

RESPONSE TO CONSULTATION PAPER

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Consultation topic:	Draft Notices and Guidelines Pursuant to the Securities and Futures Act (Consultation Paper I)
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Response to Consultation Paper I: Draft Notices and Guidelines Pursuant to the Securities and Futures Act (dated 6 October 2017)

1. My comments are confined to the questions posed in section 7 of the Consultation Paper viz. Questions 4, 5 and 6.

2. The expression “persons who commonly invest” (“Common Investors”) serves a number of purposes. First, it is an essential element in the definition of what constitutes information that is generally available under s. 215. Second, the common investor is integral to defining what constitutes material effect on price or value of securities under s. 216.

3. Section 215 and the definition of information “generally available”. Where the information in question is generally available, the prohibition against trading does not apply. This is because the element - that the information is not generally available - is one of the essential ingredients for the operation of s. 218 (applicable to a connected person) and s. 219 (applicable to a non-connected person). Both provisions require one to establish the physical element - “[the accused] possesses information concerning the corporation ... that is not generally available...” (s. 218(1)(a) and s. 219(1)).

3. With the amendments effected by the Securities & Futures (Amendment) Act 2017, s. 215 reads:

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 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).

(Words highlighted in red inserted by SF(A)A.)

4. Section 215, as set out in full above, shows that the SF(A)A does not change the basic structure of s. 215. It continues to be true that information is deemed generally available if any one of limbs (a), (b) or (c) is satisfied.

5. The SF(A)A changes what may be termed the *channel of dissemination* ingredient found in s. 215(b)(i); it leaves intact what may be termed the “sinking in time”/“penetration time” ingredient found in s. 215(b)(ii). It is important to note that s. 215(b) does not go so far as to require the market to impound the information into the price before it is regarded as generally available. What it requires is a reasonable period for dissemination amongst the Common Investors after the information has been made through channels likely to reach them. The text of the new s. 215(b)(i) indicates that information will be taken as generally available if the information is disseminated using a channel targeting any of the classes listed in (A), (B) and (C) – provided, of course, the penetration time requirement in 215(b)(ii) is also satisfied. This is because the phrase, “any of the following classes of persons”, necessarily leads one to the interpretation that paragraphs (A), (B) and (C) are alternative ingredients and not conjunctive ingredients.

6. The SF(A)A introduced a statutory definition of “persons who commonly invest” in s. 214:

“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 any class of securities, securities based derivatives contracts or CIS units, of that kind.*

The purpose of the amendment is aimed at providing a broader notion of the common investor than that articulated in *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913, in which Common Investor were defined as those who possessed “general professional knowledge”. The Court of Appeal specifically excluded from the definition of Common Investor (a) “daily retailers out to make a make a quick buck without the general knowledge of the consideration that would inform an investor as to whether or not to buy or sell securities” and (b) “expert investors who specialize in the research of investing in securities”.

7. Para 3.1 of the Annex F to the Proposed Guidelines says that the clause “a section of the public that is accustomed or would be likely to deal in” is intended to reflect the fact that there are different relevant sections of the public for the different financial products. Thus the relevant section of the public for the purposes of securities trading may vary well

be different from the relevant section of the public for the purposes of a securities-based derivatives contract. I agree that the amendment achieves this purpose. I also find para 3.1-3.3 helpful. My only reservation relates to the reference to accredited investors in para 3.2; the reasons are set out in para [8] below. I would also suggest an amendment to the header before para 3.1 to insert the words “segment of the public that is” – for these are the additional operative words that perform the task the MAS seeks to highlight.

8. The initiative to broaden the definition beyond that articulated in *Kevin Lew* resonates with the present commentator; the initiative will avoid the problem of disclosure through channels targeted at those with general professional knowledge and thereby providing them an advantage over the less sophisticated. I believe the amendments achieve this by defining the relevant investor to whom information should be disseminated as one who “is accustomed or would be likely to deal in [the relevant product]”. Retail investors in securities would fall within this definition insofar as they are “likely to deal” in such securities. In my view, what the amendments predicate in the context of securities dealings is for the information to be disseminated through channels that are likely to reach persons accustomed or likely to deal in the securities. This would include retail investors – in addition to expert investors and institutional investors. As regards whether the channel is likely to bring the information to the attention of accredited investors, it would depend on whether the accredited investor is one who is accustomed or likely to deal in the securities. Insofar as an investor may qualify as an accredited investor merely by reason of his net personal assets (s. 4A(1)(a)(i)(A)) or income (s. 4A(1)(a)(i)(A)), he may also be a dormant investor who does not follow the market. In other words, it is not a given that an accredited investor is “accustomed or likely to deal in the securities.” I would therefore recommend that MAS rephrase para 3.11 to delete reference to “all four said classes of investors”. The point is better made by stating that the channels of communication must reach beyond investors with “general professional knowledge” to the less sophisticated; the operative language is investors who are “accustomed or would be likely to deal in [the relevant financial product].” An accurate characterization would be that the dissemination must be through a channel which reaches all likely participants in the market. The point is not whether the investor is able to process the information, but one of equality of access. This is the underlying assumption in requiring (broad) dissemination to the market, rather than to a segment of the market participants. While the unsophisticated trader may not be able to fully make sense of the information, he may yet be alerted to tap his information network to ascertain how the information affects his investments.

9. In para 3.6, the Guidelines set out the knowledge descriptor and abilities that, in the view of the MAS, can apply to retail investors. Given the broad definition of the Common Investor in s. 214 inserted by the SF(A)A, I am not sure what para 3.6 adds to the Common Investor definition in s. 214, or for that matter, the interpretation of information “generally available” (s. 215). Indeed, the descriptors and abilities set out in 3.6.1 -3.6.3 may, if used to interpret the definition of the Common Investor, narrow the broad language in the amended statute. That would be unfortunate. Para 3.6 sets out those investors who are likely to play the desired role in adjusting the price based on fundamentals; while this may be a plausible interpretation of s. 215 without the definition of the Common Investor in s. 214, the statutory language in s. 214 suggests that the channel of dissemination should go beyond targeting such rational investors who have some knowledge and experience.

10. If there is a concern that the breadth of the Common Investor definition renders material effect in s. 216 too broad, I would point to the other control – the physical ingredient, whether “the information would, or would be likely to, influence (persons who commonly invest in securities)...” Those who are unable to process the information should not count, since their capacity serves as a limiting factor to the influence that the information might play. It is here that the qualities set out in para 3.6.1-3.6.3 can usefully feature to identify those investors who are capable of being relevantly influenced for the purpose of determining material price impact. An underlying premise to “influence” in s. 216 is that the investor must be economically rational and have the capacity to appreciate the significance of the information.

11. Summary

(a) Question 4. See para [7] above.

(b) Question 5. On the proposed characteristics of retail investors. The definition of Common Investor in s. 214 is sufficiently clear. The ambit of the statutory language - accustomed or would be likely to deal in [the relevant financial product] – covers retail investors. It is not necessary to further set out the characteristics of retail investors. However, I think that para 3.6.1-3.6.3 can be useful for s. 216 – for identifying the characteristics of Common Investors who count when considering if they would be influenced by the information: see para [10].

(c) Question 6. On the MAS position that for information to be considered generally available, it must be made known to all classes of Common Investors. With the caveat relating to accredited investors (see [8]), I would agree that the dissemination go beyond investors with ‘general professional knowledge’ to the general investing public. This

would comport with the statutory definition of the Common Investor - “segment of the public that is accustomed or would be likely to deal in (the relevant financial product)”.

Professor Alexander Loke

3 November 2017