

# Bird & Bird ATMD

## Legal Update

### *Changes to the “Accredited Investor” regime in Singapore*

February 2019



*Key changes to the Accredited Investor (“AI”) regime, as introduced by the Securities and Futures (Amendment) Act 2017 (“SFAA”), have successively come into force. In summary, the key changes to the AI regime are as follows: (1) an update to the definition of an AI, (2) the introduction of a new opt-in process for eligible persons or entities to choose whether to be treated as an AI or retail investor, and (3) an opt-out process for existing clients of financial institutions (“FIs”) to opt-out of being treated as an AI. In this article, we will look at these changes to the AI regime, as well as the consequential implications of choosing to be treated as an AI.*

### Updated Definition of AIs

Pursuant to the SFAA and the Securities and Futures (Classes of Investors) Regulations 2018 (“SF(CI)R 2018”), the definition of AIs has been amended to tighten eligibility requirements and to also allow a wider class of persons and entities to be eligible to be classified as AIs.

With effect from 8 January 2019, upon the implementation of the relevant regulations of the SF(CI)R 2018, the following classes of persons are eligible to be AIs:

#### Individuals

An individual is eligible to be an AI in the following 3 situations:

- the individual’s net personal assets exceed S\$2 million (or its equivalent in a foreign currency), subject to the condition that the value of the individual’s primary residence (after deducting any outstanding amounts in respect of any credit facility that is secured by the residence from the estimated fair market value of the residence) can only account for up to S\$1 million of the individual’s net person assets;

- the individual’s financial assets (net of any related liabilities) exceed S\$1 million (or its equivalent in a foreign currency); or
- the individual’s income in the preceding 12 months is not less than S\$300,000 (or its equivalent in a foreign currency).

#### Joint Account Holders

If an individual holds a joint account with an AI, that individual would also be treated as an AI in respect of dealings through that joint account.

#### Corporations

A corporation is eligible to be an AI if its net assets exceed S\$10 million (or its equivalent in a foreign currency). The value of the corporation’s net assets is to be determined by the corporation’s most recent audited balance sheet, or if the corporation is not required to prepare audited accounts regularly, a balance sheet certified by the corporation as giving 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.

With the introduction of the SF(CI)R 2018, even if a corporation does not have net assets exceeding S\$10 million, it is still eligible as an AI, if all its shareholders are AIs.

## Trusts

Trustees of the following trusts, acting in their capacity as trustee, are eligible to be regarded as AIs:

- a trust where all of its beneficiaries are AIs, whether as an individual, corporation or any other person as may be prescribed by the Monetary Authority of Singapore ("**MAS**");
- a trust where all the settlors: (i) are AIs (whether as an individual, corporation or any other person as may be prescribed by the MAS), (ii) have reserved to themselves all investment and asset management powers, and (iii) have revocation powers under the trust; or
- a trust where the trust property or subject matter exceeds \$10 million in value (or its equivalent in a foreign currency).

## Entity (other than a corporation)

An entity (other than a corporation) is eligible to be an AI if its net assets exceed S\$10 million (or its equivalent in a foreign currency).

## Partnership (other than a limited liability partnership)

A partnership (other than a limited liability partnership) is eligible to be an AI if every partner is an AI.

## New Opt-In Regime

Currently, investors that qualify as AIs are automatically deemed as AIs in their dealings with FIs, even if such investors are unaware of their status as AIs. However, a new opt-in regime for eligible AIs will come into force on 8 April 2019, with the introduction of the SF(CI)R 2018 as amended by regulation 2 of the Securities and Futures (Classes of Investors) (Amendment No. 2) Regulations 2019 ("**SF(CI)R Amendment No. 2**"). Under the new regime, the default position will be that all new eligible AIs are to be treated as retail investors, unless they expressly consent to be treated as AIs in accordance with the prescribed requirements.

Under the new opt-in regime, if an FI has assessed the investor to be an eligible AI and intends to treat the investor as an AI, the FI must first provide the investor with the following statements in writing:

- a a statement that the FI has assessed the investor to be eligible as an AI;

- b a statement that the investor may consent to be treated by the FI as an AI;
- c a statement that the investor may at any time withdraw his or her consent to be treated by the FI as an AI;
- d a general warning set out in the First Schedule of the SF(CI)R 2018; and
- e a clear explanation in plain language of the effect of consenting to being treated as an AI, in sufficient detail to allow the investor to make an informed decision whether to consent to be treated as an AI or not.

