HERBERT SMITH FREEHILLS

LIGHTER TOUCH, OR MORE OF THE SAME? MAS ISSUES CONSULTATION PAPER ON PROPOSED GUIDELINES ON INDIVIDUAL ACCOUNTABILITY AND CONDUCT

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Legal Briefings

On 26 April 2018, the Monetary Authority of Singapore (**MAS**) issued a Consultation Paper on its proposed, and much-anticipated, senior manager accountability regime in the form of 'Guidelines on Individual Accountability and Conduct' (**Guidelines**).

The Consultation Paper comes soon after the release of the Financial Stability Board's (**FSB**) Toolkit for firms and regulators to use to strengthen governance frameworks to mitigate misconduct risk. The Toolkit encourages regulators to develop and monitor a responsibility and accountability framework.

A brief summary of the Guidelines is set out below. You can also read our bulletin on the FSB's Toolkit here.

PURPOSE OF THE GUIDELINES

Like the senior manager accountability regimes in the UK (**SMCR**), Hong Kong (**MIC Regime** and **RISMA Regime**) and Australia (**BEAR**), the Guidelines seek to strengthen the individual accountability and oversight of directors and senior managers and raise the standards of conduct across the financial services industry.

Specifically, the MAS has said that the Guidelines reinforce financial institutions responsibilities in three key areas:

- promoting the individual accountability of “senior managers”;
- strengthening the oversight of “employees in material risk functions”; and
- reinforcing standards of proper conduct among all employees.

SCOPE OF THE GUIDELINES

“Senior managers” are defined in the Guidelines as individuals employed in an executive capacity by, and who are principally responsible for the day-to-day management of, the financial institution. These include, but are not limited to, the senior managers performing core management functions, e.g. the chief executive officer, chief financial officer, chief risk officer, heads of business functions, head of human resources, head of compliance etc.

“Employees in material risk functions” are defined in the Guidelines as employees whose decisions or activities could impact a financial institution’s risk profile. These include, but are not limited to, employees in executive, business, risk management, control, or support functions who, while not senior managers, have the authority to make decisions or conduct activities that can significantly impact the financial institution’s safety and soundness, or cause harm to a significant segment of the financial institution’s customers or other stakeholders.

The Guidelines generally apply to banks, insurers, capital markets intermediaries and infrastructures. As such, the MAS regime is broader in scope than the MIC Regime and the RISMA Regime in Hong Kong and the BEAR in Australia, but similar to the SMCR (in its extended form) in the UK.

HOW THE GUIDELINES COMPARE

Whereas the SMCR and the BEAR are enshrined in legislation, the MAS has followed Hong Kong’s approach in issuing regulatory guidance that supplements the existing regulatory framework. For this reason, and given the MAS *does not* intend to ask for regulatory submissions from financial institutions on the roles and responsibilities of senior managers (a key component of the other senior manager accountability regimes), the Guidelines may appear more “light touch”. In practice, however, financial institutions will still be required to go through a similar responsibility mapping exercise and maintain adequate records in order to demonstrate compliance.

Another key departure between the Guidelines and the other senior manager accountability regimes is the outcomes-based approach adopted by the MAS, which identifies five accountability and conduct outcomes – listed below – to which financial institutions would be expected to work towards.

CONDUCT OUTCOMES

- Senior managers who have responsibility for the management and conduct of functions that are core to the financial institution's operations are clearly identified.

- Senior managers are fit and proper for their roles, and held responsible for the actions of their staff and the conduct of the business under their purview.

- The financial institution's governance framework is supportive of and conducive to senior managers' performance of their roles and responsibilities. The financial institution's overall management structure and reporting relationships are clear and transparent.

- Employees in material risk functions are fit and proper for their roles, and subject to effective risk governance as well as the appropriate standards of conduct and incentive structure.

- The financial institution has a framework that promotes and sustains the desired conduct among all employees.

ACTIONS

The MAS has said that the outcomes-based approach is intended to facilitate financial institutions' implementation of the Guidelines in a proportionate manner, as relevant to the nature, size and complexity of their operations. Exactly how financial institutions should go about this, however, has been largely left up to them.

