



GIBSON DUNN

Global Regulatory Developments and  
what to expect across the globe

November 30, 2021

# Agenda

❖ **Cryptocurrencies**

❖ **ESG**

❖ **Individual accountability, culture and conduct**

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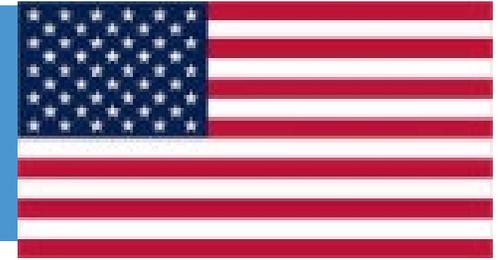
# Cryptocurrencies

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## General Background – Recent Developments

- **Cryptocurrencies have gone mainstream:**
  - Mastercard unveiled plans to support cryptocurrency payments across its network.
  - Coinbase went public on the NASDAQ exchange with a direct listing, opening at a value of over \$85 billion.
  - Countries across the globe are at various stages of designing, researching, and piloting Central Bank Digital Currencies.
  - El Salvador accepts Bitcoin as legal tender, with other countries, particularly in Latin America, aiming to follow suit.
  - SEC approved a bitcoin futures ETF.

## US – Trends and Recent News



- **US**
  - The SEC, CFTC, FinCEN, DOJ, Treasury, OFAC, the CFPB and State regulators have all shown an interest in cryptocurrencies.
  - Cryptocurrencies have been identified as an enforcement priority.
  - AML Act of 2020, infrastructure bill and various pending legislation targeting cryptocurrencies (e.g., the Digital Commodity Exchange Act of 2021 (discussion draft)) to expand regulatory regimes to encompass cryptocurrency transactions, e.g., tax reporting, travel rule, crypto-specific reporting requirements, trading rules and BSA requirements.

## US – SEC – Background

- The critical threshold question is whether a particular digital token constitutes a “security.”
  - SEC Staff – in the form of the FinHub, which is a standalone office with a Director who reports to the SEC Chair – are available to consult on this and related issues.
  - From many accounts, this “consultation” process is unproductive and unlikely to lead to actionable guidance.
- If so, then the SEC has jurisdiction over that token and the full panoply of federal securities laws applies.
- Between July 1, 2013 and December 31, 2020, the SEC brought 75 cryptocurrency-related enforcement actions, mostly involving allegations of fraud and/or unregistered securities offerings.

## CFTC – Background



- The CFTC has stated that virtual currencies, including Bitcoin and Ethereum, are encompassed under the definition of a “commodity” in the Commodity Exchange Act (CEA), and thus subject to its jurisdiction with respect to enforcement.
- While the CFTC has enforcement authority over spot market commodity transactions, the CFTC’s regulatory authority is limited to futures and other derivatives products (including certain leveraged transactions) and does not extend to spot market commodity transactions.
- As a result, the CFTC does not regulate a cryptocurrency even if it is a commodity (and regardless of whether or not it is a security), meaning that the trading of cryptocurrencies that are commodities and not securities is not subject to specific regulation.

## CFTC – Enforcement



- Under the CEA, prohibited activity involving virtual assets includes: (i) fraud or manipulation of spot market trading of virtual currencies; (ii) disruptive trading practices (e.g., wash trading) involving virtual currency swap or futures contracts; and (iii) offering virtual currency leveraged retail transactions, futures, options, and/or swaps without registering with the CFTC as an intermediary or trading such virtual currency products on a platform that is not registered with the CFTC.
- Allegations under Rule 180.1 prohibiting manipulative and deceptive devices have also featured in CFTC actions involving cryptocurrencies.
- CFTC permits the listing of futures contracts of certain virtual currencies on registered exchanges. Additionally, the CFTC has found that tokens themselves can be derivatives contracts.

