

# CONSULTATION PAPER

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## **Proposed Amendments to the Securities and Futures Act (Part XII & Section 324)**

MAS

Monetary Authority of Singapore

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## 1 Preface

1.1 On 11 February 2015, MAS issued a consultation paper on proposed amendments to the Securities and Futures Act (Cap. 289) (“SFA”), to complete the expansion of its scope to regulate over-the-counter (“OTC”) derivatives (the “February Consultation Paper”)<sup>1</sup>. Other amendments were also proposed therein to ensure that the SFA remains current in view of market and international developments. The consultation closed on 24 March 2015.

1.2 Following the feedback received for the proposals set out in section 4.2 of the February Consultation Paper, MAS is now seeking comments on the relevant draft legislative amendments under Part XII of the SFA.

1.3 This consultation also includes a proposed amendment to section 324 of the SFA to support market misconduct investigations carried out with powers under the Criminal Procedure Code (“CPC”).

1.4 MAS invites interested parties to provide their comments on the draft legislative amendments.

**Please note that all submissions received will be published and attributed to the respective respondents unless they expressly request MAS not to do so. As such, if respondents would like (a) their whole submission or part of it, or (b) their identity, or both, to be kept confidential, please expressly state so in the submission to MAS. In addition, MAS reserves the right not to publish any submission received where MAS considers it not in the public interest to do so, such as where the submission appears to be libellous or offensive.**

1.5 Please submit written comments by 23 September 2015 to —

Secondary Markets Conduct & Enforcement Division  
Market Conduct Department  
Monetary Authority of Singapore  
10 Shenton Way  
MAS Building  
Singapore 079117

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<sup>1</sup> <http://www.mas.gov.sg/news-and-publications/consultation-paper.aspx>

Fax: (65) 6225 1350

Email: [SFA FAA LegisConsult@mas.gov.sg](mailto:SFA_FAA_LegisConsult@mas.gov.sg)

1.6 Electronic submission is encouraged.

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## 2 Introduction

2.1 In February 2015, MAS sought feedback under section 4.2 of the February Consultation Paper on proposed amendments to Part XII of the SFA. The amendments were intended to strengthen the effectiveness of MAS' enforcement regime in deterring market misconduct. MAS has reviewed the feedback received and is now proposing draft legislative amendments necessary to effect the relevant proposals, comprising:

- (a) the revision of section 199 of the SFA to clarify that there is no requirement of material price impact to establish a case of false or misleading disclosure;
- (b) the introduction of a statutory definition in section 214 of the SFA of the phrase "persons who commonly invest" which is found in sections 215 and 216 of the SFA;
- (c) amendments to section 232 of the SFA, in order that the civil penalty imposed may be commensurate with the gravity of misconduct, even in cases where the profit gained or loss avoided happens to be low; and
- (d) priority for MAS' civil penalty claims over debts by other unsecured creditors that accrue subsequently after contravention.

2.2 In addition, MAS is also proposing to amend section 324 of the SFA to make clear that MAS' officers, who may exercise investigation powers under the CPC in the course of their investigation, would be able to apply for an order under section 324 of the SFA regardless of whether the investigations were being carried out under the SFA or the CPC.

2.3 The proposed legislative amendments to Part XII and section 324 of the SFA are set out in the Annex<sup>2</sup> for comments.

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<sup>2</sup> The proposed draft legislative amendments to Part XII and s324 of the SFA (in the Annex) take into account the proposed draft amendments arising from the OTC derivative reforms, as set out under Annex 1 of the February Consultation Paper. As a result, the proposed draft legislative amendments to Part XII of the SFA do not only cover securities, but also securities-based derivative contracts and units in a collective investment scheme.

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### **3 Legislative Amendments to Part XII SFA**

#### **3.1 Revision of section 199 of the SFA**

3.1.1 Section 199 of the SFA is concerned with the dissemination of statements or information in the market which is false or misleading in a material particular, and not the extent of impact that the false or misleading disclosure has on the market. Liability is established as long as the false or misleading particular would likely result in either an inducement to trade or have an effect on the price of the securities (i.e. raising, lowering, maintaining or stabilising the price).

