Stability Board Report, which noted the complexity of the issue and stated that “many firms limit what they disclose to third parties about former employees due to legal risks arising from data protection, defamation, employment rights or privacy law”.



Another aspect of strengthening individual accountability relates to the problem of individuals who engage in misconduct but are able to obtain subsequent employment elsewhere without disclosing their earlier misconduct to the new employer (so-called rolling bad apples). The result is that employees are mobile, but their conduct records are not, and a valuable deterrent against misconduct – risk to future employment – is thus lost (2018 Financial Stability Report).

UK

The PRA and FCA issued detailed guidance, in 2016, on regulatory references.

Regulated firms must seek regulatory references when considering the appointment of individuals to senior management functions (SMFs), certification functions or notified non-executive director (NED) functions.

The requirements include a template reference form.

Ireland

The CBI's 2018 Guidance on Fitness & Probity Standards states that the CBI expects regulated firms to make all reasonable efforts to obtain references from former employers or other relevant persons in respect of individuals they propose to employ in a CF role.

The regulatory impact analysis to the Central Bank (Individual Accountability Framework) Bill, stated, "Feedback from industry in the UK in relation to the SMCR has been broadly positive, with reservations focused on elements that are not replicated in the Irish legislation, particularly the operation of Regulatory References".

Hong Kong

In May 2021, the HKMA published a "Consultation Conclusions Paper on Implementation of Mandatory Reference Checking Scheme to Address the 'Rolling Bad Apples' phenomenon".

This new Mandatory Reference Checking Scheme is to be introduced on a phased basis.

The HKMA's intention is that the new scheme is not to be introduced as a mandatory requirement. Rather, it "should be an industry-led initiative to be endorsed by the HKMA".

Singapore

In May 2021, MAS issued a consultation paper on proposals to mandate reference checks:

"Given that late, ambiguous or partial reference check responses would hinder meaningful information exchange on prospective employees, MAS proposes to require [financial institutions] to perform reference checks and respond to reference check requests, based on a set of minimum mandatory information within a specified period of time".

Malaysia

In March 2018, the BNM issued a policy document on "employee screening".

This includes a requirement on financial institutions, who propose to hire an individual, to request references from current and previous employers of the individual.

Australia

In June 2017, the Australian Banking Association ("ABA") issued a Banking Industry Conduct Background Check Protocol.

The February 2019 Royal Commission report ("Hayne Report") recommended that the ABA Protocol be mandatory for all Australian finance service licensees whose licence authorises the provision of legal advice. A 2020 Act implemented this recommendation, giving ASIC powers to adopt a Reference Checking and Information Sharing Protocol. Relevant ASIC legislative instrument came into force in October 2021, covering recruitment of financial advisors and mortgage brokers.



Civil sanctioning of individuals

UK

The FCA and PRA have wide powers to sanction individuals for misconduct including: public censure (in effect, a public reprimand), financial penalty “of such amount as it considers appropriate”, suspension for up to two years or restriction on activities for up to two years.

For this purpose, “misconduct” can be a breach of the above SMCR individual conduct rules, knowingly concerned in a breach of regulatory requirements by a regulated firm or, in the case of a person in an SMF, breach of the “duty of responsibility” ie, failure to take “reasonable steps” to prevent a breach of regulatory requirements in the area of the regulated firm’s activities over which the SMF was responsible.

To date, only one individual has been fined for breaches of the SMCR individual conduct rules.

Separately, the FCA or PRA may withdraw their SMF approval in relation to an individual if they are no longer satisfied that the individual has the requisite fitness and probity.

Ireland

Under the current Administrative Sanctions Procedure (“ASP”), the CBI may impose sanctions, including disqualification and/or a fine of up to €1 million on a “person concerned in the management” of a regulated firm who has “participated” in a regulatory breach by the firm.

Under the Individual Accountability Framework legislative proposals, these sanctioning powers would be available for breaches of the proposed new individual conduct rules and duty of responsibility. Also, the sanctions could be imposed, under these proposals, without the need for the regulator to establish any breach of regulatory requirements by the firm. To date, 17 disqualifications have been imposed on individuals under the ASP. Separately, the CBI may prohibit a person, for a specified period or indefinitely, from performing a CF role if it is of the opinion that the individual is not of such fitness and probity as is appropriate for the role. To date, the CBI has issued nine prohibition notices.

Hong Kong

The disciplinary sanctions that the SFC may impose on a regulated person under Part IX of the SFO are civil rather than criminal in nature. The SFO empowers the SFC to order a pecuniary penalty of not exceeding the amount which is the greater of HK\$10 million or three times the amount of profit gained or loss avoided by the relevant person as a result of his misconduct.



