

BOARD NOTICES

BOARD NOTICE 39 OF 2004**FINANCIAL SERVICES BOARD**

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002
(ACT NO. 37 OF 2002)

**CODE OF CONDUCT FOR AUTHORISED FINANCIAL SERVICES PROVIDERS,
AND THEIR REPRESENTATIVES, INVOLVED IN FOREX INVESTMENT
BUSINESS, 2004**

I, Jeffrey van Rooyen, Registrar of Financial Services Providers, hereby under section 15 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), publish a code of conduct for authorised financial services providers, and their representatives, involved in forex investment business, as contained in the Schedule hereto, drafted after consultation with the Advisory Committee on Financial Services Providers, representative bodies of the financial services industry and client and consumer bodies determined by that Committee, as well as the regulatory and supervisory authorities concerned.

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J VAN ROOYEN.

Registrar of Financial Services Providers

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SCHEDULE

CODE OF CONDUCT FOR AUTHORISED FINANCIAL SERVICES PROVIDERS, AND THEIR REPRESENTATIVES, INVOLVED IN FOREX INVESTMENT BUSINESS, 2004

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PART I

INTRODUCTORY PROVISIONS

Definitions and application

1. (1) In this Code "the Act" means the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), a word or expression to which a meaning has been assigned in the Act or in the Exchange Control laws, shall, unless clearly inappropriate, have that meaning and, unless the context indicates otherwise—

"churn" means excessive trading in a client's account by a forex investment intermediary to maximise the commissions or the revenue of the intermediary regardless of the client's interests;

"clearing firm" means an entity outside the Republic which complies with the requirements set out in, and has been approved in accordance with, the Regulations, and which handles confirmation, delivery and settlement of foreign exchange transactions in the foreign exchange market;

"currency pair" means the two individual currencies involved in a foreign exchange transaction;

"drawdown" means the reduction in a managed forex account or a self-directed forex account value because of a trade or series of trades in the relevant account;

"ensure" means, in relation to a person and any matter mentioned in a provision of this Code, to take any necessary steps in order that the clear objective of the provision is achieved;

"Exchange Control laws" means the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), and any exchange control regulations, rules and rulings promulgated or issued under or by virtue of that Act;

"foreign forex services provider" means a person outside the Republic of South Africa who complies with the requirements set out in, and has been approved in accordance with, the Regulations, to the extent that the person carries on, as a regular feature, business corresponding to and complementing the business of a forex investment intermediary in the Republic;

"forex investment" means an investment in a financial product referred to in paragraph (e) of the definition of "financial product" in section 1(1) of the Act, in foreign exchange trading based on price fluctuations in the foreign exchange market, but excluding transactions in foreign exchange conducted under Exchange Control laws by authorised dealers and their bureaux de change or commercial agencies;

"forex investment advisor" means a financial services provider carrying on, as a regular feature of business, the rendering of advice on forex investments;

"forex investment business" means the business carried on by forex investment advisors and forex investment intermediaries;

"forex investment intermediary" means a financial services provider carrying on, as a regular feature of business, the rendering of intermediary services in respect of forex investments;

"forex services provider" means an authorised financial services provider carrying on business as a forex investment advisor or a forex investment intermediary (including any representative of any such advisor or intermediary);

"General Code" means the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003, published by Board Notice No. 80 of 2003, in *Gazette* No 25299 of 8 August 2003;

"introducing broker" means a forex services provider who in terms of a written agreement introduces clients' funds to a foreign forex services provider for the purpose of discretionary or non-discretionary dealing on such introduced funds;

"leverage" means the usage or gearing of a relatively small foreign currency margin deposit to control a much larger foreign currency amount usually expressed as the ratio of the margin deposit to the total value of levered foreign currency;

"managed forex account" means a forex investment resulting from the advice or the intermediary services of a forex investment advisor or a forex investment intermediary, and which account is managed for or on behalf of

a client by that intermediary or another forex investment intermediary appointed by the firstmentioned intermediary;

"margin" means a specified amount of money used as collateral to insure against potential losses from outstanding positions;

"margin call" means a call from a clearing firm to a client to deposit additional collateral to cover outstanding commitments arising from outstanding loss-making positions;

