

**CHAPTER 46:08 - NON-BANK FINANCIAL INSTITUTIONS REGULATORY
AUTHORITY: RULES**

**NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY
(MARKET INTERMEDIARIES' CONDUCT OF BUSINESS) RULES 2012**

(Section 50)

March 2012 ARRANGEMENT OF RULES

RULES

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1. Citation

- (1) These rules may be cited as the Non-Bank Financial Institutions (Market Intermediaries' Conduct of Business) Rules 2012-.

2. Interpretation

- (1) In these Rules, all terms carry the same meaning as in the Act:-
“the Act” means the Non-Bank Financial Institutions Regulatory Authority Act.
“the Authority” means the Non-Bank Financial Institutions Regulatory Authority;
“advertisement” means a communication to the public, any section of the public, to clients, or any group of clients that provides information about products, services, investment opportunities offered by a market intermediary.
“board” means
 - a. where the securities business is a company, the Board of directors;
 - b. where the securities business is a partnership, the partners; or

c. where the securities business is conducted in another legal form, the persons registered with the Authority as having responsibility for the conduct of the business.

“broker” is a person whose licence permits the conduct only of the activities defined in paragraph (b) of the definition of “securities dealer” in Section 2 of the Act.

“broker/dealer” is a person whose licence permits the conduct only of the activities defined in paragraphs (b) and (c) of the definition of “securities dealer” in Section 2 of the Act.

“client” is a person to whom a market intermediary provides services, or intends to provide services in the course of its regulated activity and includes a potential client.

where the market intermediary is a custodian, or trustee of a collective investment undertaking, the term “client” shall mean the collective investment undertaking or undertakings for which the market intermediary provides services.

where the market intermediary is an asset manager, a management company or a person operating a collective investment undertaking the term “client” shall mean the collective investment undertaking and the investors in that undertaking.

“client account” has the meaning given in Rule 8.

“client assets” means any property other than client money that a market intermediary holds but whose beneficial owner is the client, regardless of the legal title.

“client money” means money of any currency that, in the course of carrying out a securities business, a market intermediary holds or receives on behalf of a client or which it owes to a client.

“financial year” means the twelve month period covered by a market intermediary’s annual accounts;

the “functionaries of a collective investment undertaking” means the management company, operator of a collective investment undertaking, trustee and custodian.

“dealer” is a person whose licence permits the conduct only of the activities defined in paragraphs (c) of the definition of “securities dealer” in Section 2 of the Act.

“expert client” is a client of an asset manager, broker, broker/dealer, or investment adviser who:

has a minimum of [P1000 000.00] available for investment, excluding the main residence; or

who is an appropriately qualified employee of a licensed market intermediary; or

who is a financial services business licensed to conduct regulated activity; or

or is a bank licensed in Botswana or elsewhere; or

who is an institutional investor such as a pension fund, insurance fund or collective investment undertaking and

who signs a declaration in the form at Schedule 3.

“key personnel” means the chief executive officer, the directors or partners (as the case may be), the compliance officer and internal auditor;

“market intermediary” means any of the following:

- an asset manager,
- a broker;
- a broker/dealer;
- a custodian,
- a dealer;
- an investment adviser,
- a management company for a collective investment undertaking,
- a person operating a collective investment undertaking, or
- a trustee of a collective investment undertaking that holds a license under Section 43 of the Act.

“person operating a collective investment undertaking” means the management company of a collective investment undertaking

“regulated activity” means any activity falling under the Act, or Regulations or rules made under the Act.

“written notification” means notification in a letter or other communication submitted to the Authority on paper or by electronic means.

3. Application

- (1) These rules apply to all market intermediaries.
- (2) Where a market intermediary is part of a financial group, certain rules, where specified, shall apply to the financial group as a whole.

4. General requirements for the conduct of business

- (1) A market intermediary shall, when conducting regulated activity:
 - a. act with integrity;
 - b. apply due skill, care and diligence in the best interests of its clients and the integrity of the market;
 - c. observe high standards of market conduct;
 - d. place its clients’ interests above its own; and
 - e. give similar treatment to similarly situated clients.
- (2) A market intermediary shall not conduct any business, other than that permitted by the licence, without the permission of the Authority except that a management company or a person operating a collective investment undertaking may engage in activities related or ancillary to the operation of a collective investment undertaking and in activities related to or ancillary to asset management and may engage in no other activities.
- (3) A market intermediary shall at all times act in compliance with the Act, Regulations and rules made under the Act and with any other applicable financial services law or any regulatory requirements of the Authority.
- (4) A market intermediary shall not act in a way that brings the capital markets of Botswana into disrepute.

