

On the Hook

With the advent of the Securities and Futures Commission's decision to implement a Manager-in-Charge regime, a new class of officers of licenced corporations could be in line to face the music for any malfeasance. – By Gina Miller

In July, the legal liabilities of select senior managers of Hong Kong Licenced Corporations got tougher. Last December, the Hong Kong Securities and Futures Commission (SFC), introduced its Manager-in-Charge (MIC) regime. Suffice it to say, there are few managers who anticipate increasing regulatory function with glee, and the word "regime" sounds draconian at the best of times. Nevertheless, the SFC's latest volley in the global trend to make governance and accountability an enforcement priority is one of the more benign exertions of its offices.

In brief, the new MIC regime adds one more tier to the accountability pool of senior managers. Under this new initiative, senior management of licensed corporations ("LCs", broadly defined as companies or corporations that engage in one of the 12 regulated activities for which the SFC provides or will provide a licence) will include directors of the corporation, responsible officers of the corporation (ROs) and now, Managers in Charge (MIC) of the corporation, to be formally responsible for managing eight "Core Functions" of the LC. These are listed as:

- i. Overall management oversight;
- ii. Key business line;
- iii. Operational control and review;
- iv. Risk management;
- v. Finance and accounting;
- vi. Information technology;
- vii. Compliance; and
- viii. Anti-money laundering and counter-terrorist financing.

"The MIC regime is expected to ruffle a few feathers here and there, especially for individuals who pre-MIC were not front and centre on the regulatory radar in Hong Kong", said Lapman Lee, Managing Director, Compliance and Regulatory Consulting for Duff & Phelps (Hong Kong) Ltd. "As a result, we may see some changes in the lines of reporting and more empowerment of both the local Board of the LC and the MICs responsible for the LC's business in Hong Kong."

The new regime dictates that each core function must be taken care of by at least one MIC of a licensed corporation – though a separate individual is not required for each one. Depending on the LC's size and needs, an individual can manage more than one Core Function, so the MIC of Compliance, for example, can also serve as the MIC of Anti-money laundering and counter-terrorist financing.

The SFC notes that the MIC does not have to be an employee of the LC, but they are required to hold a position of authority within the corporation and be properly accountable. In practice this will mean that the role of MIC cannot simply be outsourced to an external party. There is also no requirement for an MIC to be resident in Hong Kong – whether an overseas-based individual meets the requirements of being an MIC will ultimately be assessed by their authority, seniority, decision making power and accountability within the LC.

Paul Moloney, the Head of Funds at Eversheds, Hong Kong says there may be some flexibility in the employment of MICs. "It is debateable that there is anything in the MIC regime expressly prohibiting the outsourcing of senior management functions. The SFC has acknowledged that there may be scenarios in which an MIC is not an employee of the LC. In



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practice, however, there are likely to be significant hurdles in effectively adopting this outsourcing model in a compliant manner”, said Moloney.

“Firstly, any MIC needs to have the requisite level of authority and seniority within the LC and will be expected to have a direct reporting line to the board or to the MIC in charge of overall management and oversight. It is unlikely that this will be the case in many outsourcing arrangements. Additionally, it is a requirement that each MIC expressly acknowledges their role. In practice, it may be difficult for firms to require their outsourced service providers to take on this responsibility and to make this acknowledgement, particularly in the context of concerns over the SFC’s enforcement remit and any potential personal enforcement risk”, said Moloney.

“Other considerations to be taken into account include any re-negotiation of commercial terms

with any outsourced service provider to adequately compensate individuals for any perceived increased personal risk. The Board of an LC contemplating using this model will also need to consider whether they have sufficient dialogue with the service provider to ensure that they can fulfil their own management and oversight roles effectively. Given the SFC’s challenging timeframes for compliance, if firms are looking to use this model, we would recommend that those difficult conversations are had sooner rather than later, so that these additional considerations can be properly taken into account and dealt with”, he said.

Karen Man, a partner with Baker & McKenzie in Hong Kong says that although the SFC has not mandated any particular organisational structure, it does expect an LC’s board to determine what the proper delegation of authority and responsibilities should be among its senior management. And they don’t have much time left to get things organised.