## US – SEC – Recent Statements and Guidance

- Recent public statements indicate greater willingness and interest in regulating cryptocurrency businesses and bringing enforcement actions:
  - On August 3, 2021, SEC Chair Gensler gave an important speech that appears to have settled, at least for the next several years, a key legal question regarding the application of the federal securities laws to digital assets, including cryptocurrencies: “Certain rules related to cryptocurrencies are well-settled. The test to determine whether a cryptocurrency is a security is clear.”
  - In May 2021, SEC Chair Gensler said that the SEC and other federal financial regulators should “be ready to bring cases” against bad actors in the cryptocurrency space.
  - Gensler also said there needed to be authority for a regulator to oversee the cryptocurrency exchanges, similar to the equity and futures markets. He said many of the cryptocurrency coins were trading like assets and should fall under the purview of the SEC.
    - “To the extent that something is a security, the SEC has a lot of authority. And a lot of crypto tokens . . . are indeed securities,” he said.

## China – Trends and Recent News



### China

- A Notice issued by Chinese authorities on 24 September 2021 prohibits a broad range of crypto-related activities such as operating a crypto asset exchange, raising funds via crypto, providing information to facilitate dealing in crypto assets, etc.
- The Notice makes clear that it is illegal to offer crypto exchange services from outside Mainland China to persons in Mainland China. The Notice also broadly prohibits financial institutions such as banks from providing services to facilitate trading in crypto assets.
- Chinese authorities have also implemented a blanket ban on crypto mining.
- Chinese government is pushing ahead with testing and promoting the greater use and adoption of the digital yuan.



## Hong Kong SAR

- Currently, Hong Kong does not have a dedicated legislative framework to regulate crypto assets. Therefore crypto assets are either regulated as a security or futures contract, or are otherwise unregulated and viewed by the regulators as form of virtual commodity.
- In 2018, the SFC introduced a regulatory framework for virtual asset portfolio managers and the distribution of virtual asset funds. Several asset managers operating in Hong Kong have since been approved by the SFC to provide crypto asset management services.
- In 2019, the SFC published the position paper on regulation of virtual asset trading platforms (for tokenized securities). In December 2021, the SFC approved the first (and currently only) virtual asset trading platform.

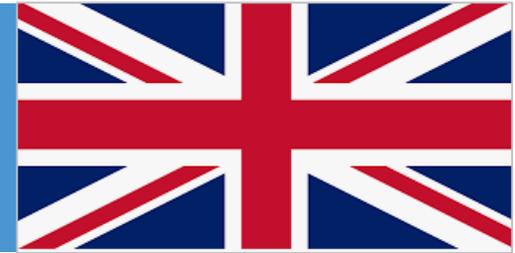
# Singapore – Trends and Recent News



## Singapore

- Crypto assets generally fall within one three categories: (i) a digital payment token (**DPT**) under the Payment Service Act 2019, which captures cryptocurrencies such as Bitcoin, (ii) **e-money** under the Payment Services Act 2019 which captures stablecoins such as Tether, and (iii) **capital markets products** under the Securities and Futures Act, which captures tokenized assets that are classified as securities, securities-based derivatives or collective investment schemes.
- Under the Payment Services Act 2019, a payment institutions licence is required to provide DPT services, including dealing in DPTs. MAS started granting major payment institutions licenses in 2021, with more licenses expected to be approved in the coming months.

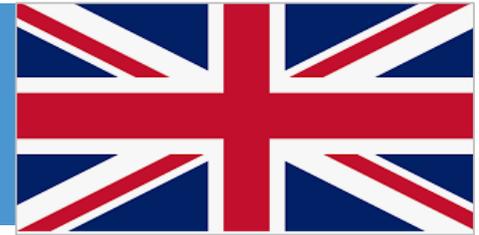
## UK – Trends and Recent News



### UK

- Cryptocurrency service providers must register with the Financial Conduct Authority to operate in the UK, unless they have applied for an e-money license. UK-based providers must additionally comply with various AML compliance requirements.
- In 2018, the FCA, Bank of England, and HM Treasury established the Cryptoassets Taskforce, which is intended to define when and how cryptocurrency should be regulated.
- In 2019, the FCA published guidance on AML/CFT compliance for the cryptocurrency sector.
- Effective January 2021, the FCA banned offerings of cryptocurrency derivatives to retail users in the UK due to perceived inherent risks.
- On July 22, 2021, the UK announced that it is considering adopting FATF's travel rule for cryptocurrency transactions. Public consultation on the travel rule opened this month.