5. Relations with the Authority

- (1) A market intermediary and any financial group of which it is a part shall, at all times, co-operate with the Authority and give the Authority such

reasonable assistance as the Authority may require for the performance of its functions.

- (2) A market intermediary shall make payments of fees promptly.
- (3) All fees and charges specified in these rules shall be payable to the Authority in such form or manner as it may approve.
- (4) A market intermediary and financial group shall give the Authority reports and notifications as specified in Schedule 1.
- (5) The Authority may prescribe the form in which audited financial statements of market intermediaries should be published.
- (6) Where the Authority, after consultation with the market intermediary, directs the market intermediary to do or refrain from doing anything and where the Authority affirms that it has reason to believe that the action (or the prevention of the action) is necessary in the interests of the investors or the capital markets, the market intermediary shall comply.
- (7) The Authority may require the market intermediary to appoint an appropriately qualified person to undertake a study into a matter related to the performance of a market intermediary with its regulatory obligations or the performance of the business and to copy the report to the Authority. The Authority may specify the person to be appointed to undertake the task.

6. Relations with clients

- (1) A market intermediary shall have a duty of care to its clients and shall act fairly and with due diligence in the best interests of its client when providing services to the client in accordance with the client agreement.
- (2) A market intermediary may disapply sub rule (5), (7), (8), and (11) when providing services to expert clients provided that the intermediary has satisfied the Authority that it has:
 - a. documented its policy for identifying and verifying clients who may be regarded as expert clients;
 - b. secured the approval of the Authority to that policy; and
 - c. undertaken the appropriate due diligence for each expert client.
- (3) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser shall have a written agreement with each client that is signed by the client and the market intermediary, and:
 - a. the client shall have a copy of the agreement;
 - b. the market intermediary shall abide by the agreement;
 - c. the agreement shall include all the information described in Schedule 2;
 - d. the market intermediary shall review the agreement no less frequently than annually; and
 - e. the market intermediary shall update the agreement whenever any material information changes and where required by the annual review.
- (4) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser shall only charge fees in accordance with a client agreement, or as may be prescribed by the Authority. A market intermediary shall not take fees or charges from a client account except in accordance with the client agreement or as prescribed by the Authority.

- (5) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser and is providing investment advice or asset management services shall not provide such services unless and until the intermediary obtains sufficient information about the client and the client's circumstances to ensure that the services provided are consistent with those circumstances. The information shall include, inter alia, particulars of:
 - a. the client's knowledge;
 - b. the client's experience;
 - c. the client's financial position; and
 - d. the client's risk appetite.
- (6) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser is not required to obtain information from a client where the services provided are confined to the execution of client orders and the client agreement states that advice will not be given.
- (7) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser shall take all reasonable steps to enable its clients or its potential clients to take informed decisions relating to their business or potential business with the market intermediary. These steps shall include, inter alia, the provision, in a clear and comprehensive manner, of information that is
 - a. clear and accurate;
 - b. sufficient for the client to make the appropriate decision;
 - c. not misleading; and
 - d. only uses meaningful, fair and accurate comparisons.
- (8) Where a market intermediary that is a broker, broker/dealer, asset manager or investment adviser is making investment recommendations to a client, the market intermediary shall take and document reasonable steps to satisfy itself that the client has a full understanding of:
 - a. the risks of the investment;
 - b. the nature of the investment;
 - c. the fees and charges associated with the investment;
 - d. the factors that are likely to affect the performance of the investment;
 - e. the terms and conditions of the investment; and
 - f. the consequences of departing from the terms and conditions (such as seeking early withdrawal of an investment that is made for a fixed term).
- (9) A market intermediary shall not make any guarantees concerning the performance of an investment unless a return is contractually guaranteed, in which case, the market intermediary shall explain on what basis that guarantee is given.
- (10) A market intermediary shall be liable to its clients for:
 - a. any unjustifiable failure to meet its commitments; or
 - b. the improper performance of its obligations
- (11) A market intermediary that is a broker, broker/dealer, asset manager or investment adviser and is providing investment advice or asset management services shall:

- a. provide suitable written advice, or take investment decisions, as the case may be, taking account of the client's financial position, investment objectives, attitude to risk and other relevant circumstances;
 - b. ensure that any claim it makes as to its independence or impartiality adequately discloses any limitation there may be on such capacity;
 - c. execute transactions on the best terms available to the market intermediary, within any parameters defined in the client agreement;
 - d. refrain from undertaking investment transactions of a frequency that is inappropriate for the client; and
 - e. conduct an annual review of the client's investment portfolio and provide a written report to the client of the outcome of the review.
- (12) A market intermediary that is a management company, a person operating a collective investment undertaking, a custodian or a trustee of a collective investment undertaking shall act in accordance with the constituting documents and prospectus of the CIU

7. Complaints

- (1) A market intermediary shall have a complaints procedure that is disclosed to the client and displayed in a public area.
- (2) A market intermediary shall deal with each complaint in a fair and timely manner, and shall inform the client of the outcome. Depending on the nature of the complaint, the market intermediary shall
 - a. provide appropriate restitution, where the complaint is justified;
 - b. address any weaknesses in the internal systems that led to the action causing the complaint; and
 - c. document any actions taken.
- (3) The complaints procedure shall include, inter alia, the following elements:
 - a. the allocation of responsibility to a person other than that about whom a complaint was made or who was responsible for the actions that led to the complaint;
 - b. the target timetable for dealing with the complaint;
 - c. the deadlines for informing the complainant of progress with dealing with the complaint, which shall not leave the complainant without information for more than three months; and
 - d. an appeal to the chief executive (or another appropriately senior officer nominated by the chief executive) where the complaint cannot otherwise be resolved.
- (4) The client shall be informed of his right to take action through the courts if the client does not consider that the complaint has been satisfactorily resolved.
- (5) A market intermediary shall inform the Authority of any complaints still unresolved more than three months after they were received.
- (6) A market intermediary shall maintain a record of complaints that identifies:
 - a. the person from whom the complaint was received;
 - b. the nature of the complaint;
 - c. the officer dealing with the complaint;
 - d. the officer about whom the complaint was made or who was responsible for the action that led to the complaint;

- e. the progress in dealing with the complaint;
 - f. the way the complaint was resolved; and
 - g. the time it took to resolve the complaint.
- (7) A market intermediary shall also maintain a summary register of complaints.

8. Client money

[Explanatory Note: This rule does not apply to market intermediaries who do not handle client money]

- (1) A market intermediary shall safeguard any client money entrusted to it.
- (2) A market intermediary who receives or holds client money shall open one or more client accounts in a bank approved by the Bank of Botswana.
- (3) A client account is a bank account controlled by a market intermediary and into which client money is paid. Client accounts may be general accounts, containing funds for a number of clients or a separate client account containing money from just one client. A client account shall have the words "client account" in the name of the account and shall be separate from any other accounts controlled by the market intermediary. The market intermediary shall document the fact that the money in the client account is held in trust for the clients.
- (4) A market intermediary shall immediately pay into a client account all client money coming into its hands for or from a client and shall ensure that interest and income accruing to the client is credited to the account.
- (5) A market intermediary shall obtain from the bank at which a client account is held, a written statement of acknowledgement that the client money in the client account is held in trust for the client or clients and is not available to offset any obligations of the market intermediary. The written statement shall be held by the market intermediary in its records.
- (6) Only client money may be paid into the client account, unless it is paid in to replace money withdrawn in error and in that case, the error shall be documented.
- (7) A market intermediary who has control of client money in a client account may only:
 - a. pay the client money to the client or a bank account in the client's name;
 - b. transfer the money to another client account; or
 - c. use the client money in settlement of an obligation of the client (including an obligation to pay the fees of the market intermediary, to purchase securities or units in a collective investment undertaking) either on the instructions of the client or in accordance with a written agreement with the client.
- (8) A market intermediary shall ensure that the management of client accounts is such that:
 - a. client money held for one client shall never be used to meet the obligations of another;
 - b. the total funds in a client account held for multiple clients shall never be less than the total obligations to clients; and
 - c. no client account shall ever be overdrawn.

