

2005 No. 382

FINANCIAL SERVICES

The Investment Recommendation (Media) Regulations 2005

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| <i>Made</i> - - - - | <i>23rd February 2005</i> |
| <i>Laid before Parliament</i> | <i>24th February 2005</i> |
| <i>Coming into force</i> - | <i>1st July 2005</i> |

The Treasury are a government department designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to insider dealing and market manipulation;

In exercise of the powers conferred upon them by section 2(2) of that Act, the Treasury hereby make the following Regulations:

PART 1

CITATION, INTERPRETATION AND APPLICATION

Citation and commencement

1. These Regulations may be cited as the Investment Recommendation (Media) Regulations 2005 and come into force on 1st July 2005.

Interpretation

2. In these Regulations—

“EEA State” means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 March 1992^(c) as it has effect for the time being;

“financial instrument” means any of the instruments listed in Article 1(3) of Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation^(d) that are admitted to trading on a regulated market (as defined in article 1(13) of Council Directive 93/22/EEC^(e) on investment services in the securities field) in an EEA State or for which a request for admission to trading on such a market has been made;

(a) S.I. 1992/1315.

(b) 1972 c. 68.

(c) OJ No. L 1, 3.1.1994, p. 3.

(d) OJ No. L 96, 12.4.2003, p. 16.

(e) OJ No. L 141, 11.6.1993, p. 27 as last amended by Directive 2000/64/EC (OJ L 290, 17.11.2000, p. 27).

“investment recommendation” means information that directly recommends the buying, selling, subscribing for or the underwriting of a financial instrument or the exercise of any right conferred by such instrument to buy, sell, subscribe for or underwrite it; and

“media” means—

- (a) a newspaper, journal, magazine or other periodical publication;
- (b) a service consisting of the broadcast or transmission of television or radio programmes; or
- (c) a service (including the internet) comprising regularly updated news or information;

but excluding any such publication or service the principal purpose of which (taken as a whole and including any advertisements or other promotional material contained in it) is a purpose mentioned in article 54(1)(a) or (b) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a).

Application of Regulations

3.—(1) These Regulations apply in respect of the production and the dissemination of an investment recommendation which the producer of that recommendation intends to be, or to become, publicly available in or through the media.

(2) Subject to paragraphs (3) and (4), any person whose business or profession is in the media and who, in the conduct of that business, or in the exercise of that profession, either—

- (a) produces an investment recommendation, or
 - (b) disseminates an investment recommendation produced by a third party,
- must do so in accordance with Parts 2 and 3; and references to a “person producing an investment recommendation” and to a “person disseminating an investment recommendation produced by a third party” are references respectively to such persons.

(3) These Regulations do not apply to—

- (a) a person (being an authorised person within section 31 of the Financial Services and Markets Act 2000(b)) (“the Act”) producing an investment recommendation where such production by him is regulated pursuant to section 22 of the Act; and
- (b) a person (being an authorised person within section 31 of the Act) disseminating an investment recommendation produced by a third party where such dissemination is regulated pursuant to section 22 of the Act.

(4) Parts 2 and 3 do not apply to the production and dissemination of an investment recommendation where —

- (a) the media in or through which the recommendation appears is subject either to a self-regulatory code or to an appropriate system or procedure with respect to the presentation of investment recommendations and to the disclosure of financial interests and conflicts of interest, and
- (b) the publication, programme or regularly updated news or information service in or through which the recommendation appears includes a clear and prominent reference to the relevant code, system or procedure.

(5) In paragraph (4)(a), a “self-regulatory code” means the Code of Practice issued by the Press Complaints Commission, the Producers’ Guidelines issued by the British Broadcasting Corporation and any code published by the Office of Communications pursuant to section 324 of the Communications Act 2003(c).

(a) S.I. 2001/544, amended by 2003/1475.
(b) 2000 c.8.
(c) 2003 c.21.

