Senior management accountability: A global perspective

View contents
Linklaters are grateful for the assistance of Arthur Cox in respect of the content relating to the proposed SEAR in Ireland.
Background

In the aftermath of the 2008 financial crisis, the need for effective governance and risk management frameworks within firms, and the role played by senior managers in promoting appropriate conduct, has been at the forefront of the international regulatory agenda. Whilst the initial focus was rebuilding balance sheets and financial resilience, there was a shared recognition that good governance and culture would play an equally important role in reducing the risk of significant failures in the future, and that senior management had a crucial role to play in fostering good governance and promoting an appropriate risk and ethical culture.

The investigations that took place after the financial crisis exposed a number of weaknesses in the way in which individual licensing/registration systems had been used to support effective governance and accountability within firms. In particular, regulators struggled to identify which individuals actually had responsibility for particular areas or functions, or how those responsibilities had been discharged. In the UK, the Parliamentary Commission on Banking Standards declared the approved persons regime to be not fit for purpose, concluding that it had failed to prevent individuals hiding behind an “accountability firewall” in respect of significant risk management failures at large financial institutions. In the US, the DOJ noted that high-level executives may be “insulated from the day-to-day activity in which misconduct occurs”. Australia’s Coleman Report went further, arguing that major banks had a poor compliance culture which senior executives had created and for which they needed to be held accountable. These weaknesses have led to many national regulators reforming their frameworks for regulating individuals and strengthening accountability within regulated firms.

This publication considers the steps taken by a number of national regulators across the globe to enhance senior management accountability. It reviews the common key features of various national regimes and highlights some of the challenges arising. Finally, we also assess whether these reforms are likely, in practice, to prove effective in promoting effective risk management and restoring trust and confidence in the financial services sector.
Common key features

National regulators have approached the enhancement of senior management accountability regimes from a variety of starting points, ranging from long-established systems of individual registration and conduct standards, to those with no regulation of individuals at all. Nevertheless, there are many similarities in the steps taken by national regulators.

One example of a jurisdiction without a formal licensing or registration system, but with other related legislation and guidelines that impose requirements on senior managers, is Singapore. Here, certain financial institutions are required to seek the prior approval of the Monetary Authority of Singapore (“MAS”) to appoint directors, CEOs and other key officers, and such individuals remain responsible and accountable for the proper exercise of their functions on an ongoing basis. The MAS has the power to impose criminal sanctions and other enforcement measures against senior managers and has exercised those powers in practice.

Likely guided by international developments, on 26 April 2018 the MAS published a consultation on a new set of guidelines to strengthen individual accountability of senior managers and raise standards of conduct in financial institutions, including requiring financial institutions to clearly identify senior managers who have responsibility for functions that are core to the management of the financial institution’s affairs (the “MAS Guidelines”). The MAS has clarified that these guidelines are intended to supplement the existing regulatory framework. The MAS issued their response to the consultation on 6 June 2019, and published a new consultation on the same day to seek additional feedback on the revised scope of financial institutions on which the MAS Guidelines will be applied. The MAS intends to implement the MAS Guidelines one year after they are published.

Types of firms covered

Most national regulators have taken a wide view of the type of firms whose senior managers should be required to submit to formal regimes. The Hong Kong MIC regime covers all SFC licensed corporations. The SEC’s duty to supervise applies to all registered broker-dealers. The UK began by applying its enhanced senior managers regime to UK banks and building societies, credit unions and PRA-designated investment firms, but will apply it to all UK-regulated firms from December 2019. In Australia, the Banking Executives Accountability Regime (“BEAR”) applies to authorised deposit-taking institutions (“ADIs”), plus significant parts of the ADI group (e.g. wealth management and insurance arms). In Ireland, it is intended that the proposed SEAR will initially cover credit institutions, insurance undertakings and certain investment firms, plus any third country branches of the above. As in the UK, the application of the proposed SEAR will likely expand in due course.

