

## **CRIMINAL CODE AMENDMENT ACT 2004**

---



**BERMUDA  
2004 : 24**

### **THE CRIMINAL CODE AMENDMENT ACT 2004**

[Date of Assent: 6 August, 2004]

[Operative Date: 1 November, 2004]

WHEREAS it is expedient to make provision for the offences of misleading statements and practices, market manipulation and insider dealing; and for connected purposes:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

#### **Short title, commencement and application**

1 (1) This Act may be cited as the Criminal Code Amendment Act 2004 and shall come into operation on 1 November 2004.

(2) This Act shall have effect only in relation to offences committed after the coming into operation of this Act.

#### **Interpretation**

2 In this Act, the "principal Act" means the Criminal Code Act 1907.

#### **Section 405 of principal Act repealed and replaced**

3 Section 405 of the principal Act is repealed and replaced by the following—

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

### **"Misleading statements and practices**

405 (1) This subsection applies to a person who —

- (a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular;
- (b) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or
- (c) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular.

(2) A person to whom subsection (1) applies is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not he is the person to whom the statement, promise or forecast is made) —

- (a) to enter or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement; or
- (b) to exercise, or refrain from exercising, any rights conferred by a relevant investment.

(3) Subsections (1) and (2) do not apply unless —

- (a) the statement, promise or forecast is made in or from, or the facts are concealed in or from, Bermuda or arrangements are made in or from Bermuda for the statement, promise or forecast to be made or the facts to be concealed;
- (b) the person on whom the inducement is intended to or may have effect is in Bermuda; or
- (c) the agreement is or would be entered into or the rights are or would be exercised in Bermuda.

(4) A person guilty of an offence under this section is liable —

- (a) on summary conviction, to a fine of \$10,000 or to imprisonment for six months or both;

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

(b) on conviction on indictment, to a fine of \$100,000, or to imprisonment for five years or both.

(9) "Relevant agreement" means an agreement —

(a) the entering into or performance of which by either party constitutes an investment activity within the meaning of section 3(2) of the Investment Business Act 2003; and

(b) which relates to a relevant investment.

(10) "Relevant investment" means an investment within the meaning of section 3(1)(a) of the Investment Business Act 2003."

### **Sections 405A to N added to principal Act**

4 The principal Act is amended by adding the following sections after section 405 —

#### **"Market manipulation**

405A (1) Any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments is guilty of an offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise, or refrain from exercising, any rights conferred by those investments.

(2) In proceedings brought against any person for an offence under subsection (1) it is a defence for him to show that he reasonably believed that his act or conduct would not create an impression that was false or misleading as to the matters mentioned in that subsection.

(3) Subsection (1) does not apply unless —

(a) the act is done, or the course of conduct is engaged in, in Bermuda; or

(b) the false or misleading impression is created in Bermuda.

(4) "Relevant investment" means an investment within the meaning of section 3(1)(a) of the Investment Business Act 2003 which is listed on the Bermuda Stock Exchange, or any other exchange in Bermuda in relation to which a recognition order is in force under the Investment Business Act 2003.

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

(5) A person guilty of an offence under this section is liable—

- (a) on summary conviction, to a fine of \$10,000 or to imprisonment for six months or both;
- (b) on conviction on indictment, a fine of \$100,000 or to imprisonment for five years or both.

### *The offence of insider dealing*

#### **The offence**

405B (1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in investments that are price-affected investments in relation to the information.

(2) An individual who has information as an insider is also guilty of insider dealing if—

- (a) he encourages another person to deal in investments that are (whether or not that other knows it) price-affected investments in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or
- (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

(3) The circumstances referred to in subsections (1) and (2) are that the acquisition or disposal in question occurs on a recognised investment exchange.

(4) This section has effect subject to sections 405C and 405D.

#### **Defences**

405C (1) An individual is not guilty of insider dealing by virtue of dealing in investments if he shows—

- (a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the investments;

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

(b) that at the time he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or

(c) that he would have done what he did even if he had not had the information.

(2) An individual is not guilty of insider dealing by virtue of encouraging another person to deal in investments if he shows —

(a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the investments;

(b) that at the time he believed on reasonable grounds that the information had been or would be disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or

(c) that he would have done what he did even if he had not had the information.

