

**Guideline No: SFA xx-Nxx**

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**GUIDELINES ON THE INTERPRETATION OF “PERSONS WHO COMMONLY INVEST”  
IN DIVISION 3 OF PART XII OF THE SECURITIES AND FUTURES ACT (CAP. 289)  
 (“SFA”)**

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**1. OBJECTIVE OF THE GUIDELINES**

1.1 These guidelines on the interpretation of the term “*persons who commonly invest*” (hereinafter referred to as “**Common Investors**”<sup>1</sup>) in Division 3 of Part XII of the Securities and Futures Act (Cap. 289) (the “**Guidelines**”), are issued by the Monetary Authority of Singapore (“**MAS**”) pursuant to section 321(1)(c) of the SFA. The purpose of the Guidelines is to elaborate on MAS’ policy stance behind the statutory definition of Common Investors in section 214 of the SFA and to provide guidance on its interpretation, as used in sections 215 and 216 of the SFA.

**2. STATUTORY DEFINITION OF COMMON INVESTORS**

2.1 The term “*persons who commonly invest*” (or Common Investors) is defined in section 214 of the SFA, and used in two provisions under Division III, Part XII of the SFA, namely:

- i. section 215(b)(i) of the SFA, which defines when information becomes generally available; and
- ii. section 216 of the SFA, which provides when a reasonable person would be taken to expect information to have a material effect on the price or value of securities, securities-based derivatives contracts, or CIS units.

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<sup>1</sup> The term “Common Investor” was coined by the Court of Appeal in *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 at [58].

These provisions are relevant for the offence of insider trading.

2.2 Before the amendment to section 214 of the SFA, there was no statutory definition of Common Investors. In the Court of Appeal decision of *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 (“*Kevin Lew*”), Common Investors was interpreted to refer to a single class of investors possessing a particular set of knowledge and abilities. The Court held that:

2.2.1 Common Investors were neither “the daily retailers out to make a quick buck without the general knowledge of the considerations that would inform an investor as to whether or not to buy or sell securities”, nor the “expert investors who specialise in the research of investing in securities”.<sup>2</sup>

2.2.2 Common Investors were the group of investors who possessed “*general professional knowledge*”<sup>3</sup>, which included:

- (a) the ability to analyse and determine the quality and the prospect of shares, which goes towards deciding when to buy;
- (b) the ability to do technical and fundamental analysis on information that is freely available;
- (c) the knowledge that fundamental analysis is the intrinsic valuation of a stock, which involves studying financial stock ratio, operating ratio and profitability ratio, and which also involves the use of variation measures like price earning ratio, dividend yield and price-to-book ratio;
- (d) the knowledge that technical analysis is concerned with examining the price and the volume behaviour of a share; and
- (e) the knowledge of how to read and analyse financial accounts and statements.

2.3 For the reasons set out in the parliamentary speech<sup>4</sup> introducing the Securities and Futures (Amendment) Bill and MAS’ consultation papers<sup>5</sup> on the Common Investor, it is MAS’ view that the interpretation of the Common Investor by the Court does not comport with market realities.

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<sup>2</sup> See *Lew Chee Fai Kevin* at [82].

<sup>3</sup> See *Lew Chee Fai Kevin* at [82].

<sup>4</sup> See *Singapore Parliamentary Debates*, Official Report (9 January 2017) Vol 94, Sitting no.30, page 73, Second Reading of the Securities and Futures (Amendment) Bill.

<sup>5</sup> MAS’ Consultation Paper on Proposed Amendments to the SFA (Part XII and Section 324) dated 24 August 2015.