3.1.2 Materially false or misleading disclosures which wrongly influence investors to trade may not necessarily result in observable significant price movements in the counter. The extent of price movements may be dependent on other market factors unrelated to the false or misleading disclosure, including, among others, the liquidity of the counter, the general sentiment of the market, and prevailing macroeconomic conditions.

3.1.3 The proposed amendments will clarify that in order to establish a case under section 199:

- (a) The statement or information disseminated must be false or misleading in a material particular and must either likely induce other persons to subscribe for or trade in securities, or likely have the stated effects on the price of the securities with no requirement of a material price impact; and
- (b) When making the statement or disseminating the information, the person does not care whether the statement or information is true or false, or the person knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

#### **3.2 Insertion of a statutory definition for the phrase “persons who commonly invest” in Section 214 of the SFA**

3.2.1 The phrase “persons who commonly invest” is found in sections 215(b)(i) and 216 of Division 3 Part XII of the SFA which deals with insider trading. Section 215(b)(i) sets out when information becomes generally available and section 216 of the SFA deems when information would be considered to have a material effect on the price or value of securities.

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3.2.2 In *Lew Chee Fai Kevin v MAS*<sup>3</sup> (“**Kevin Lew**”), the Court of Appeal referred to “persons who commonly invest in securities” as the Common Investor. In describing the Common Investor, the Court adopted the attributes of the “*reasonable investor*” in the Sarawak High Court decision of *Public Prosecutor v Chua Seng Huat*<sup>4</sup>. The Sarawak Court defined the “*reasonable investor*” as *an investor who possesses “general professional knowledge as opposed to the said daily retailer or a person who has made specific researches”*. The Court made it clear that this reasonable investor was not the daily retailer 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 was he the expert investor who specializes in the research of investing in securities. The Court held that such “*general professional knowledge*” included the ability to do technical and fundamental analysis on information that is freely available and the knowledge to read and analyse financial statements, amongst others.<sup>5</sup>

3.2.3 It is MAS’ view that firm enforcement actions should be taken against insider trading in order to preserve investors’ confidence, particularly the confidence of retail investors, in the integrity of the Singapore capital markets.

3.2.4 There is therefore a need for a statutory definition of the concept of the Common Investor to ensure that the standard market knowledge vested in the hypothetical Common Investor reflects the majority of market participants (including retail investors) and the realities of the market.

3.2.5 MAS proposes to amend section 214 of the SFA to insert a statutory definition for the phrase “persons who commonly invest” as follows:

““persons who commonly invest” shall mean one or more members of the public who deal in securities, securities-based derivative contracts, or units in a collective investment scheme of the type in question on a regular basis.”

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<sup>3</sup> [2012] 2 SLR 913

<sup>4</sup> [1999] 3 MLJ 305

<sup>5</sup> The Court of Appeal described “*general professional knowledge*” at [82] as including:

- (a) the ability to analyse and determine the quality and the prospect of shares;
- (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;
- (d) the knowledge that technical analysis is concerned with examining the price and volume behaviour of a share; and
- (e) the knowledge of how to read and analyse financial accounts and statements

3.2.6 The range of investors which constitute “*one or more members of the public*” who deal in the relevant asset class “*on a regular basis*” is wide. It can range from retail investors who invest on a regular basis to expert investors.

3.2.7 In MAS’ view, the level of knowledge and qualities possessed by “persons who commonly invest” as set out in section 214 and for the purposes of sections 215 and 216 of the SFA, would be as follows:

- (a) They would be rational and economically motivated investors with at least some experience and knowledge of investing in the relevant asset class, but they may or may not be investment professionals;
- (b) They would be aware of the prevailing price of the relevant asset class from time to time; and
- (c) They would have knowledge of or the ability to obtain, generally available information concerning the relevant industry of the asset class in question and in particular, information concerning the company in question, and would have the ability to draw inference from and assess the reliability of the information in question.

3.2.8 The above knowledge and qualities possessed by “persons who commonly invest” would be set out in a set of guidelines, to be issued subsequently by MAS.