## UK – Trends and Recent News



### UK

- The FCA warned in June 2021 that 111 companies are offering cryptocurrency services in the UK without being properly registered, which FCA Head of Enforcement and Market Oversight, Mark Steward, described as “a very real risk...[they] are worried about.”
- In December 2020, the FCA said that “a significantly high number of businesses [were] not meeting the required standards under the Money Laundering Regulations [which] has resulted in an unprecedented number of businesses withdrawing their applications [for FCA registration].”
- There have been splits in approach among UK banks with respect to crypto, with some recently prohibiting payments to cryptocurrency exchanges.
- Both the FCA and Bank of England Governor, Andrew Bailey, have warned about the high risks associated with cryptocurrency. And this month, a Bank of England policymaker warned that digital currencies could trigger a financial meltdown.



### EU

- In July 2021, the European Commission presented a package of legislative AML proposals that included a proposal to prohibit anonymous cryptocurrency transactions and incorporate a Travel Rule for cryptocurrency transactions.
- Also in July 2021, France proposed making the Paris-based European Securities and Markets Authority responsible for cryptocurrency regulatory oversight across the EU.

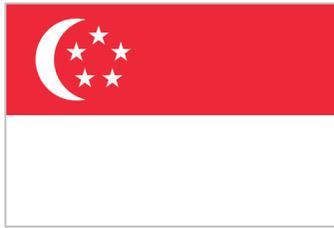
## US – Stablecoins

- The President’s Working Group on Financial Markets, the OCC and FDIC issued a report on stablecoins on November 1, 2021.
- The Report identifies the following principal recommendations:
  - Congress should promptly enact legislation to provide a “consistent and comprehensive” federal prudential framework for stablecoins:
    - Stablecoin issuers should be required to be insured depository institutions.
    - Custodial wallet providers that hold stablecoins on behalf of customers should be subject to federal oversight and risk-management standards.
    - Stablecoin issuers and wallet providers should be subject to restrictions on affiliations with commercial entities.
  - In the absence of Congressional action, the Financial Stability Oversight Council (FSOC) should consider steps to limit stablecoin risk, including designation of certain stablecoin activities as systemically important payment, clearing, and settlement activities
- Thus, the Report calls for the imposition of bank-like regulation on the world of stablecoins with some sense of urgency.

## US – SEC – *Howey* Test

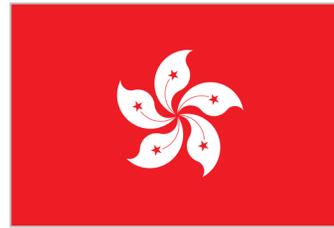
- The SEC uses the *Howey* test to assess whether a digital asset is an “investment contract,” which is included in the definition of “security.” Under that test, an investment contract exists when there is:
  - an investment of money;
  - in a common enterprise;
  - with a reasonable expectation of profits;
  - derived from the managerial or entrepreneurial efforts of others.
- In April 2019, SEC’s FinHub published guidance on the application of this test to digital assets.
- The critical factor is the “efforts of others” prong of the *Howey* test.

# Classification of crypto assets in HK, Singapore, UK



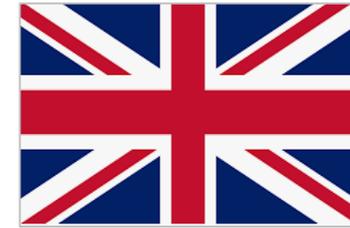
## Singapore

- Digital payment tokens
- E-money
- Capital market products (including securities, collective investment scheme, etc.)



## Hong Kong

- Securities (including structured product, collective investment scheme, etc.)
- Futures contracts
- (In future) virtual assets



## UK

- Security tokens
- E-money tokens
- Exchange tokens
- Utility tokens
- Collective investment schemes
- Financial promotions regime

## What is DeFi?

- Broad term for a system where financial products become available to participants on a blockchain without the need for intermediaries.
- Some examples of DeFi applications:
  - Decentralized Exchanges (DEXs)
  - Lending Platforms
  - Yield Farming
  - Liquidity Mining
- Stablecoin issuers should be required to be insured depository institutions.
- Regulators have raised concerns about various areas in the DeFi space.