- 2.4 Section 214 of the SFA has been amended by virtue of the Securities and Futures (Amendment) Act 2017, which was passed in Parliament on 9 January 2017, to provide a statutory definition for Common Investors as follows:

*“persons who commonly invest”, in relation to investment in any kind of securities, securities-based derivatives contracts or CIS units, means a section of the public that is accustomed, or would be likely, to deal in any securities, securities-based derivatives contract or CIS unit, or in a class of securities, securities-based derivatives contracts or CIS units, of that kind;”.*

- 2.5 The statutory definition of Common Investors will accordingly affect the reading of sections 215 and 216 of the SFA, which have been amended as follows:

***Information generally available***

***215.*** *For the purposes of this Division, information is generally available if —*

- (a) it consists of readily observable matter;*
- (b) without limiting the generality of paragraph (a) —*
  - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of ~~persons who commonly invest in securities of a kind whose price or value might be affected by the information~~ any of the following classes of persons:*
    - (A) persons who commonly invest in securities of a kind of which the price or value might be affected by the information;*
    - (B) persons who commonly invest in securities-based derivatives contracts of a kind of which the price or value might be affected by the information;*
    - (C) persons who commonly invest in CIS units of a kind of which the price or value might be affected by the information; and*
  - (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or*
- (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:*
  - (i) information referred to in paragraph (a);*
  - (ii) information made known as referred to in paragraph (b)(i).*

***Material effect on price or value of securities, securities-based derivatives contracts or CIS units***

***216.*** *For the purposes of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of securities, securities-based derivatives contracts or CIS units,*

*if the information would, or would be likely to, influence any of the following persons ~~who commonly invest in securities~~ in deciding whether or not to subscribe for, buy or sell ~~the first mentioned~~ those securities, securities-based derivatives contracts or CIS units:*

*(a) the persons who commonly invest in the securities, securities-based derivatives contracts or CIS units;*

*(b) any one or more classes of persons who constitute the persons mentioned in paragraph (a).*

### **3. POLICY STATEMENT AND GUIDANCE ON THE STATUTORY DEFINITION OF COMMON INVESTORS**

#### **A. “Accustomed or would be likely to deal in”**

- 3.1 The statutory definition identifies Common Investors by employing the phrase “*section of the public that is accustomed, or would be likely to deal in*”. This simply refers to the investors for securities, securities-based derivatives contracts or CIS units. The phrase is intended to reflect the fact that there are different types of investors who invest in securities, securities-based derivatives contracts or CIS units, which encompass a wide range of products. Thus Common Investors can comprise different classes of investors, and the types of classes of investors would depend on the product in question.
- 3.2 For example, in MAS’ view, the section of the public that is accustomed, or would be likely, to deal in listed equities would comprise different classes of Common Investors, namely retail investors, accredited investors<sup>6</sup>, expert investors<sup>7</sup> and institutional investors<sup>8</sup>. On the other hand, the Common Investors in securities-based derivatives contracts (for example, a futures contract on an equity index) may be different, as trading in such products is likely to be dominated by non-retail investors. In other words, the determination of the types of investors who are Common Investors is very much product-specific.
- 3.3 This approach – of determining the types of investors that are “accustomed, or likely to deal in” in a particular product based on the product in question – is consistent with that taken in Hong Kong. The statutory definition in section 214

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<sup>6</sup> See section 4A(1)(a) of the SFA.

<sup>7</sup> See section 4A(1)(b) of the SFA.

<sup>8</sup> See section 4A(1)(c) of the SFA.

of the SFA is modelled after legislation in Hong Kong. The phrase “*accustomed, or would be likely to deal in*” is used in section 307A(1) of the Hong Kong Securities and Futures Ordinance to define what is “inside information”. The phrase is used to refer to investors in listed equities of a corporation, and the investors in the listed equities can comprise different types of investors.<sup>9</sup>

## **B. Characteristics of the classes of investors**

- 3.4 The insider trading statutory framework contemplates that different classes of investors react differently to price sensitive information, according to the characteristics unique to the class of investors. Classes of investors such as “accredited investors”, “expert investors” and “institutional investors” are defined in the SFA. It is MAS’ view that the “general professional knowledge” described by the Court in *Kevin Lew* (referred to in paragraph 2.2.2) is more likely found in accredited investors, expert investors and institutional investors, than in retail investors.
- 3.5 It is difficult to provide an exhaustive definition of who would constitute the class of retail investors, as it is a broad and wide-ranging group of investors.
- 3.6 Nevertheless, MAS is of the view that the following set of knowledge descriptors and abilities can apply to retail investors:
- 3.6.1 They would be rational and economically motivated investors with at least some experience and knowledge of investing in the relevant financial product, but may not be investment professionals;
  - 3.6.2 They would be aware of the prevailing price of the relevant financial product from time to time; and
  - 3.6.3 They would have knowledge of or the ability to obtain, generally available information concerning the company or issuer in question, and would have the ability to draw inference from and assess the credibility of the information in question.