"margin requirement" means the amount of margin required by a specified amount of leveraged currency;

"omnibus account" means an account that one forex investment intermediary or foreign forex services provider carries for another foreign forex services provider in which the deposits of multiple individual account holders are combined in such a manner that the funds are at all times identifiable as belonging to a specific person;

"Regulations" means Chapter VI of the Financial Advisory and Intermediary Services Regulations, 2003, as inserted by Government Notice No. 297 of 12 March 2004 in *Gazette* No. 26112 of that date;

"self-directed forex account" means a forex investment, arranged by a forex investment advisor or forex investment intermediary, on which the client involved has full discretionary dealing power.

- (2) In the case of any inconsistency or conflict between-
- (a) a provision of this Code and a provision of the General Code, the firstmentioned provision shall prevail;
 - (b) a provision of this Code, or of the General Code as applicable to this Code, and a provision of the Exchange Control laws, the lastmentioned provision shall prevail.

PART II**GENERAL PROHIBITIONS AND DUTIES APPLYING TO FOREX INVESTMENT INTERMEDIARIES****Prohibitions**

2. A forex investment intermediary may not directly or indirectly-
- (a) by means of any statement, promise, forecast or by any other action that it knows to be misleading or which is likely to be misleading –
 - (ii) induce a client to enter into a mandate with the forex investment intermediary; or
 - (iii) induce the client to enter into any other agreement relating to forex investments;
 - (b) sell to or provide a third party with a client's details, without the client's prior written approval;
 - (c) charge the client any kind of fee for terminating a mandate other than accrued fees for services rendered before the termination;
 - (d) receive or intermediate on or deal with client funds in the Republic for purposes of forex investment without such funds being cleared under the applicable provisions of the Exchange Control laws;
 - (e) advise a client to deal in a self-directed forex account or, in the case of a managed forex account, deal on behalf of a client, where the minimum leverage applied to the client's funds will on a regular basis exceed widely used industry norms;
 - (f) churn a client's account for fees or commissions; or
 - (g) in the promotion or advertising of forex investments-
 - (i) quote hypothetical investment returns;
 - (ii) quote real investment returns applicable to a specific product for a period shorter than twelve months, or shorter than the existence of the managed forex account if it has been in existence for a period shorter than 12 months; or
 - (iii) state or imply that the investment performance of the forex investment intermediary or of a particular product, achieved in the past, will be repeated.

General duties of a forex investment intermediary**3. A forex investment intermediary must—**

- (a) (i) deposit, transfer or arrange for the transfer of money received from or on behalf of a client for investment in a forex investment without undue delay to the final destination agreed with the client in terms of the mandate received from the client;
- (ii) in the event that the intermediary performs the function of an introducing broker for a foreign forex services provider, in which it has managerial powers and authority to in any manner whatsoever accept or handle clients' funds, disclose such facts to the client and assure that clients' funds will at all times be separated from its own funds and be separately identifiable as the funds of each separate client;
- (b) observe high standards of integrity and fair dealing in all matters relating to intermediary services;
- (c) act in the interests of the clients;
- (d) act with due skill, care, diligence and good faith;
- (e) observe high standards of market conduct;
- (f) provide to a client, on request and if required by the General Code or this Code, in a comprehensible and timely manner, any reasonable information regarding the investment of the client, market practices and the risks inherent in the different products;
- (g) wherever and whenever appropriate, obtain from a client the necessary information about the financial situation, investment experience and investment objectives of the client to enable the forex investment intermediary to act in the interests of that client at all times;
- (h) avoid any conflict between own interests and the interests of a client and where a conflict of interest does arise, the forex investment intermediary must –
 - (i) adequately disclose details of such conflict to the client while maintaining the confidentiality of other clients; or
 - (ii) decline to act for that client;
- (i) disclose to a client all fees and other charges, whether direct or indirect, relating to the intermediary services rendered in relation to that client's forex investments;

