Regulating Banking Ethics: A Toolkit

*David Zaring**

INTRODUCTION

In the wake of the financial crisis, a dizzying array of new tools were given to regulators to prevent the next disaster from happening, or at least from happening in quite as destabilizing a way. In addition to new capital requirements; agreed-upon leverage rules; new ratio requirements for the relationship between assets and both long-term and short-term funding; and different tools for overseeing the derivatives markets and the orderly resolution of large financial institutions, regulators also announced that there would be some softer initiatives.

The most prominent of these has been the effort to make banks more ethical through government oversight. Often this has been characterized as an effort to change the culture of financial institutions, and frequently neither ethics nor culture has been well defined.

Nonetheless, the new approach is a real departure. Overseeing ethics and culture represented a change of tack by regulators who used to focus above all else on bank balance sheets and credit risk—tangible, often mathematical exercises in accounting and risk mitigation. Regulating culture is different. It is amorphous, depends on industry cooperation, and has nothing to do with math.[1] Make bankers act more ethically, regulators reasoned, and they would be less likely to cut corners, evade regulation, and destabilize their own or other institutions.

As John C. Williams, President of the Federal Reserve Bank of New York (New York Fed), explained in 2018, capital and other regulations are a necessary component of financial oversight but "far from *sufficient*. The danger we face today is that people may conclude that the hardened defenses are enough, and other supervisory activities around culture,

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* Professor at the Wharton School of Business, University of Pennsylvania. Thanks to Christina Skinner and to Jennifer Corcoran, Lani Matsumiya, and Michelle Mohr for research assistance.

1. For a discussion, see Dan Awrey et al., *Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?*, 38 DEL. J. CORP. L. 191, 205–07 (2013) ("Framing policy debates around seemingly inchoate concepts like culture and ethics is thus often, and understandably, viewed as somewhat impractical.").

conduct, and governance are superfluous."[2] For these reasons, Williams said, "We must stay vigilant around the 'softer' side of supervision. Strong culture and robust corporate governance are our first lines of defense."[3] The New York Fed was a pioneer in emphasizing the importance of culture in regulating banks. Williams's predecessor, William Dudley, made it a central feature of his approach to regulatory reform.[4]

However, U.S. institutions have not been alone in their scrutiny of banking ethics. Australia convened a "Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry," and in 2018, it concluded that cultural change was essential. The Commission recommended that Australian regulators "build a supervisory program focused on building culture that will mitigate the risk of misconduct" as a component of their ordinary prudential supervision of banks.[5] Europe has also signed on to the idea, urging banks to take a proactive role in implementing an ethical culture and warning them that regulators would be on the cultural case. As European Central Bank Supervisory Board Chair Danièle Nouy has observed, "[t]he people who manage a bank can shape the culture and behavior of the entire organization. That is why supervisors keep a close eye on who becomes a bank manager."[6]

International institutions have also gotten involved. After the financial crisis, the Organisation for Economic Co-operation and Development (OECD), in concert with the G20 and the Financial Stability Board, developed its "High-Level Principles on Financial Consumer Protection," which included criteria for responsible business conduct.[7] The

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2. John C. Williams, President and CEO, Fed. Reserve Bank of N.Y., Remarks at Governance and Culture Reform Conference: Now Is the Time for Banking Culture Reform (June 18, 2018), https://www.newyorkfed.org/newsevents/speeches/2018/wil180618 [https://perma.cc/XPC6-ZWDA].

3. *Id.*

4. William C. Dudley, Former President and CEO, Fed. Reserve Bank of N.Y., Remarks at the Banking Standards Board: Reforming Culture for the Long Term (Mar. 21, 2017), https://www.bis.org/review/r170321d.htm [https://perma.cc/H4LJ-HGDF].

5. KENNETH M. HAYNE, COMMONWEALTH, 1 FINAL REPORT: ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY 37 (2019), https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf [https://perma.cc/F4A5-3EPN].

6. Danièle Nouy, Chair, Supervisory Bd. of the European Cent. Bank, Speech at the 7th Congress of the Solvay Schools: Ethics in Banking from Gordon Gekko to George Bailey (Oct. 15, 2018), https://www.bankingsupervision.europa.eu/press/speeches/date/2018/html/ssm.sp181015.en.html [https://perma.cc/7Z83-6D4S]; *see also* Sabine Lautenschläger, Member, Exec. Bd. of the European Cent. Bank, Speech at the 14th Asia-Pacific High-Level Meeting on Banking Supervision: Risks to Banks - From Inside and Out (Feb. 13, 2019), https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190213~eab73a449d.en.html [https://perma.cc/TPR6-SJLG] ("[T]he onus is on the banks and their stakeholders to bring about a cultural shift.").

7. Gert Wehinger, *Banking, Ethics and Good Principles*, OECD OBSERVER (2013), http://oecdobserver.org/news/fullstory.php/aid/4017/Banking,_ethics_and_good_principles_.html [https://perma.cc/9RQV-SQXF].

Financial Stability Board in 2018 also published a seventy-eight page paper on "Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors."[8] The report identified seventeen such tools designed to realize three goals: changing the culture of banks, emphasizing the individual responsibility of bankers for wrongdoing, and addressing the problem of bankers who leave one bank under a cloud of suspicion and then find work at another bank, bringing suspect values along with them.[9] Bank of England Governor and former Financial Stability Board Chair Mark Carney has called this last issue the "rolling bad apples" phenomenon and has decried it, among a myriad of other problems, as related to the ethics of financial institutions.[10]

There is little doubt that culture matters for institutions—entities ranging from economics departments to soccer teams spend plenty of time thinking about the cultures they hope to foster—and that culture is also exceedingly hard to measure or define.[11] Regulators now have had a decade since the financial crisis to operationalize their approach to guiding and improving the ethics and culture of the banks they oversee. Understanding what they have chosen to do makes it easier to assess the value of the effort to make cultural transformation an important part of a regulatory program. It also offers lessons to the broader world of public administration, where some agencies, such as environmental regulators,[12] have not made a culture of compliance a priority, while others—securities regulators come to mind—have tried to do more to make certain values stick.[13]

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8. *See generally* FIN. STABILITY BD., STRENGTHENING GOVERNANCE FRAMEWORKS TO MITIGATE MISCONDUCT RISK: A TOOLKIT FOR FIRMS AND SUPERVISORS (2018), http://www.fsb.org/wp-content/uploads/P200418.pdf [https://perma.cc/GJ6M-HNS7] [hereinafter STRENGTHENING GOVERNANCE FRAMEWORKS TO MITIGATE MISCONDUCT RISK].

9. *See id.* at 2.

10. *Id.* at 3.

11. *See, e.g.*, Jim Taylor, *Build a Positive and High-Performing Sports Team Culture*, PSYCHOL. TODAY (July 29, 2013), https://www.psychologytoday.com/us/blog/the-power-prime/201307/build-positive-and-high-performing-sports-team-culture [https://perma.cc/K5AZ-NB52].

12. *See generally* ENVTL. PROT. AGENCY, WORKING TOGETHER F.Y. 2018–2022 U.S. EPA STRATEGIC PLAN (2018), https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf [https://perma.cc/B4LS-LWXP].

13. The Securities and Exchange Commission has been described as a business ethics regulator. *See* David Zaring, *Financial Reform's Internationalism*, 65 EMORY L.J. 1255, 1307 (2016) ("[T]he Supreme Court has said that a 'primary objective of the federal securities laws' entails the 'promotion of "a high standard of business ethics . . . in every facet of the securities industry."'" (quoting Sec. & Exch. Comm'n. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186–87 (1963)). The SEC recently promulgated Regulation Best Interest, which codifies the obligations of broker-dealers and investment advisors to put the interests of others ahead of their own. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33, 318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240).