Singapore

Financial institutions are responsible for supervising the conduct of their staff and have a duty to ensure that their representatives conduct themselves in accordance with all applicable regulatory requirements. In the event of misconduct by a representative, the financial institution is required to investigate the facts and circumstances of that misconduct, and submit a report to MAS.

Where necessary, the financial institution is expected to take appropriate disciplinary action against a representative found guilty of misconduct. The receipt of such information allows MAS to assess the need for regulatory action against the individual involved, such as a prohibition order.

Malaysia

The primary objective of the new regime is stated to be to foster appropriate conduct and behaviour. On this basis, BNM expressly stated that financial institutions should ensure that a “material failure” by responsible individuals is met with appropriate consequences, and that BNM does not expect to take enforcement actions as an immediate response to individual misconduct or poor behaviour except in cases of “serious misconduct committed with intent”.

It is anticipated that misconduct would be dealt with either internally by the regulated firm or, in more serious cases, through the criminal law.

Australia

Under the BEAR, where an Accountable Person breaches his or her accountability obligations, the regulator has no powers to fine the individual, but may disqualify the individual from acting as an Accountable Person for “a period that APRA considers appropriate”.

Under the January 2020 FAR proposals, it had been proposed that Accountable Persons would have been subject to civil penalties for breaches of their accountability obligations. That proposal was not contained in the July 2021 draft FAR legislation. The October 2021 Bill, however, provides for civil penalties for any person (whether or not an Accountable Person) who e.g. attempts to contravene or aids, abets, counsels or procures a civil penalty obligation or is knowingly concerned in such contravention (in essence, breach by the regulated firm of its accountability obligations e.g. to take reasonable steps to conduct its business with integrity, due skill, care and diligence).

The FAR proposals would also give powers to the regulator to issue directions to the regulated entity to address concerns, where it has reasonable grounds to believe that the entity or Accountable Person has breached obligations.



Extra-territorial implications for senior managers



UK

This applies to senior managers regardless of their location. Senior managers outside the UK who have responsibilities for the UK operations might fall within scope of the SMCR (SMF7: Group Entity Manager). According to the PRA, “the PRA does not require pre-approval of senior individuals located overseas whose responsibilities in relation to the United Kingdom are limited to developing the group’s overall strategy. The PRA’s focus is on those individuals who, irrespective of their location, are directly responsible for implementing the group’s strategy in UK Relevant Firms”.

Ireland

Under the current Fitness and Probity regime, the CBI’s 2018 Fitness and Probity FAQs provide that senior managers based outside of Ireland “who may be able to exert a significant influence over the performance of [Controlled Functions] or PCFs in [a regulated firm] by virtue of a reporting line” are exempt from the CBI’s code and the Fitness and Probity Standards. Such persons could, however, be investigated by the CBI if it has concerns about the individual’s fitness and probity, could be required to comply with an evidentiary notice and could be prohibited from holding a Controlled Function role (in essence, a position of significant influence and/or a customer-facing role, it includes all PCFs).

Hong Kong

The disciplinary powers under Part IX of the SFO apply to all regulated persons as defined. Such powers do not differentiate between regulated persons located in Hong Kong and those outside Hong Kong.