PART 2

PRODUCTION OF INVESTMENT RECOMMENDATIONS

Disclosure of identity of producers

4. A person producing an investment recommendation must disclose clearly and prominently in that recommendation his identity, in particular, the name and job title of the individual who prepared it and the name of the legal person responsible for its production.

Fair presentation

5. Reasonable care must be taken by a person producing an investment recommendation to ensure that in that recommendation—

- (a) facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information;
- (b) all the documents, figures, names and other records used are reliable and if there is any doubt as to their reliability that this is clearly indicated; and
- (c) all projections, forecasts and price targets are clearly labelled as such and that any material assumptions made in producing or using them are indicated.

Disclosure of interests etc

6.—(1) Subject to paragraph (6), a person producing an investment recommendation must disclose, in the recommendation itself, all relationships and circumstances that may reasonably be expected to impair the objectivity of that recommendation, in particular, where he has—

- (a) a significant financial interest in one or more of the financial instruments which are the subject of the investment recommendation, or
 - (b) a significant conflict of interest with respect to an issuer of a financial instrument to which the investment recommendation (directly or indirectly) relates.
- (2) For the purposes of paragraph (1)(a), a “significant” financial interest includes—
- (a) in relation to a legal person, a holding exceeding 5% of the total issued share capital in the issuer of the shares in question, and
 - (b) in relation to a natural person, a holding exceeding £3000 of the total issued share capital in the issuer of the shares in question.
- (3) Where the person producing the investment recommendation is a legal person—
- (a) the significant financial interests and the significant conflicts of interest that it must disclose under paragraph (1) include any such interests or interest that it (or any connected legal person) has that are—
 - (i) accessible, or reasonably expected to be accessible, to the persons involved in the preparation of the recommendation, or
 - (ii) that are known to persons who, although not involved in the preparation of the recommendation, had, or could reasonably be expected to have, access to the recommendation prior to its being disseminated to customers or to the public; and
 - (b) the requirement of disclosure of significant financial interests and of significant conflicts of interest under paragraph (1) applies also to any person who (whether under a contract of employment or otherwise) works for the person producing the investment recommendation and who was directly involved in preparing that recommendation.
- (4) The reference in paragraph (3)(a) to a legal person being “connected” to the person (“A”) producing the investment recommendation, means—
- (a) a parent undertaking of A;
 - (b) a subsidiary undertaking of A;

- (c) a subsidiary undertaking of the parent undertaking of A;
 - (d) a parent undertaking of a subsidiary undertaking of A; or
 - (e) an undertaking in which A or an undertaking mentioned in sub-paragraph (a), (b), (c) or (d) has a participating interest.
- (5) In paragraph (4)—
- “parent undertaking” in sub-paragraphs (a), (c) and (d) has the same meaning as in Part 7 of the Companies Act 1985^(a) (or Part 8 of the Companies (Northern Ireland) Order 1986^(b)); and includes an individual who would be a parent undertaking for the purposes of those provisions if he were an undertaking (and “subsidiary undertaking” is to be read accordingly).
- “subsidiary undertaking” in sub-paragraphs (b), (c) and (d) has the same meaning as in Part 7 of the Companies Act 1985 (or Part 8 of the Companies (Northern Ireland) Order 1986); and includes, in relation to a body incorporated in or formed under the law of any EEA State other than the United Kingdom, an undertaking which is a subsidiary undertaking within the meaning of any rule of law in that State for the purposes of the Seventh Company Law Directive^(c) (and “parent undertaking” is to be read accordingly); and
- “participating interest” in sub-paragraph (e) has the same meaning as in Part 7 of the Companies Act 1985 (or Part 8 of the Companies (Northern Ireland) Order 1986); and includes an interest held by an individual which would be a participating interest for the purposes of these provisions if he were taken to be an undertaking.
- (6) A person producing an investment recommendation may, if he considers that the disclosure required under paragraph (1) would be disproportionate in relation to the length of that recommendation, comply with the requirements of that paragraph —
- (a) by including in the recommendation itself a clear and prominent reference to the place where the disclosure can be directly and easily accessed by the public (such as an appropriate internet site of his from which a direct internet link can be made to such disclosures), or
 - (b) where he produces two or more recommendations which appear together, by including in one of the recommendations a single clear and prominent reference to the place where the disclosures required for all the recommendations can be directly and easily accessed by the public.