The MAS has proposed expanding the scope of the MAS Guidelines to cover all the financial institutions it regulates (except for certain exempt entities and entities with a headcount of less than 20 (who may still consider adopting the specific guidance described in the MAS Guidelines)).

Licensing and approvals

With the exception of Australian regulators, who have placed the onus of assessing the suitability of senior managers solely with the regulated entity, senior managers regimes have generally included the creation, or expansion, of a role for regulators in checking the appropriateness and competence of nominees for senior manager roles.

There has also been a desire to cast the net wider than just those holding the most senior positions, in recognition of the fact that a wider range of personnel can cause harm to customers, the market or the firm and should therefore be subject to mandatory standards and the risk of disciplinary action if they do not comply with them. Rather than using licensing or registration regimes, however, regulators have tended to push this responsibility on to firms, together with an obligation to continuously monitor the ongoing suitability of their employees, and in some cases to formally reassess that suitability on a regular basis. This is intended to help ensure that firms remain focused on this issue and do not abdicate responsibility for ongoing monitoring of staff on the basis that their relevant regulator has already signed off on their suitability and capability.

“Senior managers regimes have generally included the creation, or expansion, of a role for regulators in checking the competence of nominees for senior manager roles.”
Common key features

Role and organisational mapping

The use of collective decision-making structures at large financial institutions, coupled with the complex management and reporting structures in place at such firms, has made it difficult for national regulators to clearly identify which senior staff members have responsibility for particular functions, business lines or decisions. Consequently, many of the accountability regimes introduced or reformed by national regulators involve improving the clarity with which responsibilities are identified and mapped.

These tend to operate on two levels: first, a requirement for the responsibilities of senior individuals to be clearly defined; and secondly, for these individual statements to be consolidated into a document which explains how these individual responsibilities fit into the overall governance and risk management frameworks of the firm as a whole. Importantly, many jurisdictions have sought to eradicate all gaps in accountability by requiring that responsibility for every area of a firm (whether conducting regulated activities or not) be allocated to a senior staff member. Many regulators also require an appropriate nexus between the role undertaken and the responsibilities ascribed to it. These reforms seek to ensure that, where a breach occurs, it is possible to identify the individual responsible for the business area or function where the breach occurred, and evaluate what steps, if any, they took or should have taken to prevent the breach occurring or continuing. Responsibilities mapping plays a key role in the senior managers regimes of Hong Kong, the UK and Australia. It also features in the proposed regime in Ireland. The Financial Stability Board’s Toolkit for Strengthening Governance Frameworks to Mitigate Misconduct Risks, published in April 2018, identifies the development and monitoring of a responsibility and accountability framework as one of its specific tools for strengthening individual responsibility.

- Italian regulator CONSOB can draw on principles such as “culpa in eligendo” (bad choice of employees) and “culpa in vigilando” (failure to properly supervise employees) to fine both a firm and those performing administrative, managerial or supervisory functions, where a manager fails to properly supervise an employee.

- In Poland, the Polish Financial Supervision Authority (KNF) may impose administrative penalties upon the relevant board member where an employee for whom they are specifically responsible commits misconduct.

- MiFID II, which has applied across Europe since 3 January 2018, requires EU member state regulators to introduce rules obliging investment firms to ensure that staff providing investment advice or information about financial instruments to clients have the necessary knowledge and competence to fulfil their roles.

- The UK SMCR requires firms to identify material risk takers and other individuals performing significant harm functions (including those dealing with or for clients), and to ensure such individuals are certified as fit and proper, both at commencement of employment and annually thereafter. The UK SMCR also imposes broad regulatory conduct rule obligations on almost all staff of an authorised firm.

- The Hong Kong MIC regime requires firms to identify managers in charge of core functions and imposes conduct rules on those staff in charge of core functions who are not carrying out licensable activity (for instance, compliance, risk management and IT functions).

- US registered broker-dealers and their employees are subject to possible sanction for failure to supervise by the SEC and relevant self-regulatory organisations.