## US legislation

- “Infrastructure Investment and Jobs Act” (signed into law on Nov. 15, 2021).
  - Amends the anti-money-laundering “cash reporting” requirements of 26 U.S.C. § 6050I to encompass transactions in “digital assets”.
  - Expands existing IRS Form 1099 reporting obligations by amending the definition of “broker”.



## Hong Kong SAR

- In 2020-21, the HK government announced plans to introduce a new virtual asset service provider (VASP) licensing regime to be supervised by the SFC. The government proposes that operators of virtual asset exchanges would need to be licensed by the SFC, and subject to the SFC's regulatory requirements (such as restricting customers to professional investors).
- According to a speech by Julia Leung (Deputy CEO and Executive Director, SFC) in November 2021, the SFC is reviewing its approach to regulating virtual assets, including reviewing whether the regulatory regime for virtual assets first introduced in 2018 is still fit for purpose. This review is likely to include consideration of stablecoins and crypto ETFs.

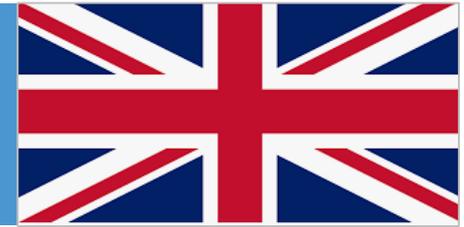
# Singapore – Developments



## Singapore

- Earlier in 2021, Singapore Parliament passed the Payment Services (Amendment) Bill which expands the scope of crypto activities which will require licenses to cover: (i) facilitating the transmission of DPT from one account to another, (ii) custodial services for DPTs, and (iii) facilitating the exchange of DPTs where the service provider does not come into possession of the moneys or DPTs involved.
- The legislative amendments also provide MAS with powers to impose measures on DPT service providers to ensure better consumer protection and to maintain financial stability and safeguard the efficacy of monetary policy. The amendment has not yet come into force, but is expected to in the near future.

## UK – Developments



### UK

#### HM Treasury consultation

- HM Treasury has consulted on extending the financial promotions regime to cover “crypto assets”.
- It has separately consulted on how the UK can ensure its regulatory framework is equipped to harness the benefits of new technologies, supporting innovation and competition, while mitigating risks to consumers and stability.

# EU – Developments



## EU

- MiCA will allow the establishment of a harmonised pan-EU regime for cryptoassets. It will create a bespoke regime and a passport for markets in cryptoassets.
- It will apply to cryptoasset issuers and cryptoasset service providers (“**CASPs**”) that is, cryptoasset wallet providers, exchanges and platforms. MiCA will introduce:
  - Transparency and disclosure for the issuance and admission to trading of cryptoassets.
  - The authorisation and supervision of CASPs and issuers of asset-referenced tokens.
  - The operation, organisation and governance of issuers of asset-referenced tokens, issuers of e-money tokens and CASPs. Consumer protection for the issuance, trading, exchange and custody of cryptoassets.
  - Prevention of market abuse to ensure the integrity of cryptoasset markets.



