Offering Funds Under the Accredited Investor Exemption and Regulatory Treatment of Closed-End Funds

Important changes introduced to the CIS Accredited Investor Exemption in 2013

As a part of its ongoing efforts to enhance and refine the regulatory framework for the offers of collective investment schemes (“CISs”) in Singapore, the MAS issued a consultation paper on December 26, 2012 proposing amendments to the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 and changes to the regulatory treatment of closed-end funds (the “Consultation Paper”).

One of the amendments relate to the accredited investor offering exemption for CISs under Section 305 of the Securities and Futures Act, Chapter 289 of Singapore (the “SFA”) (the "Accredited Investor Exemption").

An offer of units in a CIS to any person in Singapore will be subject to the prospectus registration requirements under the Securities and Futures Act, Chapter 289 of Singapore (the “SFA”). The Accredited Investor Exemption provides for an exemption from such prospectus registration requirements when units in a CIS are offered to accredited investors1 in Singapore, and subject to certain other conditions.

One of the key conditions for the Accredited Investor Exemption is that the offeror must submit an online notification of the intended offer of units in a CIS (referred to as a “restricted scheme”) to the Monetary Authority of Singapore (“MAS”) via MAS’s online portal known as CISNet, prior to any offer to accredited investors.

New requirement for an information memorandum

The MAS introduced a requirement that an offer of units in a restricted scheme (whether Singapore or foreign) under the Accredited Investor Exemption must be made in or be accompanied by an “information memorandum” which complies with prescribed disclosure requirements. A softcopy of the information memorandum is also required to be submitted to the MAS for record purposes via CISNet. In its response to the

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1 An “accredited investor” includes:
(a) an individual whose net personal assets exceed S$2 million (or its equivalent in value in any foreign currency) or whose income in the preceding 12 months is not less than S$300,000 (or its equivalent in value in any foreign currency); and
(b) a corporation with net assets exceeding S$10 million in value (or its equivalent in value in any foreign currency) as determined by its most recent audited balance sheet or in the case of a corporation which is not required to prepare audited accounts regularly, a balance sheet of the corporation certified by it to give a true and fair view of the state of affairs of the corporation as of the date of the balance sheet, which date shall be within the preceding 12 months.
feedback received on the Consultation Paper dated April 1, 2013, the MAS clarified that the fund managers may use existing offering documents to satisfy this requirement, provided such documents contain the prescribed information memorandum disclosures.

The information memorandum is required to state the following:

- the investment objectives of the restricted scheme, and the investment approach of the fund manager;
- the risks of subscribing for or purchasing units in the restricted scheme;
- whether the restricted scheme is regulated by any financial supervisory authority and if so, the title and jurisdiction of the legislation and the contact details of the authority;
- information on whether the fund manager for the restricted scheme and, where applicable, the trustee or custodian, are regulated by any financial supervisory authority and, if so, the contact details of the authority;
- in case of a restricted Singapore scheme, the name and place of incorporation of the fund manager, and where applicable the trustee or custodian;
- in case of a restricted foreign scheme –
  - where the scheme is a corporation –
    - its place of incorporation and business address; and
    - the name and place of incorporation or registration of the fund manager and where applicable, the trustee or custodian; or
  - where the scheme is not a corporation, the name and place of incorporation or registration of the fund manager and where applicable, the trustee or custodian.
- any redemption conditions and gating structures;
- policy regarding side letters that may further qualify the relationship between the restricted scheme and selected investors, and the nature and scope of such side letters;
- where applicable the past performance, or where information on the past performance may be obtained;
- the details on where the accounts may be obtained; and
- fees and charges payable by the investors and by the restricted scheme.

This information memorandum requirement applies to (a) each CISNet notification of a new offer and (b) each CISNet annual declaration², that is submitted on or after July 1, 2013. For any subsequent annual declaration relating to a restricted scheme for which an information memorandum had already been submitted previously, the fund manager will not need to re-submit the information memorandum unless there are changes made to the information memorandum.

² The responsible person for a restricted scheme is required to make an annual declaration via CISNet that the previously notified information on the restricted scheme remains true and correct.
Important change to the regulatory treatment of closed-end funds

The MAS also introduced a change to the regulatory treatment of closed-end funds by making such funds subject to the purview of the regulatory offering regime for CISs in Singapore.

Previously a closed-end fund (i.e. a fund whose units are exclusively or primarily non-redeemable at the election of the holders of units) was excluded from the definition of a CIS, and an offer of units in a closed-end fund was generally treated under the SFA as an offer of securities. It should be noted that the offering rules and exemptions for securities under the SFA are different from the offering rules and exemptions for CISs.

A closed-end fund is now deemed to be a CIS if it has all of the following characteristics:

- a. it falls within limb (a) of the definition of “collective investment scheme”\(^3\) under Section 2(1) of the SFA;
- b. it is constituted on or after July 1, 2013;
- c. all or most of the units issued cannot be redeemed at the election of the holders of the units;
- d. under its investment policy, investments are made for the purpose of giving participants the benefit of the results of the investments, and not for operating a business;
- e. it has one or more of the following characteristics:
  - o the investment policy is clearly set out in a document that is provided to each participant before, or at the time, the participant invests;
  - o there is a contractual relationship between the closed-end fund and every participant, which requires the closed-end fund to comply with the investment policy (as amended from time to time) of the arrangement; and
  - o the investment policy of the closed-end fund sets out the types of authorized investments, and the investment guidelines or restrictions.

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3 Limb (a) of the definition of “collective investment scheme” refers to –

(a) an arrangement in respect of any property –

(i) under which –

(A) the participants do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions in respect of such management; and

(B) the property is managed as a whole by or on behalf of a manager.

(ii) under which the contributions of the participants and the profits or income from which payments are to be made to them are pooled; and

(iii) the purpose or effect, or purported purpose or effect, of which is to enable the participants (whether by acquiring any right, interest, title or benefit in the property or any part of the property or otherwise) –

(A) to participate in or receive profits, income, or other payments or returns arising from the acquisition, holding, management or disposal of, the exercise of, the redemption of, or the expiry of, any right, interest, title or benefit in the property or any part of the property; or

(B) to receive sums paid out of such profits, income, or other payments or returns.
Offer of closed-end funds to accredited investors in Singapore

A closed-end fund constituted on or after July 1, 2013 will generally be deemed to be a CIS, and the CIS offering exemptions (rather than the securities offering exemptions) will have to be considered when offering units in such a fund. In particular, a closed-end fund constituted on or after July 1, 2013 which intends to use an accredited investor offering exemption will need to comply with the conditions of the Accredited Investor Exemption, including the requirements to submit an online CISNet notification and subsequent annual CISNet declarations, as well as the requirement to furnish an information memorandum. This may be contrasted with the previous position, where a closed-end fund could use the accredited investor offering exemption for securities under Section 275 of the SFA which has no filings requirements (this continues to apply to closed-end funds constituted before July 1, 2013).

Accordingly, post July 1, 2013, it is important to first determine whether a closed-end fund will be deemed a CIS, in order to ensure that the correct offering exemption is used for offers in Singapore.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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