I. THE THEORY OF ETHICS REGULATION

Ethics regulators have tried to improve the culture of banks largely by encouraging the banks themselves to take steps to improve their culture in the way regulators would like. Behind that encouragement, however, a range of initiatives can be found, ranging from bringing the banks together to consider the question—the convening power—to certifying that senior bankers are appropriate for the job—the credentialing power. A variety of initiatives involving more of an imposition than calling a meeting, but not quite as intrusive a regime as one requiring executive pre-approval, have also been adopted in the effort to improve bank cultures.

There is a large array of activities that are or could be considered cultural regulation, and so some distinctions must be made. Some regulators include under "cultural change regulation" any binding rule designed to deter already illegal conduct or to broaden the number of bankers who can be held responsible for such conduct. These regulations are designed to address illegality in the hope that cultural change at the sanctioned institution will follow, but they could just as easily be characterized as standard enforcement against institutions or individuals with conflicts of interest or inadequate internal controls. It does not make sense to view anti-fraud enforcement as a new sort of regulation, rooted in driving cultural change, because financial regulators have been on the lookout for fraud for years.

For example, a new Dutch ethics regulator has sanctioned bankers for forging signatures and misusing private information—conduct that would plainly be illegal in the past.[14] Although the regulator appears to be new, the matters being policed are regulatory classics.

Similarly, British regulators consider their Senior Manager and Certification regime to be an important component of their culture change efforts.[15] But that regime makes senior managers responsible for wrongdoing by subordinates in other parts of the bank—an extension of a liability rule, even if it is one designed to incentivize senior managers to create a culture of compliance throughout the bank.[16] But the cultural change is supposed to work by extending legal sanctions, which now apply both to the banker who broke the law and to the senior manager who was leading the bank when the banker broke the law.[17]

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14. *See infra* Section II(D).

15. *Senior Managers Regime: Approvals*, BANK OF ENG. (Oct. 7, 2019), https://www.bankofengland.co.uk/prudential-regulation/authorisations/senior-managers-regime-approvals [https://perma.cc/C8EB-5LFZ].

16. *See infra* Section II(E).

17. *Senior Managers and Certification Regime*, FIN. CONDUCT AUTH. (May 9, 2019), https://www.fca.org.uk/firms/senior-managers-certification-regime [https://perma.cc/4QRF-L4V5].

I also exclude risk management from efforts to change culture, though of course, a different risk management approach at a financial institution could affect the culture of the firm. For example, many American financial firms are now required to have risk management committees at the board level; this reform has been characterized by some as an effort to curb an overly risk-loving financial culture.[18] But regulators have long scrutinized the risk management programs at banks. The board risk management committee initiative exemplifies this[19] by creating a channel at the board level for a risk management tool consistent with the usual inclination of regulators to ensure that banks do not take dangerous risks.

This sort of regulation does look different. As Cynthia Williams and her co-authors have discussed, the Dutch National Bank (DNB or De Nederlandsche Bank) has hired organizational psychologists to encourage the development of healthy bank cultures.[20] The DNB has created a behavioral and culture unit within the supervisory group of the central bank and issued a white paper on the "supervision of behavior and culture."[21] The attention is soft; the DNB has expressed concern with the so-called "tone at the top" of the bank as a critical way to make firms take ethics seriously.[22] And the DNB wants ethics to be more than a matter of "box ticking."[23] All of this is a form of emphasis rather than a specific set of requirements that might look to outside observers like regulation itself.

Regulatory strategies for obtaining cultural change can be placed along a spectrum—a rough one, with plenty of regulatory initiatives that touch on different parts of the spectrum at the same time—of softer to harder measures.[24] The lowest key approach to cultural improvement

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18. *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, 12 U.S.C. § 5365 (2018); DAVIS POLK & WARDWELL LLP, DODD-FRANK ENHANCED PRUDENTIAL STANDARDS MATERIALS 7–8 (2010), https://www.davispolk.com/files/Dodd-Frank_Act_Sections_165_and_166.pdf [https://perma.cc/Q44Z-2JNP].

19. *See* DELOITTE, RISK COMMITTEE RESOURCE GUIDE FOR BOARDS (2012), https://deloitte.wsj.com/cfo/files/2012/07/risk_committee_guide.pdf [https://perma.cc/LF89-E4YR].

20. For a nice discussion, see John M. Conley, Lodewijk Smeehuijzen, Cynthia A. Williams & Deborah E. Rupp, *Can Soft Regulation Prevent Financial Crises?: The Dutch Central Bank's Supervision of Behavior and Culture*, 51 CORNELL INT'L L.J. 773, 774, 780 (2019).

21. *See* DE NEDERLANDSCHE BANK, SUPERVISION OF BEHAVIOR AND CULTURE: FOUNDATIONS, PRACTICE & FUTURE DEVELOPMENTS (2015), https://www.dnb.nl/binaries/Supervision%20of%20Behaviour%20and%20Culture_tcm46-334417.pdf [https://perma.cc/9DR4-CANA].

22. Conley et al., *supra* note 20, at 795.

23. *Id.* at 799–800.

24. For overviews, see DELOITTE, BUILDING WORLD-CLASS ETHICS AND COMPLIANCE PROGRAMS: MAKING A GOOD PROGRAM GREAT: FIVE INGREDIENTS FOR YOUR PROGRAM (2015), https://www2.
deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-

comes when regulators use their convening power to require firms to think about ethics. There is a component of information exchange involved in this process, as well as an implicit threat of enforcement if culture conferences produce no results. But the central idea is an invitation to reflect on self-regulation, if you like. The New York Fed has regularly deployed its convener powers at conference on banking ethics; it is the form of regulation that most heavily relies on industry to take the lead in attending to culture.[25]

This sort of best practices and benchmarking-style governance can be further institutionalized. For example, the British Banking Standards Board and American self-regulatory organization FINRA, both industry-created institutions, have turned to such practices—the board through an annual survey and FINRA through a variety of measures ranging from a convening power to enforcement.[26]

Another popular approach—if quite strange—to improving culture is the ascent of the oath in which regulators or industry require or encourage members to swear to uphold a number of broad principles. Sometimes, as in the case of the Netherlands, this oath can serve as a basis for enforcement if broken.[27]

More onerous still is the information exchange that some regulators call for, especially when it involves a requirement that the work histories of bankers and other industry professionals be made available to the public or scrutinized by firms before they can hire the banker. Such measures are designed to prevent unethical bankers, forced out of their current banks but not out of the industry, from spreading their practices to other institutions.[28]

The most stringent—at least potentially—"soft" requirement requires the pre-approval of the regulator before the banker can begin working in the profession. The U.K. has created such a regime for senior managers of its financial institutions.[29] This gatekeeping role in some ways changes what bank regulators do. Rather than enforcing rules against unethical or illegal bankers, like a law enforcement agency, certification

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programs.pdf [https://perma.cc/2VUD-C2AF]; MCKINSEY & CO., COMPLIANCE 2.0: EMERGING BEST PRACTICE MODEL (2015), https://www.mckinsey.com/~/media/mckinsey/business%20functions/risk/our%20insights/compliance%2020%20emerging%20best%20practice%20model/compliance_20_emerging_best_practice_model.ashx [https://perma.cc/9A4H-BP8P].