Non-written investment recommendations

7.—(1) A person producing a non-written investment recommendation may comply with the requirements of regulations 4 to 6 to disclose information or indicate certain matters —

- (a) by including in the recommendation itself a clear and prominent reference to the place where the information and matters that would otherwise have to be disclosed or indicated in it can be directly and easily accessed by the public (such as at an appropriate internet site to which a direct internet link can be made to those matters or to that information), or
 - (b) where he produces two or more recommendations which appear together, by including in one of the recommendations a single clear and prominent reference to the place where the information and matters required to be disclosed or indicated for all the recommendations can be directly and easily accessed by the public.
- (2) A “non-written investment recommendation” is an investment recommendation that is—
- (a) broadcast or transmitted in the form of a television or radio programme, or

^(a) 1985 c.6. Sections 258-260 were modified by sections 21 and 22 of the Companies Act 1989 (c.40) and by regulation 2(3) of the Financial Institutions (Prudential Supervision) Regulations 1996, S.I. 1996/1669.

^(b) S.I. 1986/1032 (N.I. 6).

^(c) European Council Seventh Company Law Directive of 13th June 1983 on consolidated accounts (No. 83/349/EEC); OJ No. L 193, 18.07.83, p. 1.

- (b) displayed on a web site (or similar system for the electronic display of information).

PART 3

DISSEMINATION OF INVESTMENT RECOMMENDATIONS PRODUCED BY THIRD PARTIES

Disclosure of identity of persons disseminating investment recommendations

8. If a person having no authority from the person who produced an investment recommendation to do so nevertheless on his own behalf disseminates that recommendation, he must indicate his own identity clearly and prominently in the recommendation or ensure that it is otherwise clearly and prominently indicated to the persons to whom that recommendation is being disseminated.

Dissemination of altered investment recommendations

9.—(1) A person disseminating an investment recommendation produced by a third party who makes a change to the direction of the recommendation (such as the change of a recommendation to “buy” into one to “hold” or to “sell” (or vice versa)), must comply with regulations 4 to 6.

(2) A person disseminating an investment recommendation produced by a third party who does not make a change to the direction of the recommendation but who makes some other substantial alteration, must ensure that the details of that alteration are clearly indicated.

(3) Where the dissemination referred to in paragraph (2) is by a legal person (either itself or through a natural person) that legal person must have a formal written policy so that those receiving the information are directed to where they can have access to—

- (a) the identity of the person who produced that recommendation,
- (b) the investment recommendation itself, and
- (c) any disclosures of the financial interests and conflicts of interest of the person who produced the recommendation which have been made pursuant to regulation 6(1) or in accordance with any rules made by the Financial Services Authority^(a).

Dissemination of summaries of investment recommendations

10. Where an investment recommendation produced by a third party is summarised and the summary is then disseminated, the summary must—

- (a) be clear and not misleading,
- (b) mention the document in which the investment recommendation appears, and
- (c) indicate where any disclosures as to the financial interests and conflicts of interest of the person who produced the investment recommendation which have been disclosed pursuant to regulation 6(1) or in accordance with any rules made by the Financial Services Authority, can be directly and clearly accessed by the public.

News reporting on investment recommendations

11. Where no change is made to the essence of an investment recommendation produced by a third party or where a summary is made of an investment recommendation produced by a third party, the requirements respectively of regulations 9 and 10 need not be complied with as respects news reporting on that recommendation or summary in or through the media.

(a) The Authority has powers to make rules under Part X of the Financial Services and Markets Act 2000.