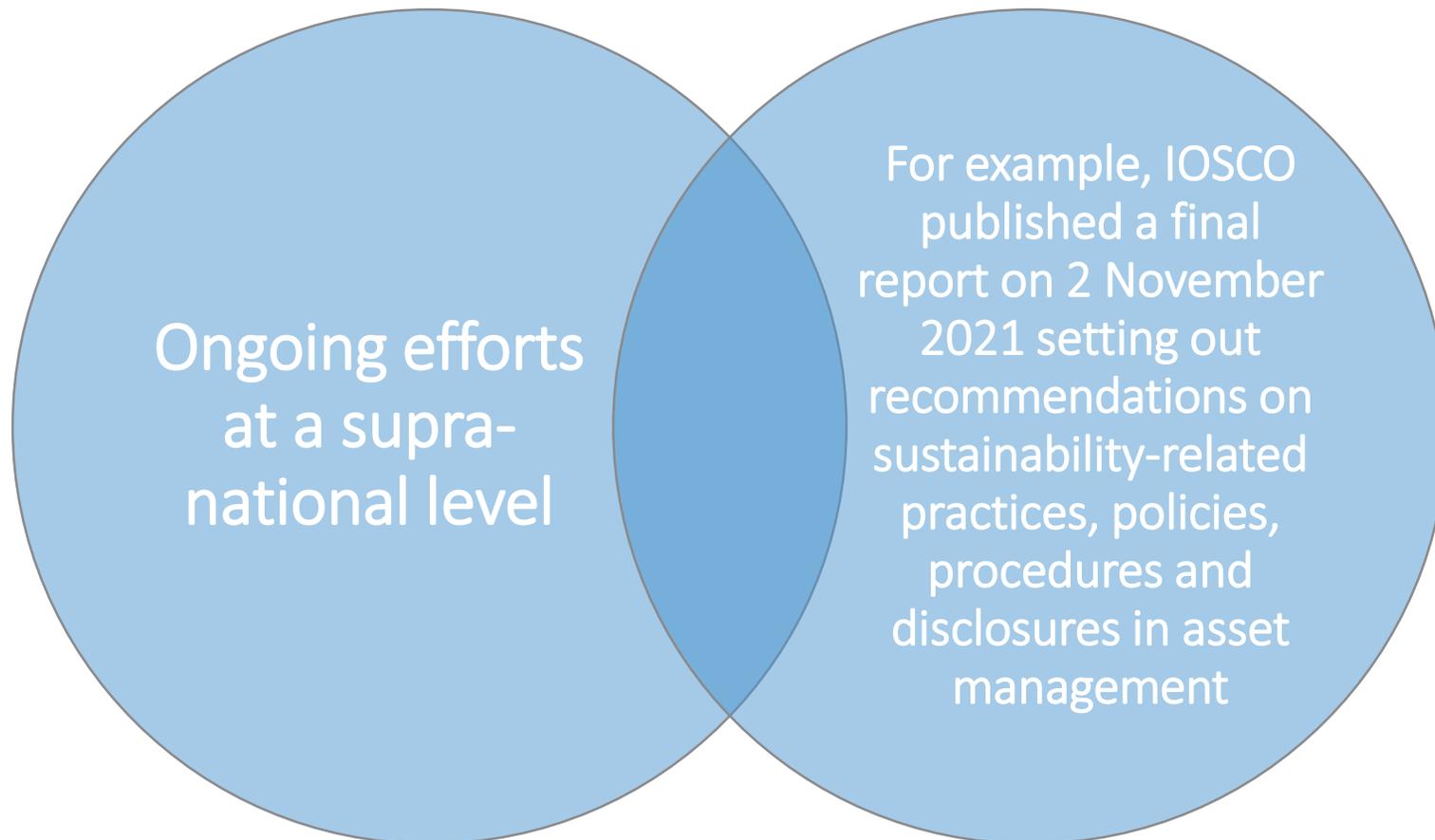
## EU

- MiCA distinguishes between three sub-categories of cryptoassets, effectively creating an escalating pyramid of obligations with those at the top being subject to more specific requirements:
- Utility tokens which present the lowest risks, sit at the bottom of the pyramid.
- Stablecoins (which are divided into e-money tokens and asset-referenced tokens) sit above utility tokens.
- Significant asset-referenced tokens or significant e-money tokens sit at the top of the pyramid as the tokens that present the most systemic risk.
- Once adopted, MiCA will apply in EU member states 18 months after it has entered into force (i.e. 2023 at earliest).

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An overview of ESG  
developments