25. James Hennessey, Senior Vice President, Fed. Reserve Bank of N.Y., Remarks at Westminster Business Forum Policy Conference: We're Only Human: Culture and Change Management (Sept. 5, 2019), https://www.newyorkfed.org/newsevents/speeches/2019/hen190905 [https://perma.cc/E33D-6EXK].

26. *See infra* Section II(B).

27. *See infra* Section II(C).

28. *See infra* Section II(D).

29. *See infra* Section II(E).

turns a financial regulator into a gatekeeper, like the Food & Drug Administration, whose approval determines whether prescription drugs can be sold.[30]

In what follows, this Article offers examples of these new initiatives, ranging from softer to harder and again, with some such regimes hitting more than one of the stations of the cross.

But first, some caveats. There are reasons to doubt that ethics regulation can work. Changing culture, an organic thing, from the outside is something that anthropologists have long deemed challenging.[31] The goals that financial regulators seem to want to achieve through ethics regulation—putting the interests of the customer first and getting banks to act like a semi-private provider of a public service—would turn part of banking regulation into a professional responsibility regime—the kind that doctors, lawyers, and accountants all labor under. But financial institutions only partly fit the professional model.[32] Some of their employees provide advice, like lawyers, but others are nothing more than salesmen of money. Financial intermediation is a public good deeply entwined with state finance, but bankers are not officers of the court or the first line of defense against an epidemic, like lawyers or doctors, and it is not clear that they should be treated in the same way.[33]

Viewed most pessimistically, the turn to culture and ethics can look like a sign that regulators have given up on the hard work of making smart financial types comply with rules they would just as soon not follow and are now seeking the help of frequently noncompliant industry to do it. In turn, this can look like greenwashing[34]—banks are distrusted and unpopular, and loud proclamations that their overseers are going to ensure that they act in a principled, ethical way going forward might turn out to be good for their image.

30. Some scholars have suggested that more FDA-like gatekeeping would be welcome in the financial markets. *See, e.g.*, Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 63, 66 (2012) (arguing that a "potentially effective form of such *ex ante* regulatory control is pre-market government licensing of complex financial instruments—including derivatives, asset-backed securities, and other structured products").

31. Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 575 (2017).

32. For an exploration of this and a case showing that investment bankers often do act with a duty of loyalty to their clients (as opposed to, presumably, traders), see Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1083 (2016) (arguing that "M&A advisors are properly characterized as fiduciaries of their clients and counters alternative conceptions of their role").

33. *Id.* at 1105.

34. Will Kenton, *Greenwashing*, INVESTOPEDIA (Sept. 29, 2019), https://www.investopedia.com/terms/g/greenwashing.asp [https://perma.cc/RPP6-S568].

II. The New Tools Used to Implement Cultural Reform

A. The Convening Power of Regulators

In what probably constitutes ethics regulation's lightest touch, the banking regulators have tried to get financial institutions to self-regulate on ethics through nothing more than emphasis through speeches and meetings. For instance, in 2018, Executive Vice President of the New York Fed Kevin Stiroh addressed some ways to address ethical failures in the banking culture. He recommended "engaging with diverse thinkers . . . to better understand the complexity of culture reform" and "facilitating discussions among the supervisory community on assessing and influencing industry culture-related efforts."[35] These could be supplemented, in his view, with conferences and workshops among academic experts and regulatory and industry representatives on culture reform. They could also be supplemented by building a relationship between business schools to train future financial market professionals in good culture and writing about the issue in white papers and the like.[36]

These sorts of conferences and meetings have become, if anything, standard tropes of ethical compliance. The New York Fed has held a number of high-level, two-day meetings with executives at large banks at which it pushed them to establish a "culture of compliance" with an ethical tone from management.[37] William Dudley, the former president of the New York Fed, and a particular proponent of improving the culture in banks, thought that "career progression is as important as compensation. . . . The key point is that firms need to take a hard look at how they reward employees."[38] To Dudley, the right incentives could be realized through bonus calculations, which could be tied to law-abidingness as well as productivity.[39]

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35. Kevin J. Stiroh, Exec. Vice President, Fed. Reserve of N.Y., Remarks at the 4th Annual Culture and Conduct Forum for the Financial Services Industry: Complexity of Culture Reform in Finance (Oct. 4, 2018), https://www.newyorkfed.org/newsevents/speeches/2018/sti181004 [https://perma.cc/ZWC5-9D58].

36. *Id.*

37. *See* FED. RESERVE BANK OF N.Y., REFORMING CULTURE AND BEHAVIOR IN THE FINANCIAL SERVICES INDUSTRY: PROGRESS, CHALLENGES, AND THE NEXT GENERATION OF LEADERS (2018), https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/2018-NewYorkFed-Culture-Conference-Summary.pdf [https://perma.cc/78ZZ-RVKU].

38. William C. Dudley, Former President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Speech at Federal Reserve Bank of New York: Strengthening Culture for the Long Term 3–4 (June 18, 2018), https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/Dudley-cultureconference-180618.pdf [https://perma.cc/JUH5-75D7].

39. *Id. See generally* Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37670 (proposed June 10, 2016) (to be codified at 12 C.F.R. pt. 1232) (American regulators have concluded that "[P]oorly structured incentive-based compensation arrangements can provide executives and employees with incentives to take inappropriate risks that are not consistent with the long-term health

In the U.K., such conferences have become annual affairs, with regulators and consumer advocates making the case at conferences of bank executives.[40]

The goal is modest. By making ethics part of the agenda of meetings involving both regulators and senior bankers, the regulators are emphasizing that they take ethics seriously. The meetings can always be supplemented with action later—former New York Fed President William Dudley warned at one conference that if bank managers "as stewards of these large financial institutions do not do [their] part in pushing forcefully for change across the industry, then bad behavior will undoubtedly persist. . . . In that case, financial stability concerns would dictate that [their] firms need to be dramatically downsized and simplified. . . ."[41] By exploring new approaches at these meetings—including some of the ways discussed later in this chapter—regulators can encourage self-regulation by industry. It is an approach that encourages financial institutions to address ethics without requiring anything of them except attendance and consideration, ideally followed by some internally generated reforms.

B. Best Practices and Benchmarking by Industry

More taxing than discussing best practices at industry meetings are regulatory requirements that industries develop such best practices. Regulators interested in improving the culture of the banks they oversee have often required this sort of best practices development, and now, invitations to devise best practices have become common to the burgeoning field of culture and ethics.[42] In theory, identifying best

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of the institution and, in turn, the long-term health of the U.S. economy"); EUROPEAN BANKING AUTH., GUIDELINES ON SOUND REMUNERATION POLICIES 33 (2015), https://eba.europa.eu/documents/10180/1314839/EBA-GL-2015-22+Guidelines+on+Sound+Remuneration+Policies.pdf/1b0f3f99-f913-461a-b3e9-fa0064b1946b [https://perma.cc/LK4A-NF4L] (European regulators have joined this effort: "[A]ssess the mechanisms and systems adopted to ensure that the remuneration system properly takes into account all types of risks, liquidity and capital levels and that the overall remuneration policy is consistent with and promotes sound and effective risk management and is in line with the business strategy, objectives, corporate culture and values and the long-term interest of the institution").

40. *See* Gillian Guy, Chief Exec., Citizens Advice, Remarks at Financial Times Banking Standards Conference: Improving the Professional and Ethical Conduct of Bankers—A Consumer Perspective (Apr. 8, 2019), https://www.bankingstandardsboard.org.uk/improving-the-professional-and-ethical-conduct-of-bankers-a-consumer-perspective/ [https://perma.cc/D9MZ-EXBY].

