RESPONSE TO FEEDBACK RECEIVED

November 2016

Response to Feedback Received – Proposed Amendments to the Securities and Futures Act (Part XII & Section 324)

MAS
Monetary Authority of Singapore

Contents

1 Preface

1.1 On 24 August 2015, MAS issued a consultation paper ("Consultation Paper") on proposed legislative amendments to Part XII and section 324 of the Securities and Futures Act (Cap. 289) ("SFA"). MAS would like to thank all respondents for their contributions. The list of respondents is provided in the **Annex**.

1.2 This response paper seeks to address the opinions and queries received on the proposed amendments. Comments that are of wider interest, together with MAS' responses, are set out below.

2 Revision of Section 199 of the SFA on prohibiting false & misleading statements

2.1 A respondent opined that the Court in *Madhavan Peter v Public Prosecutor* [2012] 4 SLR 613 ("*Madhavan*") was right to read a level of "embedded materiality" into section 199 of the SFA; that the price effect should be a significant effect before an offence is established.

2.2 Another respondent queried about what would constitute a statement that is false or misleading in a material particular if it does not require a material price impact. Conversely, if the price effect is *de minimis*, it may be difficult to envisage how such a statement would be considered misleading in a material particular. The respondent opined that the extent of the price impact may ultimately constitute a factor in determining the importance or significance of the statement.

2.3 A respondent also asked if MAS would clarify (a) the principle in retaining the words "in a material particular", (b) how the term "material" should be interpreted in relation to a false or misleading particular, and (c) whether a statement or information is false or misleading in a material particular could be determined with reference to whether the statement or information in its entirety would be likely to give rise to the effects in limb (a), (b) or (c) of section 199 of the SFA.

MAS' Response

2.4 The objective of the amendment is to restore the law to the plain reading of section 199 of the SFA as it best accords with MAS' policy intent, which is to ensure that investors can make informed decisions in a fair and transparent market. To achieve this objective, the general investing public must be protected against false and misleading information which may or may not have a significant price effect on the market but yet may wrongly influence market investment behaviour.

2.5 In that regard, the amendment is meant to depart from the decision in *Madhavan* that a particular aspect of a false or misleading statement must be likely to effect a "material" or "significant" change in price before liability can be established under section 199 of the SFA. In our view, this decision in *Madhavan* is inconsistent with the plain reading of section 199 of the SFA, and it unduly raises the legal threshold for liability under section 199 of the SFA.

2.6 As identified by the High Court in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [61], the constituent elements of the various offences under section 199 of the SFA are as follows:

(a) The accused made a statement or disseminated information;

(b) The statement or information was false or misleading in a material particular;

(c) The statement or information was likely to –

(i) induce the subscription [section 199(a)], sale or purchase [section 199(b)] of securities by other persons; or

(ii) have the effect of raising, lowering, maintaining or stabilising the market price of securities [section 199(c)];

(d) At the time the accused made the statement or disseminated the information–

(i) he knew that the statement or information was false or misleading in a material particular; or

(ii) he did not care whether the statement or information was true or false; or

(iii) he ought reasonably to have known that the statement or information was false or misleading in a material particular.

2.7 The plain reading of section 199 of the SFA does not require a statement that is false or misleading in a material particular to have a material or significant price effect before liability can be established. Section 199 of the SFA only requires the statement or information to be false or misleading in a material particular and <u>likely</u> to have the <u>effect</u> of raising, lowering, maintaining or stabilising the market price of securities.

2.8 The words "material particular" is retained in section 199 of the SFA to provide that the false or misleading particular must be material vis-à-vis the rest of the statement or, in other words, that an important or significant aspect of the statement must be false or misleading, and that particular aspect of the statement should be of a nature which a reasonable person would attach importance to in respect of his investment behaviour or

which would influence market prices. Section 199 of the SFA does not seek to penalise dissemination of false or misleading information which is not of importance to the market.

2.9 With respect to the price effect of the false or misleading statement, section 199(c) of the SFA does not require the price effect to be "significant" or "material"; it only requires the likelihood of an effect.

2.10 To make it clear that the words "material particular" in section 199 of the SFA does not refer to the effect of the false or misleading statement on price, the words "whether **significant** or otherwise" will be inserted into section 199(c) of the SFA. We have chosen the word "significant" instead of "material" to avoid confusion with the first concept of "material particular".

2.11 This amendment recognises that disclosures which are false or misleading in a material particular may not necessarily result in significant price movements due to various external reasons, including illiquidity of the product, contemporaneous reporting from another independent source which corrects the misleading information and such other prevailing market conditions which can influence the share price. In such situations, regulatory sanctions must nonetheless be available to punish and deter such misconduct.

2.12 Finally, the amendment is also consistent with the positions in other jurisdictions which similarly do not require the market impact to be material or significant before the offence of false or misleading disclosures can be made out.

3 Introducing a statutory definition of the phrase "persons who commonly invest" in section 214 of the SFA

3.1 Most respondents supported MAS' proposal to provide a statutory definition in section 214 of the SFA for the phrase "*persons who commonly invest*" (referred to here as the "Common Investor") referred to in sections 215(b)(i) and 216 of the SFA.

3.2 Several respondents gave feedback on the scope of the statutory definition. Some asked if the scope was sufficiently wide enough to cover the different investor types. They were concerned that the Common Investor definition is "under-inclusive" and not wide enough to capture persons who do not trade regularly or who do not trade at all such as buy-and-hold investors, research analysts or persons in the investment seminar business because the inside information in question may still be able to influence such investors.