- Australia has introduced civil penalties for ADIs that fail to comply with their obligations under BEAR.

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Common key features

**Location of senior managers**

There are interesting differences in the views of national regulators about the extent to which senior managers based outside their jurisdiction can be held directly accountable to them. The UK’s PRA and FCA have been keen to ensure that the “hearts and minds” of an entity’s management sit within the UK. Specifically, the CEO and Board of the legal entity are expected to have oversight of the business and activities of the firm as a whole, and it is expected that there should be appropriate reporting lines or accountability ultimately to that CEO and Board. As a result, the PRA and FCA would be unlikely to allow firms to register a substantial number of senior managers based overseas. However, the SMCR specifically provides for a Group Entity Senior Manager role, intended to capture individuals based in a parent or affiliate entity who have significant influence on the management of the UK regulated entity (rather than simply sitting and overseeing the implementation of a global strategy). Relatively few Group Entity Senior Managers have been identified by banks under the SMCR, but we anticipate that the PRA and FCA will continue to focus on whether such individuals should be identified in light of their influence and impact on the UK entity.

In contrast, the SFC in Hong Kong recognises both that MICs may not necessarily be employees of the licensed firm in question (despite holding positions of authority) and may be based abroad. In Singapore, the MAS Guidelines require financial institutions to designate individuals as senior managers based on where actual oversight responsibilities and decision-making authority resides in practice, regardless of the individual’s physical location. This may reflect the realities of the relevant markets in the two jurisdictions. It highlights, however, the difficulties faced by national regulators in attempting to reconcile expectations of local accountability for senior figures with the global and functional nature of reporting lines and decision making. We touch on this issue again later in this paper.

**Meaningful penalties**

A key objective of the introduction of more robust senior management regimes was to facilitate enforcement action against individuals, ensuring that those in senior positions face meaningful consequences for their actions (or omissions). Unsurprisingly, many of the regimes instituted by national regulators include clear mechanisms for taking enforcement action against senior individuals whose behaviour is deemed to breach relevant standards (e.g. failure to take reasonable steps to ensure a business/function is effectively controlled or complies with regulatory requirements). Penalties generally include both fines and the ability to remove or suspend an individual who has been approved or licensed.

There are differences in the consequences for an individual of breaching the rules set out in these new accountability schemes. Not all jurisdictions use this as the basis of enforcement action to which serious financial and other penalties may attach. Jurisdictions such as Hong Kong and Singapore have chosen instead to rely upon existing legislation providing for disciplinary action against individuals. This reflects the differences in the legal systems in which these new accountability regimes must operate, as well as the different starting points and approaches of the regulators concerned. Some have expressed concern about the risk of certain jurisdictions ceasing to be attractive to talented senior individuals where the approach they take is considered to be unduly severe relative to other jurisdictions.

“Hong Kong and Singapore have chosen to rely upon existing legislation providing for disciplinary action against individuals.”
The type of conduct that results in penalties is also evolving. Whilst it is largely self-evident that individuals should be held to account where they have been directly involved in misconduct, liability for failing to detect wrongdoing, or for poor management or oversight which allowed organisational or control failings within a particular business area to persist, is a less developed area. Such “misconduct” is clearly within certain regulators’ sights. For example, the US has seen an increase in cases in an AML context in which compliance officers have incurred penalties for failing to address breaches of the relevant legislation which occurred on their watch. This includes cases in which the compliance officer in question had no direct knowledge of the misconduct but was deemed to be liable for the firm’s failure to establish and implement adequate AML procedures. Concurrent action has almost always been taken against the firm itself in respect of the same failings. The US regulator FINRA has been particularly active in this space, although similar cases have also been taken in the UK, e.g. Sonali Bank and Steven Smith.