41. William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry: Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html [https://perma.cc/M4U4-AZVY].

42. For a discussion of best practices as a regulatory tool, see David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 297 (2006) ("In a classic best practices scheme, regulated entities themselves devise practices to comply with relatively unspecific regulatory requirements.").

practices can encourage firms to move towards the benchmark, after which new best practices can be identified, and the process can iterate onward.[43] However, as this sort of regulation is not mandatory, progress is by no means assured.

1. The U.K.'s Banking Standards Board

The U.K. has sought to identify the best practices for banking culture by tasking industry with the creation of an institution to study the question and to regularly survey bankers to assess how they view the culture at their employers.

In June 2013, the U.K. Parliamentary Commission on Banking Standards published a report titled "Changing Banking for Good."[44] One change proposed creating a "professional body for banking in the U.K."[45] In 2015, the banks responded by creating the Banking Standards Board.[46] The board is a non-governmental entity funded by its members[47] that

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43. Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 781 (2005) ("[T]he aim is not to achieve uniformity, but to pool information, identify best practices, and compare solutions across locations.").

44.

> The Parliamentary Commission on Banking Standards is appointed by both Houses of Parliament to consider and report on professional standards and culture of the UK banking sector, taking account of regulatory and competition investigations into the LIBOR rate-setting process, lessons to be learned about corporate governance, transparency and conflicts of interest, and their implications for regulation and for Government policy and to make recommendations for legislative and other action.

PARLIAMENTARY COMMISSION ON BANKING STANDARDS, CHANGING BANKING FOR GOOD, 2013-14, HC 175-II, at iv (UK), https://www.parliament.uk/documents/banking-commission/Banking-final-report-vol-ii.pdf [https://perma.cc/A8Z3-TS7R].

45. PARLIAMENTARY COMMISSION ON BANKING STANDARDS, CHANGING BANKING FOR GOOD, 2013-14, HC 175-I, at 33 (UK), https://www.bankingstandardsboard.org.uk/wp-content/uploads/2016/03/banking-standards-report.pdf [https://perma.cc/4X22-K6HQ].

46. *What Is the BSB?*, BANKING STANDARDS BD., http://www.bankingstandardsboard.org.uk/what-is-the-bsb/ [https://perma.cc/DYP7-WNVU]. For a discussion of the Libor manipulation crisis and the cultural conditions existing prior to the proposal of the BSB, see Justin O'Brien, *Culture Wars: Rate Manipulation, Institutional Corruption, and the Lost Normative Foundations of Market Conduct Regulation*, 37 SEATTLE U. L. REV. 375, 409–10 (2014) ("The extraordinary testimony provided by senior bankers at RBS to the British Parliamentary Commission on Banking Standards in February 2013 offers a compelling rationale to externally validate protestations of commitment to cultural reform. . . . [T]he banking executives were, in turn, shocked at the crookedness involved in the manipulation of Libor, dismayed at the lack of moral restraint, and keen to differentiate between ethical bankers and amoral traders."). For a discussion of the BSB's principle of the role of culture as a business input, see Saule T. Omarova, *Ethical Finance as a Systemic Challenge: Risk, Culture, and Structure*, 27 CORNELL J.L. & PUB. POL'Y 797, 818 (2018) ("[F]inancial regulators successfully incorporated it into their rhetoric by emphasizing that 'good culture' is in financial firms' economic self-interest.").

47.

> The BSB is a self-described private sector body funded by membership subscriptions and open to all banks and building societies operating in the UK. It is neither a regulator nor a trade association; it has no statutory powers, and it will not speak or lobby for the industry.

promotes best practices and encourages the exchange of information. Both turn on its annual assessment, designed to provide insight to its member banks into the current status of culture in the U.K. banking industry.[48] The assessment invites employees to evaluate how their firms fare on nine characteristics: openness, reliability, honesty, competence, responsiveness, organizational resilience, respect, accountability, and shared purpose.[49] The assessment is designed with the assistance of academics and also includes a quantitative element. It is based on a thirty-four question employee survey, from which the scores on the nine characteristics come.[50] The board also evaluates these characteristics qualitatively through focus groups and interviews.[51] The results are aggregated at both the firm level and for all BSB members collectively so that individual members are able to compare their performance to that of other member banks, although many of these results are not shared with the public.[52]

The board's annual review and discussion of its assessment is more public and describes the results of the survey on an aggregate basis. While the 2017 survey results showed an improvement in culture as compared to 2016, the 2018 survey showed a slowing of improvements (as measured based on the results of the assessment in aggregate).[53] The board model has had its share of cross-border appeal. In December 2017, the five largest retail banks in Ireland announced plans to establish their own board, the Irish Banking Culture Board.[54] The board launched on April 15, 2019, and will also conduct an annual survey on the state of banking culture in that country. In America, Stiroh, the New York Fed official, has praised the board as an institution that can, given the importance of "cultural capital,"

> It will, instead, provide challenge, support and scrutiny for firms committed to rebuilding the sector's reputation, and it will provide impartial and objective assessments of the industry's progress.

What Is the BSB?, *supra* note 44.

48. The board says that its proprietary employee survey is designed to "build a picture of how far individual firms, and firms collectively, demonstrate characteristics . . . associated with good organisational cultures . . . [and] promote continuous collective improvement." BANKING STANDARDS BD., ANNUAL REVIEW 2018–2019, at 10 (2019), https://www.bankingstandardsboard.org.uk/pdf/banking-standards-annual-review-2018-2019.pdf [https://perma.cc/2SE4-PTAK].

49. *Id.* at 13.

50. *Id.* at 14.

51. *Assessment Results 2018*, BANKING STANDARDS BD., https://www.bankingstandardsboard.org.uk/assessment-results-2018/ [https://perma.cc/SKS5-CXUQ].

52. *Assessment Results 2017*, BANKING STANDARDS BD., https://www.bankingstandardsboard.org.uk/assessment-results-2017/ [https://perma.cc/F4KT-MSYP].

53. *Id.*

54. *See generally Frequently Asked Questions*, IRISH BANKING CULTURE BD., https://www.irishbankingcultureboard.ie/faq/ [https://perma.cc/LL8Q-2K7E].

provide insight into practices that banks can adopt to improve that capital.[55]

2. FINRA's Efforts to Promote Ethics in the Financial Industry

The U.S. has its own long extant self-regulatory organization (SRO), and that organization has also adopted the idea of taking ethics seriously. The Financial Industry Regulatory Authority (FINRA) has developed a reporting requirement, has played a role as an ethics convener, and has policed ethics as a traditional enforcer; the efforts fall in different parts of our continuum of intensity of regulation, but one of those initiatives has required surveys of its membership, as with the BSB, in an effort to understand what works to improve culture and to convey that information to the industry. FINRA developed the BrokerCheck database and thus has tried to develop a user-friendly way to offer clients information about their brokers and investment advisers, including information about prior disciplinary proceedings. BrokerCheck was first introduced in 1998, making FINRA a relatively early adopter of one approach banking regulators have highlighted to deal with the rolling bad apples problem.[56] Today, BrokerCheck includes information about nearly 630,000 registered representatives and 3,600 securities firms across the United States.[57]

Like the U.K.'s Banking Standards Board, FINRA has also sought to provide its members with information about best practices, even though it has not, so far, tried to do so via a comprehensive, repeated survey of financial professionals. FINRA has, however, offered its members guidance on establishing, communicating, and implementing cultural

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> The BSB, for example, provides one lens on assessing culture change for a broad cross-section of financial services firms operating in the U.K. Each firm participating in the survey has the ability to see its outcomes relative to others and the industry average. This type of industry-wide assessment gives firms insight into areas they can individually focus on, as well as areas they may want to address as an industry.