## Continued drive to develop ESG practices and disclosures at supra-national level

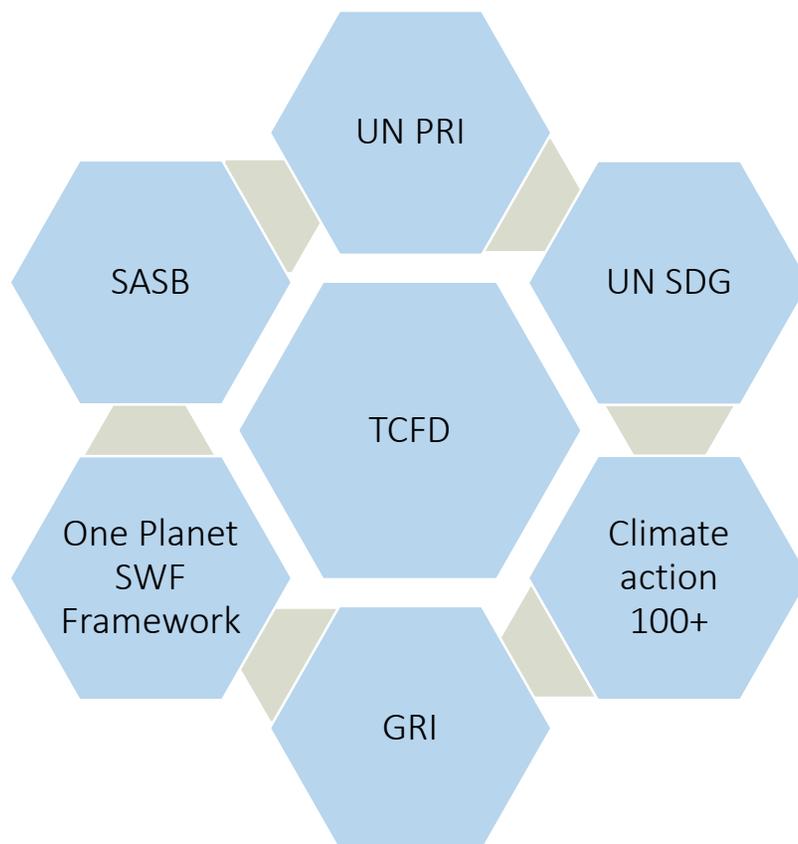


# Different regulatory approaches

EU	UK	US	APAC
<ul style="list-style-type: none"><li>• SFDR</li><li>• Taxonomy Regulation</li><li>• MiFID/AIFMD amendments</li></ul>	<ul style="list-style-type: none"><li>• FCA proposed regime for TCFD-aligned disclosures</li><li>• FCA discussion paper on “Sustainability Disclosure Requirements”</li></ul>	<ul style="list-style-type: none"><li>• SEC proposed rulemaking is expected by January 2022</li><li>• Principles-based disclosure requirements re: “materiality” already apply to ESG matters, but only to the extent they are material</li></ul>	<ul style="list-style-type: none"><li>• ESG-related disclosure regimes for fund managers (e.g. HK SFC, Taiwan FSC, Singapore MAS, Australia ASIC)</li><li>• PRC CSRC: disclosures by listed companies</li><li>• Other ESG-related disclosures standards to be rolled out in APAC (e.g. Thailand SEC, TCFD-aligned disclosures by Japan FSA and Australia ASIC,)</li></ul>

## Multitude of ESG standards

Over time, there have been a number of attempts to introduce global standards to harmonize ESG reporting, leading to a number of competing, disparate frameworks. Increased investor pressure to report under different frameworks increases compliance burden.



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# Individual accountability, culture and conduct

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# How did we get here?

Financial crisis

Regulatory recognition that a lack of clarity re. individual responsibilities makes it difficult for regulators to hold individuals to account

Fines and sanctions act as deterrents to misconduct by firms

Preventative approaches that influence behaviour are also needed to mitigate misconduct risk by individuals

Introduction of senior management accountability regimes in key jurisdictions such as UK / Hong Kong / Australia

FSB Toolkit to strengthen governance frameworks to mitigate misconduct risk

## Current trends in individual accountability

UK – focus on non-financial misconduct

### APAC

- First disciplinary action against Manager in Charge
- Focus by HKEX on directors of listed companies

