GUIDANCE NOTE

DEFINITION OF FOREIGN CURRENCY DENOMINATED INSTRUMENTS

1. Background

The question has arisen as to what is included in the definition of financial products relating to foreign currency denominated investments. Specifically the question is whether financial products such as insurance policies or collective investment schemes, that are held in foreign currency, or even further provide the client with the option to be paid in such denominated foreign currency upon maturity of his/her investment, fall within the ambit of section 1(1)(e) of the Financial Advisory and Intermediary Services Act, No 37 of 2002 ("the Act") resulting in applicants for licences in terms of the Act falling within this subcategory. The question is important due to the following reasons:

- To whom does the Code of Conduct for Authorised Financial Services Providers, and their representatives, involved in forex investment business ("the Forex Code") apply;
- Under which subcategory must applicants, desiring to deal in the abovementioned products, apply and accordingly complete the application form.

2. Definitions

In this regard three definitions of **financial products** as contained in section 1(1) of the Act are of importance:

(e) "a foreign currency denominated investment instrument, including a foreign currency deposit";

(i) "any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive";

(j) "any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (i), inclusive"

3. The Forex Code

The intention has always been that the Forex Code be applicable only to authorised financial services providers ("providers") involved in the speculative forex investment business. Under speculative investment business is meant financial services with the primary objective to provide persons with the means to speculate in and profit from movements in currency exchange markets.

The following definitions in the Forex Code is relevant:

"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, but excluding transactions in foreign exchange conducted under Exchange Control laws by authorised dealers and their bureaux de change or commercial agencies;

"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);

4. Subcategories

It is important to determine to which subcategory the financial product belongs in order to correctly complete the application form. Paragraph (e) refers to a foreign currency denominated investment instrument, including a foreign currency deposit. Strictly speaking a collective investment scheme held in foreign currency is included in the definition. However, it is suggested that the following approach be adopted: It must be established what the primary feature of a product is: if the primary objective is an investment in the foreign currency market, it falls within paragraph (e). (In most cases this would be speculative investment in forex as defined in the Forex Code, but this does not necessarily have to be the case.)

Where the primary feature of the investment resembles one of the other categories of investment products (e.g. an insurance policy or collective investment scheme), but the secondary feature is that the investment would be denominated in foreign currency, it is categorised under paragraph (j). The latter only applies in the instances where a foreign product supplier issues the product. In the instances where the product is issued by a product supplier in the Republic, but held in a foreign currency, it resorts under the specific category under which its primary features are described.

5. “including a foreign currency deposit”

As stated above, a foreign currency deposit is included in the definition in paragraph (e). It must be borne in mind that a deposit in foreign currency, which in nature and character is essentially similar or corresponds to a deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990), falls within the ambit of paragraph (j) and the application form has to be completed in this manner.