Kevin J. Stiroh, Exec. Vice President, Fed. Reserve Bank of N.Y., Remarks at the GARP Risk Convention: Reform of Culture in Finance from Multiple Perspectives (Feb. 26, 2019), https://www.newyorkfed.org/newsevents/speeches/2019/sti190226 [https://perma.cc/4UTH-ZZWD].

56. *See* Press Release, FINRA, New, Improved NASD BrokerCheck Goes Live Online Today (Mar. 19, 2007), https://www.finra.org/media-center/news-releases/2007/new-improved-nasd-brokercheck-goes-live-online-today [https://perma.cc/GVN4-VME4].

57. *Statistics*, FINRA, https://www.finra.org/newsroom/statistics [https://perma.cc/K4YL8WBU].

values,[58] and it has held a conference on building and maintaining an ethical culture.[59]

FINRA has always played an important role in sanctioning industry professionals who run afoul of its rules, and here too, it has tried to use the language of ethical improvement in its enforcement. Between 2014 and 2018, FINRA filed over 6,000 disciplinary actions, including expelling over 100 firms and barring over 2,000 individuals from the industry.[60] As we have seen, when it comes to enforcement actions, much of what gets labeled as ethics enforcement looks like the kind of enforcement that would be done even if regulators never spoke about ethics or culture. But FINRA is different, if only a little, because of how explicitly it has highlighted its goals of cultural improvement and its long tenure as a policer of ethics-like conflicts of interest and consumer protections.

FINRA indicated in 2016 that one of its enforcement priorities would be to determine how firms would "establish, communicate and implement cultural values, and [determine] whether cultural values are guiding business conduct."[61] It sanctioned a number of compliance officers at firms for failing to adequately police or deter misconduct during this period, which some in the industry took as evidence of an effort to improve the compliance culture at firms.[62]

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58. *Targeted Examination Letter on Establishing, Communicating and Implementing Cultural Values*, FINRA (Feb. 2016), https://www.finra.org/rules-guidance/guidance/targeted-exam-letter/establishing-communicating-and-implementing-cultural-values [https://perma.cc/L25C-B49F].

59. PATRICIA ALBRECHT ET AL., FINRA, BUILDING AND MAINTAINING AN ETHICAL CULTURE (2018), http://www.finra.org/sites/default/files/2018_AC_Ethical_Culture.pdf [https://perma.cc/PR8Y-YB87].

60. *Statistics*, *supra* note 57.

61. HARDY CALLCOTT & EMILY CULBERTSON, SIDLEY AUSTIN LLP, FINRA IS CONCERNED ABOUT FIRM CULTURE: WHAT DOES IT MEAN? (2016), https://www.sidley.com/~/media/publications/law360_finra-is-concerned-about-firm-culture_what-does-it-mean.pdf [https://perma.cc/MM3K-8E7S].

62. *See* Blackrock Advisors, LLC, SEC No-Action Letter, 2015 WL 1800501 (Apr. 20, 2015) (order instituting administrative and cease-and-desist proceedings) (investment adviser CCO Bartholomew Battista did not force portfolio manager to disclose a conflict of interest and was sanctioned for FINRA Rule 206 violations); In re SFX Fin. Advisory Mgmt. Enterprises, Inc., Investment Advisers Act of 1940 Release No. 4116, 2015 WL 3653814 (June 15, 2015) (order instituting administrative and cease-and-desist proceedings; sanctioning investment adviser CCO Eugene Mason for FINRA Rule 206 violations by failing to implement compliance policies to detect misconduct); In re Thomas R. Delaney II, Initial Decision Release No. 755, 109 SEC Docket 962 (ALJ Aug. 17, 2015) (broker-dealer CCO Thomas Delaney who caused business to violate Reg SHO 1,500 times); Press Release, U.S. Attorney's Off. S. Dist. N.Y., Acting Manhattan U.S. Attorney Announces Settlement of Bank Secrecy Act Suit Against Former Chief Compliance Officer at Moneygram for Failure to Implement and Maintain an Effective Anti-Money Laundering Program and File Timely SARS (May 4, 2017), https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-bank-secrecy-act-suit-against-former [https://perma.cc/FRY9-FLGR] (FinCEN sanctioned chief AML officer Thomas E. Haider of money transmitter for failing to design an effective AML program).

Moreover, many FINRA actions have been brought under its longstanding Rule 2010, which provides that a FINRA "member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade"—a standard fairly brimming with concern about culture.[63] The organization's own appellate body has characterized Rule 2010 as "a broad and generalized ethical provision . . . sufficiently wide to encompass any unethical, business-related conduct."[64] In fact, Rule 2010 is the most commonly invoked FINRA rule and allows the regulator to "capture conduct that cannot be efficiently or easily proved to violate another rule but that FINRA believes is worthy of sanction."[65] FINRA has used the rule to sanction individuals who made material misrepresentations and omissions in a company's public filings,[66] a company that altered customer-related information after the customer complained about the suitability of a recommendation,[67] and a firm that failed to maintain the required minimum net capital required by the Securities Exchange Act.[68]

These cases, like many enforcement cases, fall into the category of being sanctionable for failing to meet high standards of "commercial honor," but also for failing to meet straightforward conflict of interest and lack of internal controls standards. According to FINRA's Sanction Guidelines, Rule 2010 remedies are to be deployed to protect the investing public by deterring misconduct and upholding high standards of business conduct; to be more severe for recidivists; and to be applied with consideration of sanctions imposed by other regulators or previous corrective action imposed by a firm based on similar conduct.[69]

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63. FINRA MANUAL R. 2010 (2008); *see also* John Curley, *FINRA Rule 2010: A Short Rule with a Long Reach*, THINKADVISOR (Aug. 31, 2018), https://www.thinkadvisor.com/2018/08/31/finra-rule-2010-a-short-rule-with-a-long-reach/?slreturn=20190430212401 [https://perma.cc/HV6F-WPXK].

64. Disciplinary Proceeding, OHO Order 16-03 (2015044379701) (FINRA Jan. 28, 2016) (order denying motion to dismiss), https://www.finra.org/sites/default/files/OHO_Order16-03_2015044379701_0.pdf [https://perma.cc/LRY2-DLM6].

65. William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 62 (2013); *see also* Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 121 (2014) (noting that Rule 2010 is "referred to as the 'just and equitable' requirement, this rule is FINRA's most commonly invoked rule").

66. FINRA, DISCIPLINARY AND OTHER FINRA ACTIONS 1, 9 (2019), https://www.finra.org/sites/default/files/publication_file/Disciplinary_Actions_June_2019.pdf [https://perma.cc/SS3X-4ZFJ].

67. *Id.* at 14.

68. FINRA, DISCIPLINARY AND OTHER FINRA ACTIONS 1, 15 (2019), https://www.finra.org/sites/default/files/publication_file/Disciplinary_Actions_February_2019_0.pdf [https://perma.cc/J3VL-LV3P].

69. FINRA, SANCTION GUIDELINES 2 (2017), https://www.finra.org/sites/default/files/2017_Sanction_Guidelines.pdf [https://perma.cc/FH3L-6MKN].