(3) An individual is not guilty of insider dealing by virtue of a disclosure of information if he shows —

(a) that he did not at the time expect any person, because of the disclosure, to deal in investments in the circumstances mentioned in section 405B; or

(b) that, although he had such an expectation at the time, he did not expect the dealing to result in a profit attributable to the fact that the information was price-sensitive information in relation to the investments.

(4) In this section references to a profit include references to the avoidance of a loss.

### **Special defences**

405D Sections 405E and 405F provide special defences to the offence of insider dealing.

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

### **Market makers**

405E (1) An individual is not guilty of insider dealing by virtue of dealing in investments or encouraging another person to deal if he shows that he acted in good faith in the course of —

- (a) his business as a market maker; or
- (b) his employment in the business of a market maker.

(2) A market maker is a person who —

- (a) holds himself out at all normal times in compliance with the rules of a recognised investment exchange as willing to acquire or dispose of investments; and
- (b) is recognised as doing so under those rules.

### **Market information**

405F (1) An individual is not guilty of insider dealing by virtue of dealing in investments or encouraging another person to deal if he shows that —

- (a) the information which he had as an insider was market information; and
- (b) it was reasonable for an individual in his position to have acted as he did despite having that information as an insider at the time.

(2) In determining whether it is reasonable for an individual to do any act despite having market information at the time, there shall, in particular, be taken into account —

- (a) the content of the information;
- (b) the circumstances in which he first had the information and in what capacity; and
- (c) the capacity in which he now acts.

(3) An individual is not guilty of insider dealing by virtue of dealing in investments or encouraging another person to deal if he shows —

- (a) that he acted —
  - (i) in connection with an acquisition or disposal which was under consideration or the subject of negotiation, or in the

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

course of a series of such acquisitions or disposals; and

- (ii) with a view to facilitating the accomplishment of the acquisition or disposal or the series of acquisitions or disposals; and

- (b) that the information which he had as an insider was market information arising directly out of his involvement in the acquisition or disposal or series of acquisitions or disposals.

(4) For the purposes of subsections (2) and (3) market information is information consisting of one or more of the following facts —

- (a) that investments of a particular kind have been or are to be acquired or disposed of, or that their acquisition or disposal is under consideration or the subject of negotiation;
- (b) that investments of a particular kind have not been or are not to be acquired or disposed of;
- (c) the number of investments acquired or disposed of or to be acquired or disposed of or whose acquisition or disposal is under consideration or the subject of negotiation;
- (d) the price (or range of prices) at which investments have been or are to be acquired or disposed of or the price (or range of prices) at which investments whose acquisition or disposal is under consideration or the subject of negotiation may be acquired or disposed of;
- (e) the identity of the persons involved or likely to be involved in any capacity in an acquisition or disposal.

### **Investments to which sections 405B to 405F apply**

405G Sections 405B to 405F apply to any investment which —

- (a) falls within paragraphs 1 to 9 of Part 1 of the First Schedule to the Investment Business Act 2003; and

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

- (b) is listed on the Bermuda Stock Exchange or any other recognised investment exchange in Bermuda;

and in the provisions of these sections any reference to an investment is a reference to an investment to which these sections apply.

### **"Dealing in investments"**

405H (1) For the purposes of sections 405B to 405F, a person deals in investments if —

- (a) he acquires or disposes of the investments (whether as principal or agent); or
- (b) he procures, directly or indirectly, an acquisition or disposal of the investments by any other person.

(2) For the purposes of sections 405B to 405F and this section, "acquire", in relation to an investment, includes —

- (a) agreeing to acquire the investment; and
- (b) entering into a contract which creates the investment.

(3) For the purposes of sections 405B to 405F and this section, "dispose", in relation to an investment, includes —

- (a) agreeing to dispose of the investment; and
- (b) bringing to an end a contract which created the investment.

(4) For the purposes of subsection (1), a person procures an acquisition or disposal of an investment if the investment is acquired or disposed of by a person who is —

- (a) his agent;
- (b) his nominee; or
- (c) a person who is acting at his direction;

in relation to the acquisition or disposal.

