

SFC introduces manager-in-charge regime to heighten senior management accountability

On 16 December 2016, the Securities and Futures Commission (SFC) announced it was taking steps to enhance the senior management regime of licensed corporations. These requirements seek to promote senior individuals' awareness of their regulatory obligations and accountability for misconduct that falls within their area of responsibility.

In its "Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management" (Circular), the SFC provides guidance on who should be regarded as the senior management of a licensed corporation. It identifies eight Core Functions – functions identified as instrumental to the operations of licensed corporations - for which licensed corporations must appoint at least one fit and proper person to be the manager-in-charge (MIC).

"Senior management"

MIC is a new category of senior management of a licensed corporation defined by the SFC.

Apart from MIC, senior management of a licensed corporation includes the directors of the corporation and responsible officers (ROs) of the corporation. The SFC clarifies that the senior management categories are not mutually exclusive, such that an individual can be a director, RO and MIC simultaneously.

It should be noted that the measures set out in the Circular are consistent with the existing provisions of the Securities and Futures Ordinance (SFO), subsidiary legislation made by the SFC, and codes and guidelines published by it under the SFO.

Who is a manager-in-charge?

An MIC is an individual appointed by a licensed corporation to be principally responsible for managing any of the eight Core Functions of the licensed corporation:

- Overall Management Oversight
- Key Business Line
- Operational Control and Review
- Risk Management
- Finance and Accounting
- Information Technology
- Compliance
- Anti-Money Laundering and Counter-Terrorist Financing

For each Core Function, licensed corporations are required to appoint at least one individual as the MIC. Given the varying control, organisational and governance structures, two or more MICs can

Key issues

- The SFC has identified eight Core Functions for which there must be a manager-in-charge.
- Licensed corporations will need to submit up-to-date management structure information to the SFC.
- They will also need to review their HR policies and procedures to ensure MICs are aware of their regulatory obligations.
- The measures are likely to prompt sensitive discussions similar to those that have taken place in the UK over the past few years.

jointly manage one Core Function. On the other hand, one MIC can be responsible for more than one Core Function.

It is not necessary for an MIC to be located in Hong Kong nor employed by the licensed corporation. When determining whether an individual is

an MIC for a Core Function, a licensed corporation should take into account an individual's seniority and authority. Further, the MIC should report directly, and be accountable, to either the licensed corporation's Board of directors or the MIC of the Overall Management Oversight function.

The SFC does not seek to apply regulatory approval for an MIC who is not a licensed person or a licence applicant. However, a licensed corporation is expected to ensure that any person appointed as an MIC is fit and proper and qualified to act in that capacity.

Roles and responsibilities of the Board

The SFC expects the management structure of a licensed corporation including the appointment of MICs to be approved by the Board of the corporation. It is the Board's responsibility to ensure that each MIC has acknowledged his or her appointment as MIC and the particular Core Function(s) for which they are principally responsible. The Board must ensure that information submitted to the SFC under the MIC regime (see below) is accurate and complete.

Alignment with the RO regime

The SFC generally expects MICs of the Overall Management Oversight function and the Key Business Line function to be ROs in respect of the regulated activities (RAs) they oversee. This is because in most cases, such MICs actively participate in or are responsible for directly supervising the business of the RAs.

MICs of other Core Functions are not expected to be ROs and not every RO is required to be an MIC.

Legal liability

Under Part IX of the SFO, the SFC may exercise its disciplinary powers to sanction a regulated person if the person is, or was at any time, guilty of misconduct or is considered not fit and proper to be or to remain the same type of regulated person.

The term "regulated person" means a person who is or at the relevant time was any of the following types of person:

- a licensed person;
- an RO of a licensed corporation; or
- a person involved in the management of the business of a licensed corporation (regardless of whether he or she is licensed).

All members of the senior management of a licensed corporation, even if not licensed, are regulated persons because of their involvement in the management of the licensed corporation's business.