Elsewhere in the US, the SEC’s Co-Enforcement Directors described individual accountability as a “core principle” in its 2017 Annual Report, noting that “In the six months since Chairman Clayton took office….. one or more individuals have been charged in more than 80 percent of the standalone enforcement actions the Commission has brought.” Similarly, the proposal by CBI to remove the ‘participation link’ (which required a prior finding of breach by a firm before its individual staff could be held to account) leaves open the possibility that a senior manager may have failed to fulfil their role competently, notwithstanding the absence of related misconduct by their firm.

The UK FCA’s predecessor, the FSA, tried unsuccessfully to prosecute former banking CEO John Potterage for failing to take reasonable steps to identify compliance weaknesses within the business he managed. The fact that the then-FSA was unable to demonstrate this on the evidence to the Tribunal’s satisfaction highlights the difficulties regulators are likely to face in bringing such cases. Even post-SMCR, whilst the new regime makes it easier to identify which senior individual has responsibility for a particular area, it does not make it much easier (if at all) to investigate and demonstrate that the individual’s conduct fell short of regulatory standards or expectations.

The FCA has enjoyed more success in cases against senior managers that have involved personal misconduct or more egregious/obvious instances of failure to supervise, e.g. Paul Flowers (2018) and Jonathan Burrows (2014). The first reported case against a senior manager under the SMCR concerned an apparently negligent failing by that individual (the CEO of a major retail bank) in connection with his conduct towards a suspected whistleblower; no wider allegations of poor management or oversight were made.

In Hong Kong, the SFC has historically taken disciplinary action to fine senior managers who are Responsible Officers for shortcomings in management oversight. No disciplinary action for management oversight against MICs has as yet been taken following implementation of the MIC regime, although the SFC has in a few cases required Board directors to provide undertakings to remediate system and control failings.

In Australia, generally speaking, regulators are required to make a successful case before a Court before a penalty is imposed on a financial institution or one of its senior managers. This has generally resulted in significant penalties for misconduct being reserved only for the most egregious legal infringements (for example, serious breaches of directors’ duties or insider trading). However, APRA’s new powers to unilaterally disqualify senior managers, together with the significant remuneration consequences for breaches of the accountability obligations, are likely to provide a in a speech delivered on November 29, 2018, U.S. Deputy Attorney General.

1 See In re Brown Brothers Harriman & Co. FINRA case no. 2013035821401 (Feb 4, 2014) and In re Raymond James & Assocs., Inc., FINRA Case No. 2014035920001 (May 18, 2016).

2 Mr Flowers was fined and barred following his inappropriate use of his firm mobile and email address; Mr Burrows was banned having admitted dishonesty avoiding paying train fares for several years.

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Common key features

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Common key features

Remuneration reform

Whilst this could be a topic in its own right, the reform of rules around remuneration within financial services firms deserves mention here, given that these reforms have developed in tandem with the introduction of more exacting requirements for senior managers. Following the crisis, it was recognised that compensation practices played a significant role in incentivising good conduct and behaviour that was aligned with the firm’s risk appetite. Post-crisis, regulators across the globe have moved to strengthen the link between the performance of senior managers and their remuneration.

- The UK (and other EU countries implementing Capital Requirements Directive IV) have introduced caps on the amount of compensation that can be paid as variable pay as a ratio to fixed pay; issued detailed rules on the factors that should be taken into account in determining variable pay; indicated how much variable pay can be paid in cash (rather than equity); set the deferral periods over which said pay is paid out (up to seven years); strengthened the frameworks for performance adjustment (both in-year and in respect of deferred but unvested pay); and introduced lengthy clawback periods (in the UK up to seven years for material risk takers and up to 10 years for certain senior managers).
- The Australian regulator, the APRA, has introduced measures requiring ADIs to have in place remuneration policies which:
  - reduce an accountable person’s variable remuneration (including to zero) in the event of breach of their accountability obligations; and
  - defer a significant portion (up to 60% for CEOs) of an accountable person’s variable remuneration for a period of four years.
- In Hong Kong, the HKMA’s March 2017 Circular on Bank Culture Reform required banks to review and reform incentive systems to ensure that they align with culture and values, do away with sales and profits targets as a primary determinant of compensation, and promote variable recognition rewards for good behaviour as well as sanctions for misconduct. In addition, the HKMA has general principles on sound remuneration systems to promote effective risk management in its Supervisory Policy Manual.
- One of the Dubai FSA’s general principles is the requirement that firms ensure their remuneration practices incentivise good governance.