3.3 Others asked if the Common Investor definition would take into account that for any product class, there may be more than one category of Common Investor, and these different categories of Common Investors may react differently to the same information.

Feedback was also given that for the purpose of section 215(b)(i) of the SFA, the access to information or availability of information may not be equal for each category of Common Investor, depending on the product in question.

3.4 Feedback was also received on MAS' proposed level of knowledge and qualities to be possessed by the Common Investor, which we have said would be set out with more detail in a further set of guidelines to be published by MAS. We note that generally most respondents supported the Common Investor characteristics proposed in our Consultation Paper.

MAS' Response

3.5 MAS will proceed with the proposal to add a statutory definition for the Common Investor. However, after reviewing the feedback received, MAS has decided to amend the definition instead of adopting the version proposed in our Consultation Paper. The Common Investor will be defined as "a section of the public that is accustomed, or would be likely" to deal in the stated products.

3.6 The Common Investor definition is worded sufficiently wide to cover different categories of investors, depending on the type of product in question. The Common Investor definition also takes into account that for any product class, there may be more than one category of Common Investor, and these different categories of Common Investors may react differently to the same information.

3.7 The scope of the Common Investor is also not that wide as to include every category of investors or persons, otherwise it will significantly lower the legal threshold for insider trading and have a chilling effect on market participants. Persons who are not accustomed to and unlikely to deal in the stated products would not be representative of Singapore's market participants, and hence would be excluded from the scope of the Common Investor.

3.8 A more detailed set of Guidelines would be issued pursuant to section 321(1)(c) of the SFA to elaborate on MAS' policy stance behind the Common Investor definition and to provide guidance on its interpretation.

4 Standardisation of Civil Penalty Ceiling

4.1 A respondent asked about MAS' rationale for removing the distinction in civil penalty quantum for situations without any profit earned or loss avoided ("Benefit") and situations where the Benefit is of little value.

MAS' Response

4.2 MAS will proceed with the proposed amendments to standardise the civil penalty ceiling.

4.3 MAS removed the distinction in order to resolve the incongruity between a case where there is no Benefit gained at all and a case where the Benefit is of little value. Under the current civil penalty provisions, the maximum penalty for the former situation is significantly higher than the maximum penalty for the latter (assuming a Benefit of little value).

4.4 The proposed amendments to standardise the civil penalty ceiling will allow the Court to administer an appropriate penalty commensurate with the culpability of the offender and gravity of the offence.

4.5 With the amendments to sections 232, 236B, 236C, 236E, 236F and 236H of the SFA, all contravening persons will now be subject to a civil penalty between $50,000 (or $100,00 for a corporation) and $2 million, unless 3 times the amount of Benefit is greater than $2 million.

5 Priority for MAS' claims under the SFA

5.1 A respondent opined that the debts owed to MAS are punitive and does not carry the same public interest justifications as other debts owed to the Government. Therefore, to accord MAS priority over the claims of unsecured creditors would result in punishing the innocent creditors without any real effect on the offender.

MAS' Response

5.2 MAS' claims under the SFA are pursued in the interests of the investing public and markets, and specifically for deterrence against market misconduct. It is essential that the contravening person's assets be made available for civil penalties and disgorgement orders instead of being depleted by his private debts.

5.3 Therefore, when weighing the public interest against the interests of private unsecured creditors, the balance would clearly come down in favour of the general public. The priority conferred is important as (a) it would be more difficult to vary or discharge freezing orders obtained by MAS over a contravening person's assets and (b) it allows MAS to carry out execution against a contravening person's assets in priority to other judgment creditors.

5.4 MAS will proceed with the proposal to accord priority for MAS' civil penalty claims and disgorgement orders. However, instead of inserting a new section 237A,

sections 232(6) and 236L(8) of the SFA will be amended to provide that the sums payable under civil penalty and disgorgement orders are to be treated as debts due to the Government for the purposes of section 10 of the Government Proceedings Act (Cap. 121).

6 Availability of orders under section 324 of the SFA regardless of MAS' source of investigation powers

6.1 A respondent opined that the amendment is unnecessary because MAS officers are still investigating as MAS officers regardless of whether the investigation powers come under the SFA or Criminal Procedure Code.

6.2 Another concern expressed is that the amendment may result in all investigations under any statute coming under the purview of section 324 of the SFA.

MAS' Response

6.3 The amendment to section 324 of the SFA is necessary as a plain reading of the current provision may lead to an interpretation that a section 324 of the SFA order can only be made if the underlying investigation is carried out under the SFA. The amendment will thus make clear that orders under section 324 of the SFA remain available regardless of MAS' source of investigation powers.

6.4 Further, powers under section 324 of the SFA can only be used for contraventions of the SFA. Hence the amendment will not allow MAS to obtain orders under section 324 of the SFA for enforcement of non-SFA contraventions.

MONETARY AUTHORITY OF SINGAPORE

7 November 2016

Annex

LIST OF RESPONDENTS TO THE CONSULTATION PAPER ON PROPOSED AMENDMENTS TO THE SECURITIES AND FUTURES ACT

1. Dr. Alexander Loke
2. WongPartnership LLP
3. Singapore Exchange Limited
4. Allen & Overy LLP
5. Investment Management Association of Singapore
6. Credit Suisse
7. Phillip Securities Pte Ltd

*This list includes only the names of respondents who did not request that their submissions be kept confidential.

Monetary Authority of Singapore