Next, if the investor wishes to be treated by the FI as an AI, the investor must then provide the FI with a written statement, or a signed statement recorded by the FI in writing, to the effect that:

- a the investor knows and understands the consequences of consenting to being treated by the AI as an AI;
- b the investor consents to being treated by the counterparty as an accredited investor; and
- c the investor knows that he or she may at any time withdraw his or her consent, upon which the FI must not treat the investor as an AI.

MAS has clarified that the investor's written statements may be provided in electronic form, such as through email. Verbal confirmation from the investor is also acceptable if the confirmation is recorded by the FIs in writing and such written records are signed by the investor. Electronic signature of such confirmation would suffice.

## Opt-out Regime for Existing Clients of FIs

For existing clients of an FI onboarded before 8 April 2019 and who meet the revised eligibility requirements of an AI as of such date, a separate opt-out regime exists to allow FIs to continue treating such clients as AIs as MAS recognises the difficulties for FIs if the opt-in regime were to apply. Under the opt-out regime, the FI must first provide to the existing client the following statements in writing:

- a a statement that the FI has assessed the existing client to be eligible as an AI;

- b** a statement that the FI intends to continue to treat the existing client as an AI;
- c** a statement that the existing client may at any time withdraw his or her consent to be treated by the FI as an AI;
- d** a general warning set out in the First Schedule of the SF(CI)R 2018; and
- e** a clear explanation in plain language of the effect of consenting to being treated as an AI, in sufficient detail to allow the investor to make an informed decision whether to give the notification of no consent to be treated as an AI.

The existing client can then choose whether to notify the FI that he or she does not consent to being treated by the FI as an AI. If the existing client does not notify the FI of his or her withdrawal of consent, the FI must then record this fact in writing, and only then would the FI be allowed to continue treating the existing client as an AI. This is in contrast with the opt-in approach that would be relied on for new clients onboarded from 8 April 2019, which requires the investor to make an express written statement giving consent, as discussed above.

FIs can only rely on the opt-out process to treat existing clients who are individuals as AIs until 8 July 2020. MAS has also clarified that FIs will need to provide these individuals with the option to opt-out of being an AI before 8 April 2019. In order to ensure that these clients can still be treated as an AI after 8 July 2020, FIs would have to obtain such clients' consents in accordance with the opt-in requirements, as set out above, by 8 July 2020. This requirement does not apply to existing clients who are not individuals (i.e. corporations, trustees, entities that are not corporations, or partnerships).

## Current Trends and Effect of being treated as an AI

We have observed that a number of FIs, including the major banks in Singapore, have already implemented the opt-in and opt-out process in their client on-boarding processes. While the forms and platforms used to facilitate the opt-in and opt-out process may vary between each FI, the opt-in and opt-out processes amongst FIs are still largely uniform. Specifically, the requisite explanation given by FIs to investors on the effects of being an AI has largely been standardised.

A brief summary of some of the implications of being treated as an AI is set out below:

- The issuer and/or offeror of securities and securities-based derivatives contracts, and units of collective investment schemes are exempt from issuing a prospectus to AIs, under sections 275 and 305 of the SFA, subject to other requirements of the SFA.
- Pursuant to sections 251 and 300 of the SFA, advertisements or publications referring to an offer or intended offer of securities and securities-based derivatives contracts, and units of collective investment schemes can be made to an AI, where a preliminary document has been lodged with MAS.
- Certain disclosure requirements to be satisfied by the capital market services licence-holders in the Securities and Futures (Licensing and Conduct of Business) Regulations apply only to retail investors and not apply to AIs, resulting in reduced protection of an investor opting to be treated as an AI.

## Concluding remarks

The update to our AI regime gives eligible investors the choice whether to consent to being treated as an AI. This affords eligible investors a greater degree of customisation in terms of the level of investor protection that the investor would require. Investors that qualify as AIs may choose to remain as retail investors so as to come under the greater level of regulatory protection, at the expense of more regulatory requirements and hurdles when trying to invest in more atypical and novel investment products. Conversely, eligible investors may choose to take up the AI status so as to avail themselves to a larger pool of investment products, at the expense of lower levels of regulatory protection compared to retail investors. It is ultimately the investor's choice on whether having easier access to a larger pool of investment products is worth the increase in investment risk.

*This article does not constitute legal advice and is intended to provide general information only based on the currently available information. Please contact our lawyers if you have queries on any specific legal matter.*

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