In addition to insisting that firms establish remuneration policies and procedures that incentivise good conduct and governance, regulators are also increasingly probing firms about their application in practice. Where risk management, accountability or personal failures are found to have occurred in respect of individual senior managers, it is now quite common for regulators to require firms to explain whether (and if not, why not) performance adjustment has been applied. This underlines their determination to foster a greater link between performance and reward for senior managers within financial institutions.
Interaction with firm liability

The relationship between firm and individual plays a key role in this area. In practice, many of the circumstances giving rise to a risk of individual liability represent matters where the firm may also have breached its regulatory obligations. Many regulators impose liability upon individuals not only for not complying with their regulatory obligations, but also where they were “knowingly concerned” (or similar) in breaches by their firm.

The UK FCA indicated at least as far back as 2013 (if not further) that settlements with firms would no longer be agreed on the basis that action would not be taken against senior managers. The FCA’s current practice when investigating a firm is always to consider whether there are grounds also for investigating the conduct of senior individuals who may bear responsibility for the matters giving rise to the investigation.

The US Department of Justice, however, has gone further still. The Yates Memo, published in September 2015, holds that, to qualify for co-operation credit after an investigation, corporations must provide the DOJ with all relevant facts relating to individuals responsible for the alleged misconduct.

This was coupled with a requirement in the Yates Memo that investigations into criminal and civil corporates focus on individuals from the outset. In addition, action against a firm should not be settled without a clear plan regarding the resolution of individual cases. Like the FCA before it, the DOJ also indicated that (absent extraordinary circumstances) culpable individuals would not be released from liability as a condition of resolving matters with a firm.

In a speech delivered on November 29, 2018, U.S. Deputy Attorney General Rod Rosenstein announced certain revisions to the Yates Memo designed to streamline the DOJ’s focus on individuals and provide increased discretion to the DOJ’s civil enforcement attorneys. Most importantly, Rosenstein announced changes to the amount of information companies must provide to the government in criminal investigations to receive credit for cooperation. The earlier policy required companies to provide the DOJ with all relevant facts relating to all individuals responsible for misconduct to qualify for cooperation credit. The revised policy now provides that companies may receive cooperation credit by making good-faith efforts to identify individuals who were “substantially involved” in misconduct, even if, despite those efforts, a company is unable to identify all relevant individuals or provide complete factual information. Further, cooperation credit in civil investigations is no longer an “all-or-nothing” question, as civil enforcement attorneys have renewed discretion to, among other things, provide partial cooperation credit when a company “meaningfully assists” in the government’s investigation.

Many national regulators have changed their investigative policies to prioritise the review of individual conduct at an earlier stage than was previously the case. Where the US DOJ’s approach differs, however, is the direct responsibility placed upon the corporate to identify and provide evidence to support individual misconduct. This approach highlights the potentially divergent interests of firms and individuals during a regulatory investigation; firms often wish to resolve an issue and move on, whereas individuals will fight hard to defend their conduct and protect their reputation and livelihoods.

In Australia, new conduct obligations have been imposed on ADIs which essentially mirror the conduct obligations of individuals. Read in the light of the new civil penalty provisions introduced for breach of BEAR obligations by ADIs, it appears that Australian regulators are more likely to pursue penalties against ADIs for individual misconduct as well as pursuing the individuals themselves.