### US

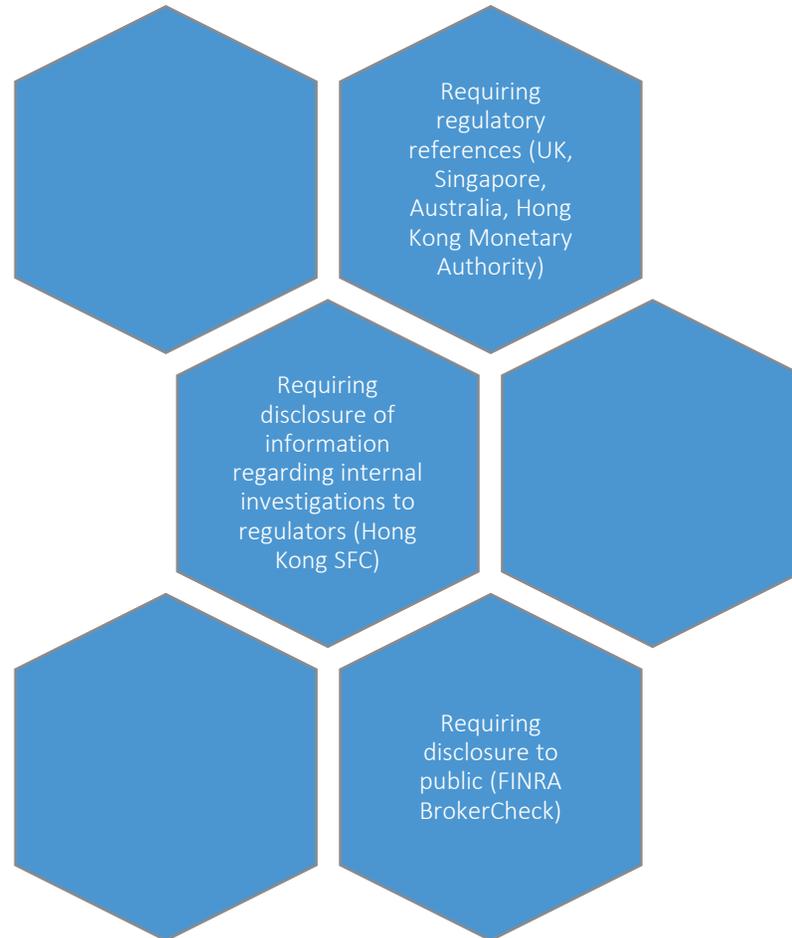
- Yates Memo

## What do we mean by “rolling bad apples”?

Individuals who engage in misconduct and who obtain subsequent employment elsewhere without disclosing their misconduct

Individuals who engage in misconduct and are able to move firms even when their misconduct is known

# How have jurisdictions dealt with “rolling bad apples”?



# Regulatory expectations regarding culture and conduct

- UK – FCA Feedback:
  - Identification of conduct risk remains weak: the depth of understanding and the ability to identify conduct risk in day-to-day working life remains unacceptably weak.
  - Remuneration and performance assessments should be more sophisticated – rewarding good not just punishing bad behaviours.
  - Speaking up is often considered unsafe: whistleblowing mechanisms and numbers continue to be under scrutiny.
  - A need for greater middle management leadership / tone from within: mid-level industry professionals should have a voice and be driving behaviours.
- Asia
  - Leading regulators in this space are HKMA and MAS.
  - HKMA focused on governance, incentive systems and assessment + feedback mechanisms.
  - HKMA has required major banks to undertake culture “self-assessments”.
  - MAS issued information paper on culture and conduct practices of financial institutions in Sept 2020 that sets out nine outcomes for firms to work towards.

## Benchmarking / measuring culture and conduct

UK

- FCA has developed “5 conduct questions” (see next slide) expressly to help firms implement more effective change programs and help the FCA examine progress.
- FCA is considering adding a 6<sup>th</sup> question in relation to D&I.

Asia

- HKMA self-assessments ask boards to identify what they consider the most salient quantitative and qualitative indicators to measure and assess culture.
- MAS has suggested some indicators – e.g. staff sentiment, whistleblowing statistics.

## UK FCA's 5 Conduct Questions

1. What proactive steps do you take as a firm to identify the conduct risks inherent within your business?
2. How do you encourage the individuals who work in front, middle, back office, control and support functions to feel and be responsible for managing the conduct of their business?
3. What support (broadly defined) does the firm put in place to enable those who work for it to improve the conduct of their business or function?
4. How does the Board and ExCo (or appropriate senior management) gain oversight of the conduct of business within their organization and, equally importantly, how does the Board or ExCo consider the conduct implications of the strategic decisions that they make?
5. Has the firm assessed whether there are any other activities that it undertakes that could undermine strategies put in place to improve conduct?

## Future Focus Areas for UK

- Non-financial misconduct
- Diversity and inclusion
- Wellbeing
- Speaking up
- Leadership and clarity of firm purpose, principles and values
- Closer alignment between shareholder, client and employee interests