FINRA has found the scope of its cultural enforcement program to be hard to define, which has led to industry complaints about unpredictability. Some observers have concluded that the organization's 2018 enforcement priorities letter "may signal a shift in FINRA priorities to more tangible areas for enforcement moving forward, perhaps in response to the feedback that many found the agency's requirements related to 'culture' difficult to quantify, and therefore difficult to manage toward."[70] The SRO has since devoted more efforts to identifying rolling bad apples, consistent with the priorities of banking regulators in other contexts.[71]

C. Oaths

Other regulators have tried to change the values of financial institutions by making them swear allegiance to particular ethical principles and, in the case of the Dutch in particular, to hold them to account if they fail to follow those principles.

The Dutch Banking Association requires all Dutch bankers to swear an oath.[72] All 90,000 bankers working in the Netherlands were required to adopt the oath by the start of 2015.[73] The oath consists of eight "integrity vows," including a commitment by each banker that they will know their "responsibility to society" and that they "will make every effort to improve and retain trust in the financial sector."[74] The oath concludes with a requirement that the banker appeal to a deity or make a solemn promise: "So help me God! This I pledge and promise!"[75]

The Dutch Banker's Oath is subject to enforcement, ranging from reprimands, to fines that max out at €25,000, to a three-year maximum

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70. Alex Russell, *FINRA 2017 Priorities: Regulator Moves Away From "Culture of Compliance"*, BATES GROUP, LLC (Jan. 10, 2017), https://www.batesgroup.com/news/finra-2017-priorities-regulator-moves-away-from-culture-of-compliance [https://perma.cc/38V9-TCMU].

71. *See Regulatory Notice 18-15*, *Guidance on Implementing Effective Heightened Supervisory Procedures for Associated Persons with a History of Past Misconduct*, FINRA (Apr. 30, 2018), https://www.finra.org/rules-guidance/notices/18-15 [https://perma.cc/MS95-ZMYP]; Robert W. Cook, President & CEO, FINRA, Speech at Georgetown University McDonough School of Business: Protecting Investors from Bad Actors (June 12, 2017) ("[I]n the last few years we have initiated more targeted efforts to better identify and supervise those firms and individual brokers who may pose the greatest risk of harm to investors—or 'high-risk' firms and brokers."), https://www.finra.org/newsroom/speeches/061217-protecting-investors-bad-actors [https://perma.cc/5TUY-2TT3].

72. Joe Pinsker, *Would a Hippocratic Oath for Bankers Lead to Better Behavior?*, THE ATLANTIC (Dec. 18, 2014), https://www.theatlantic.com/business/archive/2014/12/would-a-hippocratic-oath-for-bankers-lead-to-better-behavior/383867/ [https://perma.cc/Y5SC-J4UZ].

73. *Id.*

74. *See The Banker's Oath*, TUCHTRECHT BANKEN, https://www.tuchtrechtbanken.nl/en/the-bankers-oath [https://perma.cc/JH8B-HTMD] for the full text of the Dutch Banker's Oath.

75. *Id.*

moratorium on working anywhere in the Dutch banking industry.[76] Enforcement matters are heard by the Foundation for Banking Ethics Enforcement (in Dutch, the "Stichting Tuchtrecht Banken"), which was set up in 2015.[77] Since then, the entity has indeed considered some enforcement measures—thirty such matters in the two years since its founding, ten of which involved the forging of customer signatures, and four involving the unwarranted review of customer data.[78] In most of these cases, the regulator handed down industry bans lasting between six to twenty-four months, depending on the case and misconduct in question.

Although the Dutch Banker's Oath is perhaps the best known and most widely applied oath rolled out in the wake of the financial crisis, it is not alone. An Australian nonprofit devised a simple oath that bankers could voluntarily take; it also consists of a list of commitments, including commitments to "serve all interests in good faith" and to "pursue my ends with ethical restraint."[79] Oath takers are listed on a public website; over 1,000 Australian bankers have signed on, though that comprises a small proportion of the Australians employed by the country's banking industry.[80] Japan Financial Services Authority employees have been reminded that they are expected to operate "for the sake of the nation and its people" and to "meet the expectations of the people."[81] The British banking industry also considered, but ultimately decided against, requiring bankers to take an oath.[82] In the U.S., the Office of the Comptroller of the Currency requires bank directors to affirm that they will "diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions."[83]

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76. *About the Foundation for Banking Ethics Enforcement*, TUCHTRECT BANKEN, https://www.tuchtrechtbanken.nl/en/about-the-foundation-for-banking-ethics-enforcement [https://perma.cc/ADL2-8XG4].

77. *Code of Conduct for Bankers Takes Effect in the Netherlands*, EURONEXT (Jan. 4, 2015), https://www.euronext.com/en/about/media/bell-ceremony-archive/code-conduct-bankers [https://perma.cc/237U-CK2K].

78. For the full collection of rulings, see *Rulings*, TUCHTRECHT BANKEN, https://www.tuchtrechtbanken.nl/en/verdicts/year/field_verdict_type/verdicts-disciplinary-committee-1 [https://perma.cc/WL4A-9H5F].

79. *Current Signatories*, BANKING & FIN. OATH, http://www.thebfo.org/The-Oath/Signatories [https://perma.cc/D6CM-2MXJ].

80. Rod Myer, *The Bankers' Oath That Can't Be Enforced and Has Never Rubbed Out a Member*, NEW DAILY (Feb. 15, 2019), https://thenewdaily.com.au/money/finance-news/2019/02/14/the-bankers-oath-that-cant-be-enforced/ [https://perma.cc/2NBY-HTPQ].

81. JAPAN FIN. SERVS. AUTH., 2018 ANNUAL REPORT, CHAPTER 2: SECTION 3, PART I (translation on file with author), https://www.fsa.go.jp/common/paper/29/zentai/02.pdf [https://perma.cc/HP9V-GXX4].

82. Paul Chisnall, *A Banker's Oath: Part of the Answer?*, BBA (July 30, 2014), https://www.bba.org.uk/news/bba-voice/a-bankers-oath-part-of-the-answer/#.XQqsl7xKg2w [https://perma.cc/9WVX-8A7V].

83. 12 U.S.C. § 73 (2018).

These oaths appear to be signaling devices, which are designed to remind bankers of their responsibilities. Enforcement actions citing any of the oaths as an underlying basis have been rare outside of Holland—and apparently nonexistent in Australia, if the voluntary oath could even serve as the basis for discipline.[84]

D. Using Information Against Bad Apples

Regulators have worried that bankers adept at circumventing rules might be asked to leave their bank, but not the industry. Creating a database—a blacklist, of sorts—of bankers who have engaged in misconduct, and forcing banks to consult the database before hiring the banker, is one way to improve a culture of compliance by making it more difficult for noncompliers to remain employed in the industry.

Former New York Fed president Dudley thought that there might be some merit to to the blacklist.[85] Dudley urged the creation of "a database of banker misconduct to combat the problem of 'rolling bad apples.'"[86] The effort to develop such a database has been one of the most common cultural reform efforts taken on by regulators since the financial crisis.[87]

Developing such a database draws on some tools that regulators, who often must disclose at least some of their enforcement actions to the public, have long had. Many financial regulators have thus created reviewable lists of former industry members subject to industry bars, if not always in as convenient a format as BrokerCheck. The U.S. Securities and Exchange Commission (SEC) regularly sanctions securities fraudsters with temporary or even permanent bans from the securities industry: it imposed 625 bars and suspensions of wrongdoers in fiscal year 2017 and over 650 bars and suspensions in fiscal year 2016, either permanently or for a period of time.[88]

The self-regulatory organization's list of disciplined brokers and dealers is not entirely publicly available, but it is reviewable by firms and regulators that are granted access by FINRA, and members of the public

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84. Myer, *supra* note 80.