3.2.9 MAS is seeking comments on:

- (a) the proposed statutory definition of the phrase “persons who commonly invest” under section 214; and
- (b) the proposed level of knowledge and qualities that “persons who commonly invest” should possess (as set out in paragraph 3.2.7 above), to be published subsequently in a set of guidelines issued by MAS.

### 3.3 Revision of Civil Penalty Ceiling

3.3.1 Under section 232(2) of the SFA, if a person, by result of his contravention, had gained a profit or avoided a loss (collectively, obtained a “Benefit”), the maximum civil penalty that can be imposed will be capped at the higher of 3 times the amount of



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Benefit obtained or S\$50,000.<sup>6</sup> This may not adequately reflect the culpability of the offender or achieve sufficient deterrence in cases where the Benefit obtained is of a small value.

3.3.2 For instance, in a case where an offender obtained a Benefit of \$1,000, the maximum civil penalty quantum that can be imposed is only \$50,000. This is so even if his conduct is particularly egregious. In contrast, if the offender had not obtained a Benefit, the civil penalty amount that could be ordered is between \$50,000 and \$2 million.<sup>7</sup> The result is that a person who obtained a Benefit of a small value may receive a civil penalty quantum which is lower than a person who did not enjoy a Benefit.

3.3.3 MAS therefore intends to amend section 232 to provide that the civil penalty ceiling will be the greater of either S\$2 million or 3 times the amount of Benefit obtained in all cases. This would allow the civil penalty quantum to be commensurate with the gravity of the misconduct, even when the Benefit obtained happens to be of a small value.

#### 3.4 Priority for MAS' Civil Penalty Claims

3.4.1 MAS' civil penalty claims under the SFA are pursued in the interests of the investing public. As such, MAS is of the view that its claims should have priority over private claims that accrue subsequently after contravention, similar to claims made by the Government under the Government Proceedings Act (Cap. 121) (the "GPA").

3.4.2 Under section 10(1) of the GPA, priority is accorded to the Government for any sum due to it, over any debt that is subsequently incurred after the debt to the Government accrues. This priority is accorded regardless of when the Government obtains judgment for the sum that is due to it.

3.4.3 MAS proposes to import the effect of section 10(1) of the GPA by adopting a provision similar to section 65 of the Central Provident Fund Board Act (Cap. 36) ("CPF Act"). Section 65 of the CPF Act states that any sum due to the Central Provident Fund ("CPF") may be sued for and recovered by the CPF under the GPA as if it were a debt due to the Government. This has been held by our Court to mean that sums due to the CPF

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<sup>6</sup> section 232(2) of the SFA

<sup>7</sup> Section 232(3) of the SFA

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enjoy priority to the same extent as a debt due to the Government under section 10(1) of the GPA.<sup>8</sup>

3.4.4 The proposed new provision will be set out as section 237A in Division 6 of Part XII of the SFA.

#### **4 Amendment to section 324 SFA**

4.1 On 17 March 2015, MAS announced that it would jointly investigate market misconduct offences under Part XII of the SFA with the Commercial Affairs Department (“CAD”) of the Singapore Police Force. Under the new arrangement, MAS’ enforcement officers are gazetted as Commercial Affairs Officers, and have the same criminal powers of investigation utilised by the CAD officers under the CPC. Such powers include the ability to search and seize items from premises.