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<sup>9</sup> The Hong Kong Securities and Futures Commission’s Guidelines on Disclosure of Inside Information dated June 2012 reviewed the decisions of the Insider Dealing Tribunal and the Market Misconduct Tribunal and indicated that the persons who are “*accustomed, or would be likely to deal in*” the listed equities of a corporation refers to the market for that listed equity and can comprise different classes of investors.

**C. “Class of securities, securities-based derivatives contracts and CIS units”**

- 3.7 For the avoidance of doubt, the word “class” in the statutory definition of Common Investors in section 214 of the SFA refers to the different types of products found within the principles-based product category definitions of “securities”, “securities-based derivatives contracts” and “CIS units” in Part XII, Division 3 of the SFA.
- 3.8 For example, classes of products under the category of “securities” would include, amongst others, listed equities, bonds and business trusts; classes of products under the category of “securities-based derivatives contracts”, would include, amongst others, futures contract on an equity and structured warrants on securities; classes of products under the category of “CIS units”, would include, amongst others, exchange-traded funds and real estate investment trusts.

**D. Section 215(b)(i) of the SFA**

- 3.9 For information to be considered generally available under section 215(b)(i) of the SFA, the intended test to be applied is whether the information has been made known in a manner that would, or would be likely to, bring it to the attention of **all** Common Investors in the relevant product.
- 3.10 For the avoidance of doubt, the phrase “classes of persons” in section 215(b)(i) of the SFA refers to only three classes of persons, namely (1) the class of persons who commonly invest in securities<sup>10</sup>; (2) the class of persons who commonly invest in securities-based derivatives contracts<sup>11</sup>; and (3) the class of persons who commonly invest in CIS units<sup>12</sup>.
- 3.11 If we use listed equities as an example, as the Common Investors of listed equities are likely to comprise retail investors, accredited investors, expert investors, and institutional investors, information is considered “generally available” under section 215(b)(i)(A) of the SFA only if it is generally available to all four said classes of investors, and not just one class. This is consistent with the

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<sup>10</sup> Section 215(b)(i)(A) of the SFA.

<sup>11</sup> Section 215(b)(i)(B) of the SFA.

<sup>12</sup> Section 215(b)(i)(C) of the SFA.

Australian approach to interpreting the phrase “generally available”, which is found in section 1002B of the Australian Corporations Act 2001, which section 215(b)(i) of the SFA has been modelled after.<sup>13</sup>

#### **E. Section 216 of the SFA**

- 3.12 MAS recognises that different classes of Common Investors may react differently to the same piece of information, depending on their level of knowledge and ability. It is for this reason that section 216 of the SFA has been amended to provide that information may be taken to have a material effect on the price or value of securities, securities-based derivative contracts or CIS units if the Common Investors in such securities, securities-based derivative contracts or CIS units, or **one or more** classes of such Common Investors, might be influenced by the information in deciding whether or not to subscribe for, buy or sell the first-mentioned securities, securities-based derivative contracts or CIS units.
- 3.13 It is MAS’ view that it would not be a workable interpretation of section 216 of the SFA if the requirement is for the same piece of information to influence **all** classes of Common Investors for that product to trade, before the information can be considered materially trade-sensitive information under section 216 of the SFA. This is because information that may influence one class of investors (eg. retail investors) to trade may not likewise influence another class of investors (eg. expert investors).

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<sup>13</sup> See the Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth), paragraph 328: “This provision [section 1002B] is intended to define the term ‘generally available’ in terms appropriate to closely held and unlisted companies as well as listed companies with dispersed shareholdings. **It would not be sufficient for information to be released to a small sector of the investors who commonly invest in the securities. The information must be made known to a cross section of the investors who commonly invest in the securities.**” [emphasis added in bold]