PART 4
TERRITORIAL SCOPE AND ACTIONS FOR DAMAGES

Territorial scope

12. These Regulations apply to any act or course of conduct of—

- (a) a person producing an investment recommendation, if his act is done, or his course of conduct is engaged in, in the United Kingdom, regardless of whether that recommendation is then disseminated in or from the United Kingdom or in or from another EEA State;
- (b) a person disseminating an investment recommendation produced by a third party, if his act is done, or his course of conduct is engaged in, in or from—
 - (i) his registered office (or if he does not have a registered office his head office), or
 - (ii) another establishment maintained by him,in the United Kingdom, regardless of whether any person to whom that recommendation is disseminated is in the United Kingdom or in another EEA State.

Actions for damages

13.—(1) A contravention of a provision in Part 2 or 3 is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

(2) A “private person” is a person who is a private person within regulation 3(1) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001**(a)**.

Nick Ainger

Jim Murphy

Two of the Lords Commissioners
of Her Majesty's Treasury

23rd February 2005

(a) S.I. 2001/2256, amended by S.I. 2002/1775.

EXPLANATORY NOTE

(This note is not part of the Regulations)

Directive 2003/6/EC(a) of the European Parliament and of the Council introduces a common EC legal regime on insider dealing and market manipulation. Implementation of this Directive is being effected in part by Regulations made by HM Treasury (the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 - S.I. 2005/ 381) and in part by the Financial Services Authority using its powers to make rules under the Financial Services and Markets Act 2000 (c.8). To the extent not so dealt with by those measures, it is implemented by these Regulations giving effect to Article 6.5 and to its implementing measure, Commission Directive 2003/125/EC(b).

Regulation 2 includes a definition of investment recommendations to which the Regulations apply, namely recommendations as to the buying, selling, subscribing for or underwriting of “financial instruments” (shares, transferable securities etc traded on markets within the European Economic Area).

Regulation 3 deals with to whom and under what conditions the Regulations are to apply. Paragraphs (1) and (2) apply the Regulations to persons who produce or disseminate investment recommendations and whose profession or business is in the media (*ie* in radio, television, newspapers etc). Paragraphs (3) and (4) reflect the fact that a dual statutory and self-regulatory regime exists in the United Kingdom and that there are a complex variety of media, news and information services. By virtue of paragraph (3), the Regulations will not apply to persons if they are authorised and regulated by the Financial Services Authority in respect of the production or dissemination of investment recommendations. Media organisations, although they may be authorised, may not be regulated in respect of the production or dissemination of investment recommendations in the course of their media activities and so their exclusion from the Regulations will depend upon whether they meet the self-regulatory requirements of paragraph (4). For this purpose they must be covered by one of the self-regulatory codes (the codes of practice, standards or guidelines issued by the Press Complaints Commission, the Office of Communications and the British Broadcasting Corporation) or by an appropriate system or procedure with respect to the presentation of investment recommendations and conflicts of interest. They must also make reference to the relevant code, system or procedure in the publication, programme etc in which the recommendation appears.

Part 2 (regulations 4 to 7) contains provisions relating to the disclosure of the identity of the producers of investment recommendations and their fair presentation, and the disclosure of financial interests and conflicts of interest. The requirements may be adapted in certain respects for non-written recommendations (*ie* those broadcast on television or radio or on a web-site) so as to avoid disproportionate requirements.

Part 3 (regulations 8 to 11) contains similar provisions as to disclosure required of persons disseminating investment recommendations that have been produced by a third party, in particular in cases where the recommendation has been altered or been summarised.

In Part 4, regulation 12 defines the territorial scope of the Regulations and regulation 13 provides that an action in damages may, in certain circumstances, be brought for contravention of the Regulations.

A full regulatory impact assessment of the effect that this instrument will have on the costs of business is available from the Capital Markets and Governance Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. A Transposition Note showing how the main provisions of the Market Abuse Directive will be transposed into UK law is available from the same address. Both documents are also available on HM Treasury’s website (www.hm-treasury.gov.uk).

(a) OJ No. L 96, 12.04.2003, p.16.

(b) OJ No. L 339, 24.12.2003, p.73.