- (9) Every day, a market intermediary shall reconcile the records showing the money being held on behalf of each client with the client bank accounts. Where there is more than one client account, the reconciliation shall apply to each client account separately as well as to all client accounts in aggregate.
- (10) The reconciliation shall be conducted by an officer who is different from the officer with responsibility for authorising payments from the client account.
- (11) Except where the client is a collective investment undertaking, a market intermediary shall send a statement to each client setting out the details of client transactions that involve the movement of client money and showing the amount owed by the market intermediary to the client (or vice versa) at the end of the period. For clients with more than ten transactions a month, the statement should be sent monthly. For all other clients, the statement should be issued every six months, unless there were no transactions in the period. All clients should receive a statement no less frequently than annually.

9. Client Assets

[Explanatory Note: This rule does not apply to market intermediaries who do not have control of client assets]

- (1) A market intermediary who has control over client assets shall ensure that the legal title to the assets is registered to:
 - a. the client; or
 - b. a company controlled by the intermediary, which shall hold no assets other than client assets; or
 - c. a licensed market intermediary, whose licence permits it to act as a custodian.
- (2) A market intermediary shall not dispose of client assets except:
 - a. on the instructions of the client; or
 - b. according to the terms of a client agreement.
- (3) A market intermediary who provides investment advice or asset management services shall provide the client a statement that shows, inter alia:
 - a. a list of the assets held on behalf of the client;
 - b. a valuation of the portfolio in aggregate;
 - c. transactions undertaken since the last statement and
 - d. the value and quantity of the specific assets held.For clients with more than ten transactions a month, the statement should be sent monthly. For all other clients, the statement should be issued every six months, unless there were no transactions in the period. All clients should receive a statement no less frequently than annually.
- (4) A market intermediary shall ensure that evidence of title to assets is safely maintained whether such title is in certificated form or in the form of electronic book entries. The record shall show when the asset was acquired, who the beneficial owner is, how title is established and who has legal title to the assets.
- (5) A market intermediary shall undertake a reconciliation no less frequently than monthly of the record of any assets held by the market intermediary on behalf of clients, both individually and in aggregate and

compare that with the evidence of title of assets controlled by the market intermediary, whether in the form of immobilised securities or those held in certificated form (if any).

- (6) A market intermediary shall not lend client assets, or pledge them against any obligation without the written instruction of the client and the written approval of the Authority to engage in securities lending. The written instructions of the client shall include the terms of the lending.
- (7) Where a market intermediary is acquiring client assets through a process of subscription for public offers and is subscribing on behalf of more than one client, the market intermediary shall allocate any securities received fairly according to a method that is documented and disclosed to clients. Where the market intermediary itself is also engaged in the subscription on its own account, the market intermediary shall separate its own subscription from that undertaken on behalf of clients.

10. Executing Client Orders

[Explanatory Note: This rule does not apply to market intermediaries who do not execute orders on behalf of clients]

- (1) A market intermediary shall not purchase assets on behalf of a client unless the market intermediary is satisfied that the client has access to sufficient funds or securities on a timely basis.
- (2) A market intermediary may only lend funds to the client for the purpose of purchasing securities if it has satisfied the Authority that it has adequate credit risk management arrangements in place and the Authority considers that it is otherwise appropriate for the market intermediary to engage in such lending.
- (3) A market intermediary shall not make a purchase or sale on behalf of a client unless it has an instruction to do so (or is operating in accordance with a client agreement or collective investment undertaking constituent document, as the case may be). The instruction shall be in writing unless the market intermediary has sufficient systems in place to protect itself against fraud or misunderstanding.
- (4) A market intermediary shall record the time and date that a client instruction is received using a time stamping or other secure method.
- (5) A market intermediary shall execute client orders promptly (except where market conditions render this impractical or unwise) and shall effect that order in the chronological sequence in which it was received. Clients should be informed promptly if market circumstances result in a delay in the execution of their order.
- (6) A market intermediary shall record the time and date of executing the order.
- (7) Client orders should always be executed before those of a market intermediary itself, its shareholders, staff or agents.
- (8) A market intermediary shall not aggregate a client order with an order by the market intermediary itself, its shareholders, staff or agents.
- (9) A market intermediary that is a broker or a broker/dealer shall deal for a client on the best terms available to the market intermediary, within any parameters defined in the client agreement.