- (j) disclose to a client non-cash incentives offered or other indirect consideration payable by another provider, a product supplier or any other person to the forex investment intermediary as a result of intermediating on the investments of that client;
- (k) explain to a client how fees and other charges are calculated and charged in sufficient detail to enable the client to understand the method of calculation;
- (l) ensure that its staff and representatives are at all times properly trained in accordance with the Act;
- (m) must, prior to appointing a clearing firm or a foreign forex services provider to accept funds or instructions on behalf of clients, apply for approval by the Registrar of such clearing firm or foreign services provider in accordance with the Regulations; and
- (n) disclose to a client-
 - (i) the name and address of the foreign forex services provider or clearing firm used, if applicable;
 - (ii) the name and address of the foreign regulator regulating the foreign forex services provider or clearing firm, and whether such provider or firm is approved or registered by such regulator;
 - (iii) the name and address of the foreign regulator under whose jurisdiction the dealing activity falls;
 - (iv) whether the foreign forex service provider or clearing firm, which holds investments on behalf of clients, maintains insurance cover to cover the risk of losses due to fraud, dishonesty and negligence by such foreign forex services provider or clearing firm and the extent of such cover.

Ceasing of business

4. (1) A forex investment advisor or intermediary must notify the registrar at once in writing if it is to cease conducting business or if its business is to be wound up or liquidated.
- (2) (a) When a forex investment advisor or intermediary ceases to conduct business or its authorisation under the Act lapses, the forex investment advisor or intermediary must within 45 days of such ceasing or lapsing, as the case may be, furnish a report to the registrar. In the case of a winding up or liquidation, the liquidator involved must furnish the report.

- (b) Such report must confirm that all cash and documents of title relating to assets and a final statement of account have been delivered to the various clients: Provided that if a forex investment advisor or intermediary is unable to fully comply, the report must contain full particulars concerning the documents which have been delivered, full reasons therefor, as well as a plan with dates on which compliance will be effected.

PART III

SPECIAL PROVISIONS APPLYING TO FOREX INVESTMENT INTERMEDIARIES

Mandate from client

- 5. (1) A forex investment intermediary must enter into a written mandate with a client irrespective of whether the client invests in a managed forex account or in a self-directed forex account. The intermediary and the client may agree to enter into an electronic mandate, provided that appropriate controls and personal identification procedures have been put in place. The mandate records the arrangements made between the parties, and must-
 - (a) stipulate whether the investment concerned is a self-directed forex investment or a managed forex investment;
 - (b) state the investment objectives of the client and whether in the case of managed forex investments, there are any investment or jurisdiction restrictions that apply to the intermediary services with specific reference to-
 - (i) the regulatory environment of the foreign forex services provider where the investments are made;
 - (ii) specific currency pairs;
 - (iii) any limitations on maximum drawdown;
 - (iv) any limitations on leverage to be employed;
 - (v) applicable margin requirements and margin call rules;
 - (c) contain a general statement pertaining to the risks associated with investing in forex investments, with particular reference to any-
 - (i) currency risk;
 - (ii) event risk;

- (iii) operational risk;
 - (iv) leverage risk;
- (d) stipulate in whose name the forex investments are to be made, for example, whether they are to be made in the name of—
 - (i) the client at the foreign forex services provider acting as clearing firm;
 - (ii) an omnibus account holder under control of a foreign forex services provider, other than the foreign forex services provider acting as clearing firm;
 - (iii) an omnibus account holder at a foreign forex services provider under direct or indirect control of the forex investment intermediary concerned;
- (e) stipulate the name of the bank, name of the account and account number of the bank, and the account number and name of the foreign forex services provider or clearing firm, as the case may be, in which the forex investment must be deposited;
- (f) stipulate, where applicable in the case of a managed forex account, the basis on which, the manner in which and the intervals at which any cash accruals which the forex investment intermediary receives on behalf of a client, must be paid to the client and, where applicable, any restrictions on withdrawals of principal amounts or profits by the client, where the account is in the client's own name;
- (g) stipulate the basis on which, the manner in which and the intervals at which the client will remunerate the forex investment intermediary for intermediary services rendered on behalf of the client: Provided that for the purposes of this paragraph it shall be deemed that the basis of the remuneration has not been stipulated if the remuneration must be calculated with reference to a source outside the mandate or if it is placed within the discretion of any person;
- (h) state whether the forex investment intermediary receives commission, incentives, fee reductions or rebates from a foreign forex services provider or any other applicable institution for placing a client's funds with them;
- (i) in the case of managed forex investments, provide for the availability to the client of reports and statements compiled by the foreign forex services provider acting as clearing firm within 24 hours of same being made available by that provider to the

financial services provider or foreign forex services provider, as the case may be, detailing all transactions;