‘Like the FCA before it, the DOJ [has] also indicated that culpable individuals would not be released from liability as a condition of resolving matters with a firm.’
Common key features

**Overseas staff**

Staff of global organisations often provide services for or to multiple legal entities within the group, including entities within other jurisdictions. This can present challenges in the context of national, legal entity focused, accountability regimes (such as the UK SMCR). Regimes which take a more expansive view of who constitutes an “employee” of a firm (e.g. those that provide services to and are supervised by, even if not continually employed by, a firm) may need to consider whether staff based in affiliates need to be identified and certified. Similarly, where a senior manager is relying on services provided on a “shared services model” basis or is accountable for a business area where business is remotely booked into it, the senior manager will need to give careful consideration to how they will demonstrate fulfilment of their supervisory and senior manager responsibilities. We discuss this point in more detail below.

Firms in the UK have also had to consider their response to the FCA’s amendments to what is known as the “30-day rule”. Under the previous regime, the 30-day rule held that, where an overseas relationship manager entered the UK to undertake regulated activity, they did not need to register as performing a controlled function provided they were not here for more than 30 days a year. This was relatively easy to monitor based on travel and other records. Under the new UK SMCR, rules have been tightened to capture not just visits to the UK but activity undertaken by employees of the firm from abroad (e.g. staff in a branch of the UK entity) that involves contact with a UK client. This will be harder to supervise, with many firms deciding to certify any overseas branch staff who may conduct dealing/advising/other regulated activities with UK clients (and training them on the relevant conduct rules accordingly).

In Hong Kong, to the extent that the regulated activity of licensed corporations is taking place overseas, it needs to be appropriately supervised by MICs. These MICs can be located outside Hong Kong so long as they are properly accountable to the licensed corporation.

“Under the new UK SMCR, rules have been tightened to capture not just visits to the UK but activity undertaken by employees of the firm from abroad.”
Reconciling the global nature of financial services organisations with national accountability regimes

The global nature of financial services organisations presents a number of challenges when viewed through the lens of legal-entity focused national accountability regimes. Systemically important firms headquartered in one jurisdiction include branches and subsidiaries across the world. Such organisations typically have functional as well as legal entity management structures and reporting lines.

Legal entity vs functional management

Where regulated firms have a global footprint, they will typically also have matrix management reporting arrangements in place, with regional business/functional heads reporting to global business heads as well as to a local CEO/legal entity board.

The relative responsibilities and accountability of regional and global functional management have not always been particularly clearly articulated or consistently applied within firms, and regulators have expressed scepticism or criticism about the impact of matrix management structures on the effective management of firms in a number of UK cases – e.g. FSA v Pottage, State Street (2014) and Deutsche Bank (2017) amongst others.

Regulators have been at pains to say that matrix management is not incompatible per se with senior management responsibility regimes. However, care is required to ensure that locally identified management are appropriately empowered and have the required authority, seniority and access to resources to enable them to fulfil their responsibilities. Similarly, as noted earlier, where authority has not been sufficiently delegated to local management, regulators expect global heads or other overseas managers to be registered, potentially under multiple national regimes – e.g. as a MIC in Hong Kong or as an SMF7 in the UK. This often leads to discussions about how much authority needs to be devolved to avoid a need to register overseas business or financial heads. We expect the interplay between local accountability regimes and matrix management structures will be an area of continued scrutiny in the coming years.

The need for robust legal entity governance has been emphasised by a number of regulators, e.g. through reviews of local board effectiveness, issuance of industry and bilateral guidance and in some areas pressuring global firms to subsidiarise at a local level to strengthen local governance protections – for example, through the appointment of non-executive directors, independent of the group, to the boards of local subsidiaries and greater scrutiny of the potential for conflicts of interest between a subsidiary and its parent – e.g. in relation to booking model or capital/funding arrangements. We discuss this further below.