(5) Subsection (4) is not exhaustive as to the circumstances in which one person may be regarded as procuring an acquisition or disposal of investments by another.

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

### **"Inside information", etc.**

405I(1) For the purposes of this section and section 405J, "inside information" means information which —

- (a) relates to particular investments or to a particular issuer of investments or to particular issuers of investments and not to investments generally or to issuers of investments generally;
- (b) is specific or precise;
- (c) has not been made public; and
- (d) if it were made public would be likely to have a significant effect on the price of any such investments.

(2) For the purposes of sections 405B to 405F, investments are "price-affected investments" in relation to inside information, and inside information is "price-sensitive information" in relation to investments, if and only if the information would, if made public, be likely to have a significant effect on the price of the investments.

(3) For the purposes of this section "price" includes value.

### **"Insiders"**

405J (1) For the purposes of sections 405B to 405I, a person has information as an insider if and only if —

- (a) it is, and he knows that it is, inside information; and
- (b) he has it, and knows that he has it, from an inside source.

(2) For the purposes of subsection (1), a person has information from an inside source if and only if—

- (a) he has it through—
  - (i) being a director, employee or shareholder of an issuer of investments; or
  - (ii) having access to the information by virtue of his employment, office or profession; or
- (b) the direct or indirect source of his information is a person within paragraph (a).

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

### **Information "made public"**

405K (1) For the purposes of section 405I, "made public", in relation to information, shall be construed in accordance with the following provisions of this section; but those provisions are not exhaustive as to the meaning of that expression.

(2) Information is made public if—

- (a) it is published in accordance with the rules of a recognised investment exchange for the purpose of informing investors and their professional advisers;
- (b) it is contained in records which by virtue of any enactment are open to inspection by the public;
- (c) it can be readily acquired by those likely to deal in any investments—
  - (i) to which the information relates; or
  - (ii) of an issuer to which the information relates; or
- (d) it is derived from information which has been made public.

(3) Information may be treated as made public even though—

- (a) it can be acquired only by persons exercising diligence or expertise;
- (b) it is communicated to a section of the public and not to the public at large;
- (c) it can be acquired only by observation;
- (d) it is communicated only on payment of a fee; or
- (e) it is published only outside Bermuda.

### **Other interpretation provisions**

405L(1) For the purposes of sections 405B to 405K, "recognised investment exchange" means an investment exchange in relation to which a recognition order is in force under the Investment Business Act 2003.

(2) For the purposes of sections 405B to 405K an "issuer" , in relation to any investments, means any company, public

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

sector body or individual by which or by whom the investments have been or are to be issued.

(3) For the purposes of sections 405B to 405K, 405N and this section —

(a) "company" means any body (whether or not incorporated and wherever incorporated or constituted) which is not a public sector body; and

(b) "public sector body" means —

- (i) the government of Bermuda or of any country or territory outside Bermuda;
- (ii) a local or municipal authority in Bermuda or elsewhere;
- (iii) any international organisation the members of which includes the United Kingdom or Bermuda;
- (iv) the Bermuda Monetary Authority; or
- (v) the central bank of any state or territory.

(4) For the purposes of sections 405B to 405K, information shall be treated as relating to an issuer of investments which is a company not only where it is about the company but also where it may affect the company's business prospects.

### **Penalties and prosecution**

405M (1) An individual guilty of insider dealing shall be liable —

- (a) on summary conviction to a fine of \$25,000 or to imprisonment for two years or both;
- (b) on conviction on indictment to a fine of \$175,000 or to imprisonment for 7 years or both.

(2) Proceedings for offences under section 405B shall not be instituted except by or with the consent of the Director of Public Prosecutions.

## **CRIMINAL CODE AMENDMENT ACT 2004**

---

### **Limits on section 405B**

405N (1) Section 405B does not apply to anything done by an individual acting on behalf of a public sector body in pursuit of monetary policies or policies with respect to exchange rates or the management of public debt or foreign exchange reserves.

(2) No contract shall be void or unenforceable by reason only of section 405B."

**CRIMINAL CODE AMENDMENT ACT 2004**

---