

CHANGES TO THE REGULATORY REGIME FOR CLOSED-END FUNDS

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Introduction

With effect from 1 July 2013, new regulations have come into force that affect closed-end funds. Previously, closed-end funds were specifically excluded from the definition of "Collective Investment Schemes" ("CIS") under Section 2 (1) of the Securities and Futures Act (Chapter 289) ("SFA") (the definition of CIS is included at the end of this note). Closed-end funds are funds that have the features of a collective investment scheme but under which units issued are exclusively or primarily non-redeemable at the election of the investors. Closed-end funds were therefore not required to comply with the regulatory regime under the SFA that relates to CIS.

The Issue

In its consultation paper on the regulatory changes in relation to closed-end funds, the Monetary Authority of Singapore ("MAS") noted that while CISs that were offered to retail investors were subject to authorisation and recognition requirements (i.e. MAS approvals for the funds), prospectus requirements as well as investment restrictions and business conduct rules on an ongoing basis, closed-end funds were not, although closed-end funds did not differ substantially from other CISs. The regulatory intent was to align customer protection for closed-end funds with the protection afforded to CIS investors. In the consultation paper, it was stated it is not MAS' intention to regulate an entity that is actively operating a business (and MAS gave as examples a business trust with active business operations or a holding company (in a group of companies) that has influence over the management of one or more operating companies within the group) but rather to regulate an entity whose primary purpose is to generate profit or return for its investors through its investment based on a defined investment policy. MAS also indicated it proposes to require closed-end funds that are offered to retail investors to be listed on an approved securities exchange.

The Change

On 28 March 2013, the Securities and Futures (Closed-end Fund) (Excluded Arrangements) Notification 2013 ("**Relevant Notification**") was promulgated. The definition of "closed-end fund" contained in Section 2(1) of the SFA is included at the end of this note. The Relevant Notification is issued under paragraph (b) of the definition of "closed-end fund" which gives MAS the power to issue a notification and deem certain arrangements not to be closed-end funds. The Relevant Notification states that certain closed-end funds, having the following characteristics, shall be considered to be CIS and shall be subject to the same regulatory regime as a CIS:

- the arrangement is constituted on or after 1st July 2013;

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- all or most of the units issued under the arrangement cannot be redeemed at the election of the holders of the units;
- under the investment policy of the arrangement, investments are made for the purpose of giving participants in the arrangement the benefit of the results of the investments, and not for the purpose of operating a business; and
- the arrangement has one or more of the following characteristics:
 - the investment policy of the arrangement is clearly set out in a document that is provided to each participant in the arrangement before, or at the time, the participant invests in the arrangement;
 - there is a contractual relationship between the entity in which the investments are made and every participant in the arrangement, which requires the entity to comply with the investment policy, as amended from time to time, of the arrangement;
 - the investment policy of the arrangement sets out the types of authorised investments, and the investment guidelines or restrictions, that apply to the arrangement.

Related Changes

In addition to the Relevant Notification, the Securities and Futures (Offers of Investments) (Collective Investment Schemes) (Amendment) Regulations 2013 ("**Relevant Regulations**") have come into force on 1 July 2013.

The Relevant Regulations stipulate that a retail CIS prospectus will require additional disclosures stated in the Relevant Regulations. These relate to, inter alia, methods of valuation, information on directors and key executives of the manager of the CIS, where the manager delegates any of its functions to a third party - the name of the delegate, the name of the financial supervisory authority which licenses or regulates the manager etc, the names of trustees and custodians and custodial arrangements in respect of the assets.

The Relevant Regulations also state that a CIS that is offered to high net worth investors (i.e. restricted Singapore and restricted foreign schemes) should be accompanied by an information memorandum that contains the information specified in the Relevant Regulations. This relates to disclosure with respect to investment risks, conditions and restrictions on the redemption of units, preferential treatment to certain investors, a track record of the CIS etc.

What are the practical implications of the Relevant Notification and Relevant Regulations to a fund manager of a closed-end fund?