- (j) empower either party to the mandate to terminate the mandate after notice in writing of not more than 60 calendar days; and
 - (k) must include details of insurance cover sufficient to cover the risk of losses due to fraud, dishonesty and negligence.
- (2) The mandate of a forex investment intermediary must be approved by the registrar who may grant approval subject to such conditions as the registrar may determine. The initially approved mandate is hereinafter referred to as the specimen mandate. The registrar may subsequent to approval require that specific amendments be made to the specimen mandate or that any other information be disclosed that is deemed necessary in the interest of the client.
- (3) A forex investment intermediary may not amend the specimen mandate substantially, without the prior written approval of the registrar.
- (4) When the mandate of a forex investment intermediary with respect to a managed forex account is terminated, such intermediary must at once return all cash, assets and documents of title to the client and must simultaneously provide the client with a detailed final statement of account. If the assets and documents of title are in possession of a bank or another forex investment intermediary the firstmentioned forex investment intermediary must at once issue an instruction to such entity to return such assets or documents of title to the client.

Reporting to clients

6. (1) A forex investment intermediary must furnish a written report to a client, which complies with subsection (2)–
- (a) on request; and
 - (b) in the case of managed forex investments, providing for reporting in printed format, or electronically if so desired by the client, on a monthly basis, detailing investment performance up to and including the last day of the previous calendar month, if applicable.
- (2) A report to a client must contain such information as is reasonably necessary to enable the client to–
- (a) produce a set of financial statements;
 - (b) determine the changes in the market value of the investment over the period reported on; and

- (c) determine the charges levied over the period reported on.
- (3) Despite subsection (2), a client may request detailed information about the following matters:
 - (a) Original value of the forex investment, as well as the current market value thereof;
 - (b) currency pairs purchased or sold during the period;
 - (c) cash receipts and payments during the period;
 - (d) profits and losses realised during the period; and
 - (e) the leverage employed during the reporting period.

Insurance

- 7. (1) A forex services provider must if, and to the extent, required by the registrar, maintain in force suitable guarantees or professional indemnity or fidelity insurance cover.
- (2) A forex services provider who does not hold investments in safe custody on behalf of clients must ensure that the foreign forex services provider or clearing firm that holds such deposits does maintain insurance cover as is required by its regulators to cover the risk of losses due to fraud, dishonesty and negligence;

PART IV

SPECIAL PROVISIONS APPLYING TO FOREX INVESTMENT ADVISORS

General functions

- 8. (1) A forex investment advisor must, prior to referring clients to a forex investment intermediary, ascertain whether that intermediary is an authorised financial services provider. If not, the forex investment advisor must determine whether that intermediary is by law required to be authorised as such and if so, decline to refer clients to such intermediary.
- (2) A forex investment advisor must conduct its business with a representative in the same manner that it must conduct its business with a forex investment intermediary.
- (3) The provisions of-
 - (a) sections 2(1)(a) to (e) and (g), 3(1)(b) to (n) and 4 of this Code; and
 - (b) section 8(1) to (5), of the General Code,

apply, with the necessary changes and unless clearly inappropriate taking into consideration the particular features of forex investment business, to a forex investment advisor and any client of the advisor.