The disciplinary sanctions which the SFC may impose on a regulated person under Part IX of the SFO are civil in nature. However senior management of licensed corporations should also be aware of potential criminal liability. The SFO imposes on every officer of a corporation the obligation to take reasonable measures to ensure that proper safeguards exist to prevent the corporation from acting in a way which would result in the corporation perpetrating conduct which constitutes market misconduct.

Where a corporation (licensed or otherwise) has been found guilty of an offence under the SFO, the SFC may seek to extend criminal liability to any of the corporation's officers where the offence is committed with their consent, connivance or otherwise attributable to their recklessness.

Reporting obligations

From 18 April 2017 (commencement date) onwards, the SFC expects a corporation applying for a license under section 116(1) SFO to provide information regarding its MICs and its organisational charts.

Existing licensed corporations must submit the required information within three months from the commencement date (on or before 17 July 2017).

The organisational chart should depict a licensed corporation's corporate hierarchy and its business and operations units, as well as the positions of all MICs, the job titles of the persons to whom the MICs report and the job titles of the persons reporting directly to the MICs in relation to the operations of the corporations.

Licensed corporations must notify the SFC of changes relating to the appointment of MICs, or any changes in the particulars of the MICs within seven business days of the changes. An updated organisational chart will be required by the SFC when there is a change in the identity of any of the MICs or in the job title of the person to whom an MIC reports.

Implications

The MIC regime is not intended for banks.

There will be a need for licensed corporations to examine carefully their existing governance structures.

Licensed corporations with excessively complex organisational arrangements may find the mapping of MICs to Core Functions challenging. In some cases, structural changes may be required which may have significant impact for these licensed corporations.

In addition, licensed corporations that are part of an internationally operating group of companies may not necessarily have senior managers for all core functions in Hong Kong. This is particularly the case for firms which do not have a deep organisation structure locally.

The MIC regime will also introduce liability for certain individuals. For example, non-employees of licensed corporations who hold positions of authority within the licensed corporations and have been appointed as MICs.

It is helpful to see however that the SFC has provided some flexibility to allow MICs to report to either the Board of directors or the MIC of the Overall Management Oversight function.

Where there are outsourcing arrangements, the SFC confirms that it is not appropriate to designate as an MIC an external party who does not hold a position of authority within the licensed corporation and who merely provides outsourced services to it. Licensed corporations should appoint at least one fit and proper MIC to supervise the outsourced functions.

Licensed corporations will also need to review their HR documents, policies and procedures to ensure that the formally assigned MICs/ newly recruited MICs are clearly aware of their regulatory obligations.

From an international perspective, the requirements are much less detailed

or prescriptive than those under the individual accountability regimes now in the force in the UK, for example. The requirements to set out "sufficient details regarding the specific responsibilities of each MIC", and for MICs to acknowledge their appointment as such may prompt difficult and sensitive discussions similar to those which have taken place in some UK based institutions over the past few years.

Contacts



Francis Edwards
Partner

T: +852 2826 3453
E: Francis.Edwards
@cliffordchance.com



Matt Feldmann
Partner

T: +852 2825 8859
E: Matthias.Feldmann
@cliffordchance.com



Edward Johnson
Partner

T: +852 2826 3427
E: Edward.Johnson
@cliffordchance.com



Mark Shipman
Partner

T: +852 2825 8992
E: Mark.Shipman
@cliffordchance.com



Donna Wacker
Partner

T: +852 2826 3478
E: Donna.Wacker
@cliffordchance.com



Helen Fok
Counsel

T: +852 2825 8801
E: Helen.Fok
@cliffordchance.com



Terry Yang
Consultant

T: +852 2825 8863
E: Terry.Yang
@cliffordchance.com



William Wong
Senior Associate

T: +852 2826 3588
E: William.Wong
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong
© Clifford Chance 2016
Clifford Chance

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.