Similarly, for reasons of cost and efficiency, globally-managed firms will typically run many support and control functions (IT, Compliance, Anti-Financial Crime, HR, Operations) on regional or global lines, often using “service centres” or “centres of excellence”. These “shared services models” can again give rise to challenges about the way in which locally responsible managers can demonstrate effective responsibility for their function (or indeed legal entity), as they have little day-to-day management responsibility for those undertaking shared services tasks for the group. Ensuring that they have appropriate input into the specification of the services to be delivered (with associated delivery standards) and ongoing visibility through management information and reporting of adherence to these standards will be central to explaining to regulators how responsibilities have been fulfilled.
Reconciling the global nature of financial services organisations with national accountability regimes

Dual-hatting and conflicts

We have seen national regulators paying increasingly close attention to the positions of individuals who perform senior roles on both the national and group boards. Some senior managers may find their capacity to fulfil senior roles at a national and group board level questioned. Scrutiny of their capacity to fulfil multiple roles (e.g. by asking questions regarding the relative time spent on each role) and their understanding of the business, strategic, regulatory and risk management of a particular entity/jurisdiction is increasingly common.

Additionally, regulators have focused on the extent to which conflicts of interest might arise as a result of an individual performing roles for multiple entities within a group – e.g. in relation to matters of compliance, resourcing, capital funding or booking model. The appointment of independent non-executive directors to local banks is seen by regulators as one way of addressing such conflicts (both from an individual and legal entity perspective). We have also seen regulators become more demanding in their requirements that a clear conflicts resolution framework be developed and implemented, identifying potential areas for conflict and how these would be managed and addressed.
More harm than good? The efficacy (or otherwise) of senior manager regimes in generating cultural change

There remains a wider question as to whether improvements in individual accountability can deliver the enhancements in governance, risk-management and overall culture within financial institutions that regulators are demanding. Revisions to the more established senior manager accountability frameworks (e.g. in the UK) are now being embedded within regulatory processes, both supervisory and enforcement, and investigations into potential failures of management by individual senior management are already underway. Senior managers regimes rest on the view that, from a behavioural perspective, by increasing the likelihood of detection and the immediacy of the punishment, poor behaviour can be better restrained. Fear of detection (or an absence of it), however, arguably operates most powerfully where deliberate failings of integrity or redress mismanagement are concerned. Whilst clearly valuable, these are just two aspects of the behavioural outcomes that senior management accountability regimes can potentially address.

Organisational risk management failings are rarely the result of deliberate or reckless mismanagement. They are generally far more likely to be a result of failings at relatively low levels of an organisation, which the firm’s governance and risk management arrangements may have failed to identify or address in as timely a fashion as would have been prudent. Senior managers may have made mistakes, but not all of these will necessarily justify the imposition of significant personal liability. An overly aggressive enforcement response, which insists that one or more persons must be at fault, or which is premised on a higher regulatory standard (formulated with the benefit of hindsight) than that which would have been expected at the time the decisions in question were taken, is to no-one’s advantage. At its worst, overemphasising enforcement will inhibit the development of a positive error-management culture, which is important to improving organisational health. Mistakes offer significant learning opportunities which will be lost if individuals feel unable to admit or discuss for fear of negative personal consequences further down the line; even where dropped, investigations into their conduct can haunt managers for the rest of their career.

Real improvements in banking decision-making and culture ultimately rest upon good leadership, at all levels, which challenges poor behaviour and the belief systems which sustain it and inspires individuals to live up to the firm’s corporate values and risk management expectations. Where adherence to these values becomes an essential factor in advancement, and they are reflected in whom leaders choose to praise, promote and remunerate, real change is possible.

In this context, senior manager accountability regimes are arguably more likely to be effective when used predominantly by supervisors, rather than the enforcement team. That is not to say that enforcement has no role to play here. However, by positioning these accountability regimes as primarily a supervisory tool, they can be used to improve supervisors’ understanding of the allocation of responsibilities within an organisation; address the extent to which decision-makers are adhering (ex ante) to the expectations placed upon them; identify areas of potential risk or confusion; and highlight how regulators and firms can work with each other to improve and address these perceived risks. This increased understanding of the organisational set-up can, in turn, enable supervisors to question staff more intelligently when things go wrong, improving their ability to separate occasions when individual behaviour is truly deserving of censure from cases in which an alternative approach will be more effective. Such an approach requires a degree of intensity to the supervisory relationship which may not be possible for all regulated firms, but key learning and guidance could still be cascaded to others using case studies and industry guidance.