Nonetheless, at a minimum, financial institutions will be required to:

- identify senior managers who are responsible for core management functions and clearly specify their individual accountabilities;

- ensure that senior managers are fit and proper for their roles and hold them responsible for the actions of their staff and the conduct of the business under their purview;
- ensure that the financial institution’s management structure and reporting relationships are clear and transparent;
- identify employees in material risk functions;
- ensure that employees in material risk functions are fit and proper and are subject to an appropriate incentive structure and effective risk governance;
- have in place a framework that promotes and sustains the desired conduct among employees;
- ensure that the conduct framework articulates the standards of conduct expected of all employees and that it is effectively communicated and enforced throughout the organisation;
- implement policies and processes to ensure regular monitoring and reporting of conduct issues to the board and senior management; and
- have appropriate incentive systems and effective feedback channels, such as whistle-blowing mechanisms, in place.

CHALLENGES

While some global financial institutions will be able to draw on their experiences in implementing the overseas senior manager accountability regimes, the differences between organisations and their business (even within the same group), the complexity of the issues involved and the lack of prescription mean that financial institutions are likely to face challenges in meeting the new regulatory requirements under the Guidelines.

For instance, financial institutions are given the flexibility to explore different means of achieving the five conduct outcomes; however, such flexibility also means uncertainty in implementing the Guidelines in practice. Financial institutions will have to think carefully when identifying individuals caught by the Guidelines to ensure that they meet the relevant criteria and are able to clearly articulate their roles and reporting relationships. Financial Institutions will also need to ensure that all material aspects of their operations are subject to appropriate management oversight.

The identification of each senior manager must reflect where actual oversight responsibilities and decision-making reside in practice, regardless of the senior manager's physical location. Accordingly, many financial institutions will find that some of their senior managers are located overseas, which in itself presents challenges of both the political and practical kind.

For some financial institutions, the process of identifying senior managers and employees in material risk functions may lead to changes to reporting lines and/or governance structures. Furthermore, changes may be need to be made to incentive systems and disciplinary procedures, among other employee-related controls and processes. Human resources teams should be engaged early in the process so that they can work in parallel with the business.

Finally, while the MAS has stated that the Guidelines do not supersede existing laws and regulations and are instead intended to supplement the existing regulatory framework, individuals who are identified as senior managers or employees in material risk functions will want to ensure that their regulatory responsibilities are clearly understood, both by them and the financial institution. This is particularly relevant in the context of an enforcement agenda in Singapore that is increasingly focused on senior management responsibility and accountability.

KEY DATES

Submissions on the Consultation Paper are due by 25 May 2018, with the MAS aiming to issue final Guidelines in Q4 of 2018.

The MAS has stated that it will adopt a consultative approach to assessing financial institutions' compliance with the Guidelines in the initial phase of implementation, and continue to engage financial institutions on the adequacy and effectiveness of their practices through supervision.

ASSISTANCE

We have been speaking to the MAS about senior manager accountability during the course of the last 18 months and William Hallatt, head of our Asia financial services regulatory practice, attended a meeting in September last year with 32 senior members of the G20 regulators and 23 senior industry representatives, during which the FSB privately consulted the participants on the FSB's Toolkit. William was the only external counsel from outside North America in attendance at that meeting.

In Hong Kong we also gained many insights from advising the Asia Securities Industry and Financial Markets Association (ASIFMA) on the MIC Regime soft consultation and a number of global banks and financial institutions on the implementation of the MIC Regime and the RISMA Regime when they respectively came into effect. Our colleagues in London have been advising global banks and financial institutions on the SMCR, which came into effect in March 2016, and our Australian colleagues continue to advise authorised institutions on the implementation of the BEAR. We have also been speaking to a number of our clients on the Responsibility Mapping Discussion Paper issued by Bank Negara in Malaysia in February 2018.

Should you have any questions regarding the Guidelines, please contact William Hallatt or Natalie Curtis.

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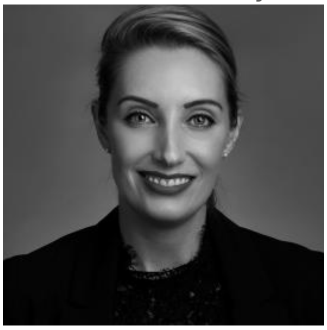
If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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