Arrangements between forex investment advisors and clients and cost disclosure

9. (1) A forex investment advisor must commence its business relationship with a client by way of a written application form signed by the client and, where applicable, the forex investment intermediary involved. The forex investment advisor and the client may agree to complete an electronic application form, provided that appropriate controls and personal identification procedures have been put in place that ensures security of information. This application form, or supplementary documentation made available to the client in addition to the application form, must record the arrangements made between the parties, and must, if applicable in a particular case, disclose clearly—
- (a) if the forex investment advisor deals with one or more forex investment intermediaries;
 - (b) if the client will deal directly with the forex investment intermediary or through the advisor;
 - (c) whether the application is for advice on a managed forex account or a self-directed forex account;
 - (d) the names and postal addresses of the client and the forex investment intermediary concerned, and the telephone, facsimile and other contact detail, if any, of the forex investment intermediary;
 - (e) that the forex investment intermediary concerned is an authorised financial services provider and state the applicable licence number;
 - (f) a list of the available investment options and leverage, drawdown and foreign regulatory environment options, and explain the type and the nature of the applicable risks;
 - (g) whether the investments in the case of managed forex accounts will be made in the name of the client at the foreign forex services provider acting as clearing firm or whether it will be made in the name of an omnibus account holder under direct or indirect control of the forex services provider;
 - (h) information on applicable exchange control measures regarding the forex investment;
 - (i) the amount of the investment and the term of the investment; and

- (j) separately, in respect of the forex investment advisor and the forex investment intermediary concerned, the total fees and benefits to be received by each in respect of a client's investment, whether by way of a deduction from the investment or not, including—
 - (i) the initial fees or costs;
 - (ii) the ongoing fees or costs;
 - (iii) any other benefit, fees or costs, whether in cash or kind.
- (2) The registrar must initially approve the application form referred to in subsection (1), and may grant approval subject to the conditions that the registrar may determine. The registrar may subsequent to approval require that specific amendments be made to such application form (hereunder referred to as the specimen application form) or that any other information that is deemed necessary be disclosed in the interest of the client. The forex investment advisor may not amend the specimen application form substantially without the prior written approval of the registrar.
- (3) If a client decides to terminate the relationship with a particular forex investment intermediary but wishes to continue to make use of the services of the originally chosen forex investment advisor through another forex investment intermediary, the lastmentioned forex investment intermediary must ensure that the client sign the applicable application form referred to in subsection (1) and the forex investment advisor must inform the client of all changes pertaining to subsection (1) (a) to (j) of this section.
- (4) If a client decides to terminate the relationship with the forex investment advisor but wishes to continue to make use of the services of the originally chosen forex investment intermediary through another forex investment advisor, then the lastmentioned forex investment advisor must ensure that the client sign the applicable application form referred to in subsection (1) and must inform the client of all changes pertaining to subsection (1)(a) to (j).
- (5) Where a forex investment advisor solicits additional funds for an existing forex investment intermediary involved, the advisor must provide the client with the information referred to in subsection (1)(a) to (j) of this section if any of the terms of the previous / initial investment had changed.
- (6) A forex investment advisor must enter into an appropriate written agreement with each forex investment intermediary to whom it refers clients, which records their particular arrangements and makes

provision for termination of the agreement by either party on written notice of not less than 60 days.

Records of advice

10. (1) A forex investment advisor must, subject to and in addition to the duties imposed by section 18 of the Act, maintain a record of any advice furnished to a client, and which record must reflect the basis on which the advice was given, and in particular-
- (a) a brief summary of the information and material on which the advice was based;
 - (b) the financial products which were considered; and
 - (c) a description of the particular forex investment that was recommended and an explanation of why a forex investment is likely to satisfy the client's identified needs and objectives.
- (2) A forex investment advisor must provide a client with a copy of the record contemplated in subsection (1) in writing.
- (3) A forex investment advisor must maintain records recording the investments owned by each client individually.
- (4) The agreement between the forex investment advisor and any forex investment intermediary must provide for the furnishing of a written report corresponding with the report provided to a client in terms of section 6(1)(b).

PART V

MISCELLANEOUS, TITLE AND COMMENCEMENT

Additional applicability of General Code

11. Subject to the provisions of this Code, the provisions of Parts V, VI, X, XI, XII and XIII, and of sections 11 and 12, of the General Code apply to any forex services provider, with the necessary changes and unless inappropriate taking into consideration the particular features of forex investment business.

Title and commencement

12. This Code is called the Code of Conduct for Authorised Financial Services Providers, and their Representatives, involved in Forex Investment Business, 2004, and comes into operation on the date determined by the Minister in terms of section 7(1) of the Act.