FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Xxvii: Offences

699. This Part contains provisions which make it an offence to make misleading statements or engage in a misleading practice in order to induce someone to enter into an investment contract. It also creates offences of misleading the Authority and the DGFT. The first of these offences is carried over from sections 47 and 133 of the FS Act 1986 and section 35 of the Banking Act. It also provides that where a corporate body (or partnership) has committed an offence then, in certain circumstances, its officers may also be guilty of that offence. In addition, this Part contains general provisions on the institution of proceedings for offences under this Act. It gives the Authority powers to prosecute insider dealing under the Criminal Justice Act 1993, to prosecute under the Money Laundering Regulations 1993, and to prosecute the offences of misleading statements and practices.

Section 397: Misleading statements and practices

- 700. This section provides for two criminal offences concerning misleading statements and practices. Persons found guilty of either of these offences may be subject to a maximum of up to 7 years imprisonment or to a fine, or to both.
- 701. The first, set out in *subsections* (1) and (2), applies where a person deliberately makes a misleading statement, promise or forecast, or dishonestly conceals facts from someone with the intention of inducing any other person to do or refrain from doing something in relation to an investment. A possible example of this offence would be someone lying about a company's financial position at a time when he was seeking to dispose of shares in that company. It is also an offence to make the misleading statement, promise or forecast recklessly and to be reckless as to whether another person was so induced.
- 702. The second offence, set out in *subsection* (3), is the creation of a misleading impression about an investment with the intention of inducing another person to do or not do something in relation to that investment. This covers such things as market manipulation, for example engaging in artificial trades in a particular investment in order to create the impression that there is more interest in the investment than really exists.
- 703. Subsection (4) provides a defence against the offence in subsection (2) for a person if he can show that a statement, promise or forecast was made in compliance with price stabilising or control of information rules. Subsection (5) provides three defences against the offence in subsection (3). The first is that the person concerned reasonably believed that his conduct would not create a misleading impression. The second defence is where the person is engaged in price stabilisation in circumstances where this is

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- permitted. The third defence is where the person acted in conformity with the control of information rules under section 147.
- 704. Subsection (7) provides the offence in subsection (3) is not committed unless the action done takes place in the United Kingdom, or the misleading impression this creates arises in the United Kingdom.
- 705. Subsections (9) to (12) give the Treasury the power to prescribe those agreements and investments to which this section applies.

Section 398: Misleading the Authority: residual cases

706. This section makes it an offence to give false or misleading information to the Authority in purported compliance with requirements under the Act in cases where this is not already an offence under other provisions (for example under section 177(4) regarding the provision of information to investigators). The penalty for this offence is an unlimited fine on indictment or a fine of up to the statutory maximum (£5,000) on summary conviction.

Section 399: Misleading the Director General of Fair Trading

707. This section applies the provisions of section 44 of the Competition Act 1998. The effect of this is that it is an offence to mislead or give false information to the DGFT when he is exercising his functions under the Act.

Section 400: Offences by bodies corporate etc.

- 708. This section makes provision as to the circumstances in which partners in a partnership and directors and officers of bodies corporate and unincorporated associations may be found guilty of an offence in a case in which an offence has been committed by the relevant partnership, body or association.
- 709. Subsection (7) gives the Treasury the power to make regulations applying the provisions of this section, with any appropriate modifications, to equivalent undertakings established under the laws of other countries.

Section 401: Proceedings for offences

- 710. This section confers powers to prosecute offences under this Act. The Secretary of State and the Authority can prosecute any offence in England, Wales or Northern Ireland. Others can only prosecute with the consent of the Director of Public Prosecutions in England and Wales or, in Northern Ireland, with the consent of the Director of Public Prosecutions for Northern Ireland. The DGFT can prosecute in England, Wales or Northern Ireland for breaches of any prohibition on carrying on any CCA 1974 business he has imposed under section 203.
- 711. Subsections (5) and (6) give the Treasury the power to set conditions relating to the way in which the Authority can bring proceedings for offences under this Act. For example, the Treasury could require the Authority to comply with the Code for Crown Prosecutors. In Scotland, prosecution will be the responsibility of the Lord Advocate.

Section 402: Power of the Authority to institute proceedings for certain other offences

712. This section allows the Authority to prosecute in England, Wales or Northern Ireland two criminal offences which are not in this Act. These are the offences of insider dealing (Part V of the Criminal Justice Act 1993) and breach of the Money Laundering Regulations 1993 (regulation 5).

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713. Subsections (2) and (3) give the Treasury the power to set conditions relating to the way in which the Authority can bring proceedings for these offences. For example, the Treasury could require the Authority to comply with the Code for Crown Prosecutors.

Section 403: Jurisdiction and procedure in respect of certain offences

- 714. This section makes provision for the procedures under which offences under the Act may be prosecuted and punished. It carries forward and has similar effect to the provisions of section 203 of the Financial Services Act 1986.
- 715. Subsection (1) makes clear that a fine imposed upon a unincorporated association must be paid out of the funds of the association, whilst subsection (2) provides that any proceedings for an offence brought against an unincorporated association must be brought in the name of the association. Subsections (3) and (4) provide that for the purposes of the service of documents, and of prosecutions, unincorporated associations should be treated in the same way as bodies corporate. Subsection (5) provides that summary proceedings may be taken against a body corporate or unincorporated association at their place of business, whilst proceedings may be brought against an individual at any place where he is present for the time being.