Singapore

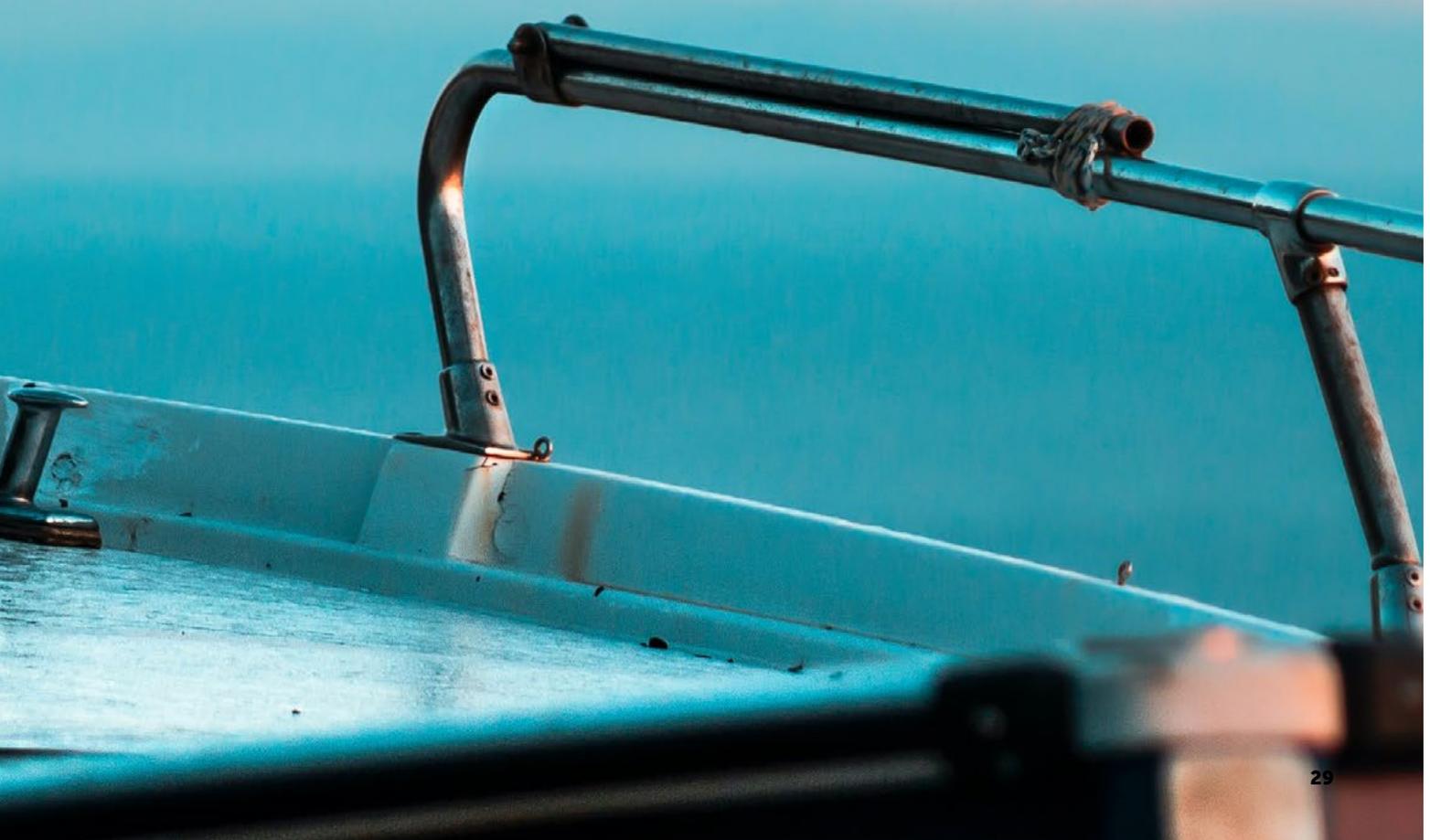
Clarity in individual responsibilities and the firm’s overall management structure requires accurate identification of senior managers that reflects actual oversight responsibilities and decision-making authority, regardless of his or her physical location.

Malaysia

Applies to individuals who are principally responsible for a financial institution and have authority in the management of a financial institution, regardless of their location.

Australia

Applies to “accountable persons”, regardless of their location. The obligations extend to branches of an ADI and its subsidiaries, regardless of their location.







Are the new individual accountability regimes likely to be successful in improving firms' cultures?

It is too early, at this stage, to reach any reliable conclusions as to the likelihood of the new individual accountability regimes succeeding in improving the culture of financial services firms. The following, though, are useful to note.

- an August 2019 UK FCA “stocktake report” on the SMCR since its inception in the banking sector in March 2016, which involved interviews with senior individuals in the industry, stated that banks told the FCA that the SMCR enabled firms to improve their controls environment, “which they expect to lead to improved behaviours” but “it is not clear to what extent the regime has been linked to culture”
- a December 2020 evaluation of the SMCR by the PRA indicated that on the basis of surveys of firms that it carried out, the SMCR “is widely considered to have had a positive impact on culture and behaviour”
- a December 2020 review by APRA of the implementation of BEAR frameworks in Australia by the ADIs found that the actions taken by the ADIs have “delivered a stronger understanding of the end-to-end accountability obligations of accountable persons at the ADIs, have sharpened challenge by boards on executive accountable persons’ actions, and facilitated more targeted engagement with APRA to achieve prudential outcomes”
- a December 2020 review of the implementation of BEAR in Australia (by Prof. Elizabeth Sheedy and Dr. Dominic Canestrari-Soh), suggests that the BEAR has given rise to improvements in governance culture and that their study indicated that:
“accountability has an empowering effect so decisions get made, problems get resolved and there is greater care and diligence. Risk/compliance functions are getting a bigger say as their line one colleagues consult them more. Directors and assurance teams also find it easier to do their jobs because they can ascertain who is accountable when things go awry” and
“supports a link between accountability and risk culture. The majority of participants (65%) report an improvement in organisational culture since the introduction of the BEAR. We observed the most favourable risk culture scores in the organisation that has been most successful in embedding accountability over time”



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