85. *See* William C. Dudley, Former President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Remarks at the U.S. Chamber of Commerce: The Importance of Incentives in Ensuring a Resilient and Robust Financial System (Mar. 26, 2018), https://www.newyorkfed.org/newsevents/speeches/2018/dud180326 [https://perma.cc/6LJ6-ZJZF].

86. *Id.*

87. *See generally* David Zaring, *The International Campaign to Create Ethical Bankers*, 3 J. FIN. REG. 187 (2017).

88. U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017, at 12, https://www.sec.gov/files/enforcement-annual-report-2017.pdf [https://perma.cc/EM56-VNBP].

can inspect parts of it, including the parts with the involuntary termination records—through the BrokerCheck portal.[89] FINRA has also compiled a database of registered investment professionals who have passed FINRA's qualification standards.[90] The database includes "registration records of broker-dealer firms and their associated individuals including their qualification, employment and disclosure histories."[91] Firms are obligated to upload forms to the database whenever they terminate an employee; in the forms, they must describe the reasons for the separation.[92] The database of individuals and firms can be accessed by members of the public, who can view their broker's disclosure history, including regulatory and involuntary termination actions, number and type of securities licensing exams passed, and years of experience.[93]

Other jurisdictions have implemented blacklists of bankers in the wake of the financial crisis. As Bank of England Governor Carney observed, Britain's Prudential Review Authority "has introduced requirements for regulated firms to provide employment references to one another in a mandatory template when hiring Senior Managers. This includes information on an individual's conduct record, and their fitness and propriety."[94] The Dutch—trendsetters when it comes to regulating the ethics of bankers—also have a blacklist.[95]

Globally, the Financial Stability Board (FSB) has made recommendations as to how to implement a blacklist on the assumption that the regulator may not have the power or desire to require it, but that industry might adopt it of its own accord.[96] In its toolkit on "Strengthening Governance Frameworks to Mitigate Misconduct Risk," the FSB

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89. *About BrokerCheck,* FINRA, https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck [https://perma.cc/D9VV-ENYU].

90. *Id.*

91. *Central Registration Depository (CRD)*, FINRA, http://www.finra.org/industry/crd [https://perma.cc/34Y6-Z4PB].

92. *See About BrokerCheck*, *supra* note 89.

93. *Id.*

94. Mark Carney, Governor, Bank of Eng., Remarks at the Banking Standards Board Panel: Worthy of Trust? Law, Ethics and Culture in Banking 3 n.6 (Mar. 21, 2017), https://www.bankofengland.co.uk/-/media/boe/files/speech/2017/banking-standards-board-worthy-of-trust-law-ethics-and-culture-in-banking.pdf?la=en&hash=140DB30905F90F73DD6A1BADFF3E13BF931AB8E8 [https://perma.cc/C864-3QMC].

95. *See generally First Measure by Disciplinary Commission for Dutch Banks: What Lies Ahead?*, CLIFFORD CHANCE BRIEFINGS, Dec. 2016, at 1, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/12/first-measure-by-disciplinary-commission-for-dutch-banks-what-lies-ahead.pdf [https://perma.cc/S27Z-TPRC] (as this memo of the early work of the disciplinary body in charge of applying the Dutch ethical code indicates: "Instead of the maximum term it has imposed a 6 month disqualification from the profession, as the bank had already terminated employment and blacklisted the employee").

96. *See* STRENGTHENING GOVERNANCE FRAMEWORKS TO MITIGATE MISCONDUCT RISK, *supra* note 8.

developed five tools for firms and two tools for regulators, all designed to deal with the problems created when unloved bankers find new homes.[97] The recommendations tend, as international financial regulatory recommendations often do, toward the banal. Firms are supposed to communicate their conduct expectations consistently; enhance their interviewing techniques; do thorough reviews of bankers before hiring; reassess employee conduct regularly; and conduct exit reviews when employees are encouraged to leave the bank.[98] It is difficult to know who would pound the table against such initiatives, at least in public.

Nor are the recommendations for national authorities and supervisors more specific. They are instructed to supervise firm employment screening practices and to "[p]romote compliance with legal or regulatory requirements regarding conduct-related information about applicable employees, where these exist."[99] The latter recommendation is supposed to ensure that where it is possible to manage a blacklist, consistent with privacy, due process, and employment laws, supervisors should try to do it.

These are modest, even bland sorts of counsel, but they do reflect the priorities of leading bank supervisors. The FSB did not have to emphasize culture, and yet it took stock of cultural regulation in 2017 in a white paper and devised the toolkit one year later, suggesting that it thought the encouragement of a global body on culture might help.[100]

More generally, the recommendations exemplify the trust that regulators can put on industry reporting. On the principle that reporting can induce compliance, another implementation mechanism that has been weighed by regulators is to require disclosure about ethics in culture in the reports of publicly traded companies.[101] As the U.K. banker David Walker has put it, "[T]here is need for enhanced narrative reporting on culture. This should be substantive, outlining fully the values set by the board with an assessment of progress, presented with the same seriousness as the hard numbers in financial reporting."[102] American banking regulators have made the promulgation of a code of ethics something that weighs on their

97. *See id.* at 8.

98. *Id.*

99. *Id.*

100. *See* FIN. STABILITY BD., REDUCING MISCONDUCT RISKS IN THE FINANCIAL SECTOR: PROGRESS REPORT TO G20 LEADERS (2017), https://www.fsb.org/wp-content/uploads/Misconduct-progress-report-July-2017.pdf [https://perma.cc/MAW3-ALLR].

101. *See* Sir David Walker, *Looking to Leadership for Continuity on Culture*, MEDIUM: FED. RES. BANK OF N.Y. (June 8, 2018), https://medium.com/new-york-fed/looking-to-leadership-for-continuity-on-culture-344d68023598 [https://perma.cc/JH64-CGJS].

102. *Id.*

assessment of the quality of the management of the bank, which, if not exactly encouraging reporting, encourages a degree of promulgation.[103]

E. Certification

One of the most stringent ways to ensure that financial institutions are managed by people with appropriate qualifications and of good character is to require firms to certify this, and for regulators to approve the certification. The requirement changes the role of the financial regulator from an ex post enforcer of regulations to an *ex ante* gatekeeper like the Food and Drug Administration, which must establish, to its satisfaction, that any new drug is "safe and effective."[104] Senior manager certification has become an important part of the U.K.'s post-crisis regulatory reforms; the pre-approval it requires from regulators has the potential to seriously constrain firms as to whom they might hire.[105]

The U.K.'s Parliamentary Commission for Banking Standards adopted a new Senior Manager and Certification Regime (SM&CR) on March 7, 2016.[106] The aim of the regime is to "reduce harm to consumers and strengthen market integrity by making individuals more accountable for their conduct and competence" by holding senior managers accountable for misconduct by lower level officials, requiring pre-approval of important bank managers by the U.K.'s financial regulators, and applying a new set of conduct rules to all.[107]

Parliament passed laws adopting the regime in 2013 and 2016 in amendments to the main U.K. financial services legislation, the Financial Services and Markets Act 2000.[108] SM&CR was rolled out in March 2016

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103. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002; Correction, 68 Fed. Reg. 5110-01 (proposed Jan. 31, 2003) (to be codified at 17 C.F.R. pt. 228, 229, 249).