From a fund manager's perspective:

- it can no longer consider a closed-end fund to be outside the regulatory ambit applicable to CISs;

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- Offers made to high net worth investors would need to fall within the safe harbour provisions applicable to CISs, if the relevant exemptions from prospectus and marketing requirements are to be used;
- Offers made to high net worth investors would need to be accompanied by an information memorandum (which contain the prescribed requirements) and the necessary notification would need to be filed with MAS;
- Existing closed-end funds constituted before 1 July 2013 will be grandfathered and not be subject to the new requirements and will be required to make the necessary disclosures to investors that they are not subject to the new regime.
- Offers made to retail investors will need to comply with the additional disclosure requirements in the Relevant Regulations and MAS may require retail closed-end funds to be listed on a securities exchange as a condition to authorisation or recognition.

Definitions of "closed-end fund" and "collective investment scheme" under the SFA

"closed-end fund" means:

An arrangement referred to in paragraph (1) or (2) of the definition of "collective investment scheme" under which units that are issued are exclusively or primarily non-redeemable at the election of the holders of units, but does not include –

1. an arrangement referred to in paragraph (a) of that definition –
 - which is a trust;
 - which invests primarily in real estate and real estate-related assets specified by the Authority in the Code on Collective Investment Schemes; and
 - all or any units of which are listed for quotation on a securities exchange; or
2. an arrangement referred to in paragraph (1) of that definition which is, or which belongs to a class or description of arrangements which is, specified by the Authority, by notification published in the Gazette, to be an arrangement that is not a closed-end fund, or a class or description of arrangements that are not closed-end funds, as the case may be.

"collective investment scheme" means:

1. an arrangement in respect of any property:
 - under which:

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- 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
 - the property is managed as a whole by or on behalf of a manager;
 - under which the contributions of the participants and the profits or income from which payments are to be made to them are pooled; and
 - 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):
 - 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
 - to receive sums paid out of such profits, income, or other payments or returns; or
2. an arrangement which is an arrangement, or is of a class or description of arrangements, specified by the Authority as a collective investment scheme by notice published in the Gazette, but does not include:
- an arrangement operated by a person otherwise than by way of business;
 - an arrangement under which each of the participants carries on a business other than investment business and enters into the arrangement solely incidental to that other business;
 - an arrangement under which each of the participants is a related corporation of the manager;
 - an arrangement made by or on behalf of an entity solely for the benefit of persons, each of whom is:
 - a bona fide director or equivalent person, a former director or equivalent person, a consultant, an adviser, an employee or a former employee of that entity or, where that entity is a corporation, a related corporation of that entity; or
 - a spouse, widow or widower, or a child, adopted child or step-child below the age of 18 years, of such director or equivalent person, former director or equivalent person, employee or former employee;
 - an arrangement made by or on behalf of 2 or more entities solely for the benefit of persons, each of whom is:
 - a bona fide director or equivalent person, a former director or equivalent person, a consultant, an adviser, an employee or a former employee of any of those entities or, where any of those entities is a corporation, a related corporation of the entity which is a corporation; or
 - a spouse, widow or widower, or a child, adopted child or step-child below the age of 18 years, of such director or equivalent person, former director or equivalent person, employee or former employee;
 - a franchise;
 - an arrangement under which money received by an advocate and solicitor from his client,

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whether as a stakeholder or otherwise, acting in his professional capacity in the ordinary course of his practice, or under which money is received by a statutory body as a stakeholder in the carrying out of its statutory functions;

- an arrangement made by any co-operative society registered under the Co-operative Societies Act (Cap. 62) in accordance with the objects thereof solely for the benefit of its members;
- an arrangement made for the purposes of any chit fund permitted to operate under the Chit Funds Act (Cap. 39);
- an arrangement arising out of a life policy within the meaning of the Insurance Act (Cap. 142);
- a closed-end fund constituted either as an entity or a trust;
- an arrangement which is an arrangement, or is of a class or description of arrangements, specified by the Authority as not constituting a collective investment scheme by notice published in the Gazette.

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