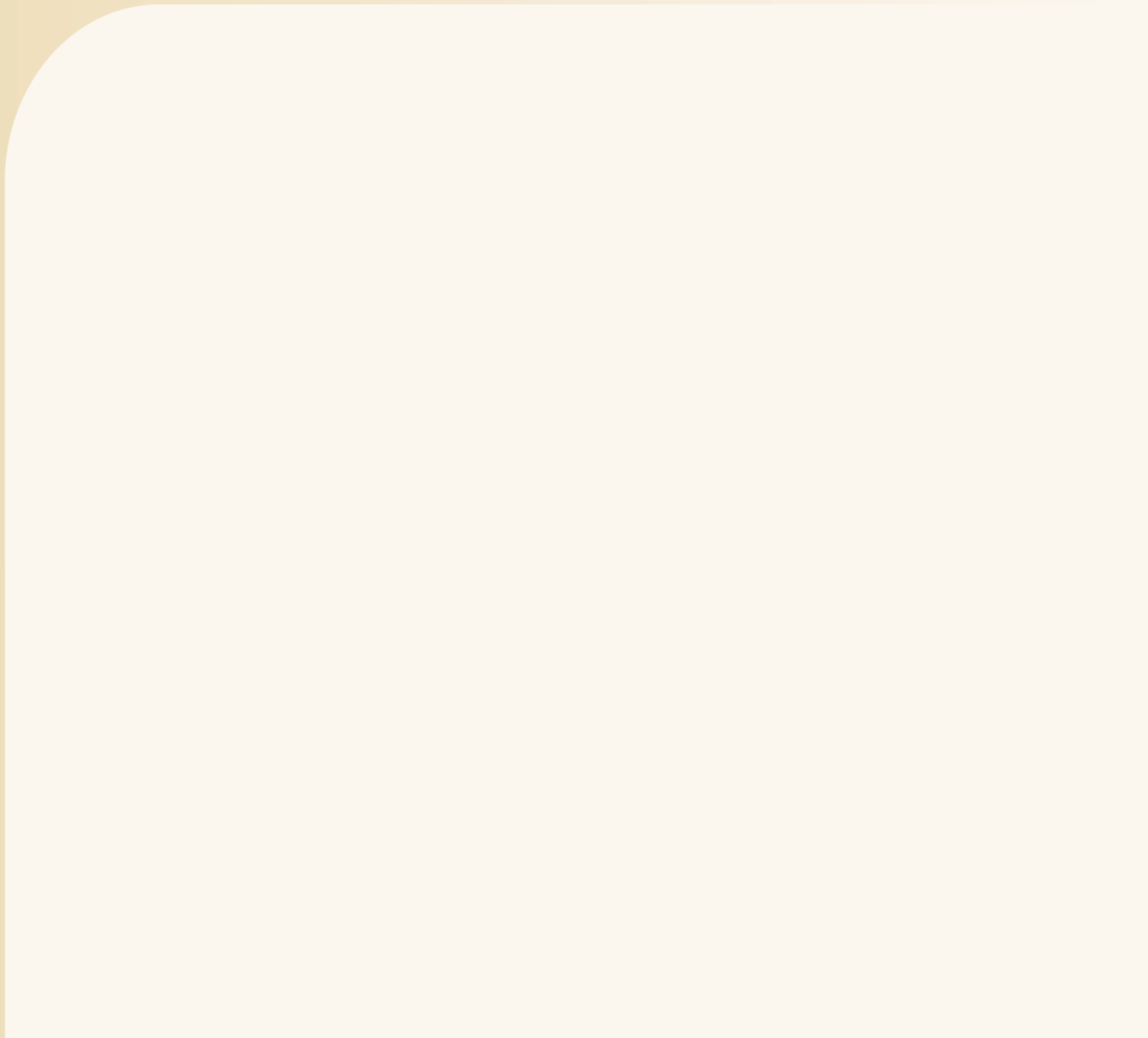
4.2 Presently, section 324(1)(a) of the SFA empowers a court to make one or more orders set out therein, where an investigation is being carried out under the SFA for any act that may constitute an offence under the SFA.

4.3 Given the commencement of the joint investigation arrangement, under which MAS officers may exercise criminal investigation powers under the CPC, a strict reading of section 324(1)(a) of the SFA may preclude MAS officers from applying for an order under section 324 of the SFA, if MAS officers are investigating a case under the CPC.

4.4 MAS therefore proposes to amend section 324(1)(a) of the SFA to clarify that the orders sought under section 324 of the SFA are available to support any investigation conducted by MAS, regardless of whether the investigation was carried out under the SFA or the CPC.

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<sup>8</sup> This was affirmed by the decision of the Singapore High Court in *Soon Aik Marine & Engineering Pte Ltd v ‘Hoesheng’ (Owners) (Central Provident Fund, intervener)* [1987] SLR(R) 148



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