104. For a discussion, see *The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA (Feb. 24, 2017), https://www.fda.gov/drugs/drug-information-consumers/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective [https://perma.cc/P4H6-WZFQ].

105. For a discussion of the senior manager regime, see Court E. Golumbic, *"The Big Chill": Personal Liability and the Targeting of Financial Sector Compliance Officers*, 69 HASTINGS L.J. 45, 88 (2017) ("The SMR, which was conceived in response to the financial crisis of 2007–2008 and LIBOR rate-fixing scandals, is designed to 'embed personal accountability into the culture' of the UK financial services industry.").

106. *A Look at the Senior Managers and Certification Regime*, BANKING STANDARDS BOARD, https://www.bankingstandardsboard.org.uk/a-look-at-the-senior-managers-certification-regime/ [https://perma.cc/WVB2-VQUN].

107. Press Release, Fin. Conduct Auth., FCA Outlines Proposals to Extend the Senior Managers and Certification Regime to All Financial Services Firms (July 26, 2017), https://www.fca.org.uk/news/press-releases/fca-outlines-proposals-extend-senior-managers-certification-regime-all-firms [https://perma.cc/56UZ-C3YX].

108. Financial Services and Markets Act 2000, c. 8, §§ 56–71 (Eng.).

and was extended to all Financial Conduct Authority (FCA)-regulated financial services firms on December 9, 2019.[109]

The pre-approval process means that senior managers at the financial institution must be assessed by their firms as "fit and proper," and they must be approved by the Financial Conduct Authority on an annual basis.[110] A fit and proper manager is one who "has obtained a qualification; has undergone, or is undergoing, training; or possesses a level of competence; or has the personal characteristics; required by the general rules made by the FCA."[111] Other financial professionals who have a "significant impact on customers, the firm and/or market integrity" must also be certified.[112] This group includes proprietary traders; client-facing advice-givers, such as financial advisers and investment managers; material risk-takers; and those with responsibility for approving the deployment of algorithmic trading strategies.[113] The FCA's pre-approval standard—the fit and proper standard—has been characterized by British regulators as an ethics regulation because it not only looks to the professional qualifications of the senior managers and key employees of financial institutions, but also because it allows for an evaluation of bankers based on their character.[114]

Less clearly, "ethical" is the requirement that senior managers prepare a "Statement of Responsibilities" that "must clearly describe all of the[] responsibilities" for which the senior manager is responsible and accountable.[115] They are also subject to a "Duty of Responsibility," which allows the FCA to hold the manager responsible when the firm breaches one of the FCA's requirements upon a showing that the senior manager did not take reasonable steps to prevent or stop the breach.[116] This regime was created partly from a sense that senior managers were not penalized for wrongdoing elsewhere in their banks during the financial crisis, but it should probably be understood as a liability rule expanding responsibility

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109. *Senior Managers and Certification Regime (SCMR)*, BNY MELLON PERSHING (Oct. 2, 2019), https://www.pershing.com/uk/en/news/what-is-big-in-our-world/regulation/smcr [https://perma.cc/5R25-G9QK].

110. FIN. CONDUCT AUTH., FIT AND PROPER TEST FOR EMPLOYEES AND SENIOR PERSONNEL SOURCEBOOK 1.2.18 (2019), https://www.handbook.fca.org.uk/handbook/FIT.pdf [https://perma.cc/TBK4-Z2CA].

111. *Id.* (italics omitted).

112. *One Year to Go Before SM&CR Applies to All FCA-Regulated Firms*, KATTEN MUCHIN ROSENMAN LLP (Dec. 10, 2018), https://katten.com/One-Year-to-Go-Before-SMCR-Applies-to-All-FCA-Regulated-Firms [https://perma.cc/GAF5-VQSD].

113. *See generally* FIN. CONDUCT AUTH., *supra* note 109.

114. *See generally* Zaring, *supra* note 87.

115. FIN. CONDUCT AUTH., THE SENIOR MANAGERS AND CERTIFICATION REGIME: GUIDE FOR FCA SOLO-REGULATED FIRMS 13–14 (2019), https://www.fca.org.uk/publication/policy/guide-for-fca-solo-regulated-firms.pdf [https://perma.cc/8KF3-WSS7].

116. *Id.* at 14.

for illegality beyond the bankers most closely associated with the illegal conduct.

The conduct rules are a mixture of both liability and ethics rules. The rules apply to all employees within a firm, not just those certified by the firm and the FCA (though senior managers get their own set of rules).[117] The purpose of the conduct rules is to "shape the culture, standards and policies of firms as a whole and promote positive behaviors that reduce harm."[118] The rules seem designed to reach matters that might be considered ethics-related, especially those that apply to street-level professionals. Those rules include acting with integrity; acting with due care, skill, and diligence; being open and cooperative with regulators; paying due regard to the interest of customers and treating them fairly; and observing the proper standards of market conduct.[119] Senior manager conduct rules include ensuring that the business is controlled effectively and complying with relevant requirements; that delegated responsibilities are discharged effectively; and that the FCA or Prudential Regulation Authority (PRA) is notified of any relevant information.[120]

The FCA's *Enforcement and Annual Performance Report 2017–2018* recounts forty-eight culture and governance cases opened between April 1, 2017, and March 31, 2018, while only two cases were closed.[121] As of the publication of the report in 2018, there were sixty-one culture and governance cases open, compared to fifteen the previous year.[122] The highest profile of these cases involved Jes Staley, the CEO of Barclays, who was fined by the FCA and PRA jointly for failing to act with "due skill, care and diligence" in attempting to identify the author of two anonymous letters that disparaged a friend and colleague.[123] The FCA reasoned that Staley should have recognized a conflict of interest between his desire to protect his friend and the best interest of the bank he led, which benefits from information provided by whistleblowers. Staley was assessed ten percent of his annual income as penalty.[124]

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117. *Id.* at 44.

118. *Id.*

119. *Id.* at 45.

120. *Id.*

121. FIN. CONDUCT AUTH., ENFORCEMENT ANNUAL PERFORMANCE REPORT 2017–2018, at 6 (2018), https://www.fca.org.uk/publication/corporate/annual-report-2017-18-enforcement-performance.pdf [https://perma.cc/SB67-JCW6].

122. *Id.*

123. *FCA and PRA Jointly Fine Mr. James Staley £642,430 and Announce Special Requirements Regarding Whistleblowing Systems and Controls at Barclays*, FIN. CONDUCT AUTH. (Nov. 5, 2018), https://www.fca.org.uk/print/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements [https://perma.cc/8N3J-V4QG].

124. *Id.*

Staley's penalty is related to culture improvement, which at banks has often involved supporting whistleblowers, but the retaliation, while not the ordinary fraud now policed by the new Dutch ethics regulator, might have been sanctionable under the pre-SC&R regime. That regime, with its code of conduct, its extended responsibility, and above all, its pre-approval process, has gone far into making ethical conduct a requirement of banking.

CONCLUSION

One of the most interesting developments of the regulatory response to the financial crisis has been the turn by regulators toward initiatives to improve the ethics of the financial industry in a way that makes the industry culturally more likely to comply with regulatory rules and avoid taking on excessive risks. It is by no means clear that the effort to regulate ethics will work, but what is clear is that regulators have made ethics a priority such that they have turned to a number of different strategies to operationalize a concept that has always risked being amorphous and un-operationalizable.