Senior manager accountability regimes undoubtedly have a key role to play in setting standards and fostering responsibility within financial services organisations. They are, however, only part of the solution. Managers at all levels need to be able to make decisions knowing that they will be allowed to learn from their mistakes, both by their managers and by regulators. The response of firms and regulators to such mistakes must reach beyond the merely punitive, if we want to see a genuine and lasting improvement in governance, culture and risk management in financial services firms.
UK: Senior Managers & Certification Regime (“SMCR”)

- Date of entry into force
- Rationale
- Firms covered
- Senior management functions
- Approvals?
- Standards of conduct
- Liability/Penalties
- Responsibilities maps?
- Statement of responsibilities (“SoR”)?
- Can a SM be out of the jurisdiction?
- Remuneration
- Interaction with firm liability
Hong Kong: Manager in Charge Regime ("MIC")

1 This table does not deal with the Hong Kong Monetary Authority's existing "manager" regime for authorised institutions or the recent tweaks brought about for registered institutions by virtue of the HKMA's October 2017 "circular"
# Australia: Banking Executive Accountability Regime ("BEAR")

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<thead>
<tr>
<th>Date of entry into force</th>
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</tr>
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<tbody>
<tr>
<td>Rationale</td>
<td></td>
</tr>
<tr>
<td>Firms covered</td>
<td></td>
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<tr>
<td>Senior management functions</td>
<td></td>
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<td>Approvals?</td>
<td></td>
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<tr>
<td>Standards of conduct</td>
<td></td>
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<td>Liability/Penalties</td>
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<td>Responsibilities maps?</td>
<td></td>
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<tr>
<td>Statement of responsibilities (&quot;SoR&quot;)?</td>
<td></td>
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<tr>
<td>Can a SM be out of the jurisdiction?</td>
<td></td>
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<tr>
<td>Remuneration</td>
<td></td>
</tr>
<tr>
<td>Interaction with firm liability</td>
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USA DoJ: Yates memo

Date of entry into force

Rationale

Firms covered

Senior management functions

Approvals?

Standards of conduct

Liability/Penalties

Responsibilities maps?

Statement of responsibilities (“SoR”)?

Can a SM be out of the jurisdiction?

Remuneration

Interaction with firm liability
Singapore: MAS Guidelines on Individual Accountability and Conduct (the “Guidelines”)
Ireland: The proposed Senior Executive Accountability Regime (“SEAR”)

- Date of entry into force
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<table>
<thead>
<tr>
<th>Date of entry into force</th>
<th>Rationale</th>
<th>Firms covered</th>
<th>Senior management functions</th>
<th>Approvals?</th>
<th>Standards of conduct</th>
<th>Liability / Penalties</th>
<th>Responsibilities maps?</th>
<th>Statement of responsibilities (“SoR”)?</th>
<th>Can a SM be out of the jurisdiction?</th>
<th>Remuneration</th>
<th>Interaction with firm liability</th>
</tr>
</thead>
<tbody>
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<td>Hong Kong: Manager in Charge Regime (“MIC”)¹</td>
<td>Australia: Banking Executive Accountability Regime (“BEAR”)</td>
<td>USA DoJ: Yates memo</td>
<td>Singapore: MAS Guidelines on Individual Accountability and Conduct (the “Guidelines”)</td>
<td>Ireland: The proposed Senior Executive Accountability Regime (“SEAR”)</td>
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¹ This table does not deal with the Hong Kong Monetary Authority’s existing “manager” regime for authorised institutions or the recent tweaks brought about for registered institutions by virtue of the HKMA’s October 2017 “circular”

² See December 2017 Response
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