- (10) A market intermediary shall ensure that transactions it executes are allocated to clients who gave the orders in a timely and equitable manner.
- (11) A market intermediary shall report all trades in securities otherwise than on a licensed securities exchange in any manner as may be prescribed by the Authority.

11. Contract Notes

[Explanatory Note: This rule does not apply to market intermediaries who do not execute orders]

- (1) A market intermediary shall, in respect of every contract for the purchase or sale of securities entered into by him (whether as principal or agent), not later than the end of the next trading day after the contract was entered into, make out a contract note which complies with sub rule (2) and:
 - a. where the contract was entered into by the market intermediary as agent, deliver the original contract note to the person on whose behalf it entered into the contract; or
 - b. where the contract was entered into by the market intermediary as principal, retain the contract note for himself.
- (2) Where the client is an expert client, the market intermediary may agree with the client that contract notes may be made out and delivered according to a timescale that is acceptable to both parties and that individual contract notes may contain the details of multiple transactions.
- (3) The contract note prepared by a market intermediary shall state whether it is in respect of a purchase or sale of securities and shall include –
 - a. the name of the market intermediary and the address of the principal place at which it carries on business;
 - b. where the market intermediary is acting as principal, a statement that it is so acting;
 - c. where the market intermediary is acting on behalf of a client:
 - i. the name and address of the person (if any) to whom the market intermediary is required to give the contract note;
 - ii. (where different) the name of the person for whom the transaction was undertaken; and
 - iii. the name of the person who gave the instruction
 - d. the date of the contract, and the date on which the contract note is made out;
 - e. the quantity and description of the securities the subject of the contract;
 - f. the price per unit of the securities;
 - g. the rate or amount of commission payable in respect of the contract;
 - h. the amount of stamp duty (if any), payable in connection with the contract and, where applicable, in respect of the transfer;
 - i. the date of settlement; and
 - j. such other information as may be prescribed by the Authority to ensure that there shall be a complete audit trail in respect of the

execution of client instructions and the settlement of market transactions.

12. Minimum financial requirements

- (1) A market intermediary shall ensure that the intermediary has and maintains at all times minimum financial resources as specified in the Non-Bank Financial Institutions Regulatory Authority (Market Intermediary)(Licensing) Regulations 2012- or such other amount as the Authority may specify. Where the market intermediary undertakes more than one activity, the minimum financial requirements shall be the sum of the amounts specified for each of those activities in the Regulations and rules.
- (2) The Authority may increase the minimum financial requirements under sub rule (1) as it may deem necessary depending on the risk profile of the market intermediary.
- (3) Notwithstanding the minimum requirements imposed under this rule, a market intermediary shall ensure that it has such additional financial resources as are necessary having regard to the nature, size, and complexity of its business for the purpose of guarding against the risk of failure to fulfil liabilities as they fall due.

13. Accounts and Audit

- (1) A market intermediary shall maintain accounts according to the requirements of the Financial Reporting Act, the non-bank financial institutions (securities business) (corporate governance) rules 2012, the requirements of the Botswana Institute of Chartered Accountants and such other requirements as the Authority may determine.
- (2) The accounts shall represent a true reflection of the financial position of the market intermediary and any financial group, of which it is part. If the market intermediary or financial group becomes aware of any apparent misstatement in any accounts submitted to the Authority, it shall report this fact.
- (3) A market intermediary shall adopt procedures to ensure that it is, at all times in compliance with its financial resource requirements and client asset requirements. These procedures shall include, but not be limited to:
 - a. daily reconciliations of the records of the money owed to , or held on behalf of clients with the funds available in the relevant segregated client accounts;
 - b. daily calculations of the financial resource requirements; and
 - c. the maintenance of the daily calculations and reconciliations on file.
- (4) A market intermediary shall appoint an independent auditor to carry out an audit of its accounts. The market intermediary shall ensure that:
 - a. the auditor is independent of the market intermediary;
 - b. the auditor has given written consent;
 - c. on reasonable enquiry, the market intermediary knows of no reason why the auditor should not serve as auditor;
 - d. the auditor is appropriately qualified and is authorised and competent to conduct an audit of the accounts;

- e. the auditor is provided by the market intermediary, with all material information that is relevant to the audit and that the market intermediary shall sign a declaration to this effect; and
 - f. the auditor has the right of access to all accounting and other records of the market intermediary and the right to require such information and explanations as the auditor considers necessary to perform its functions;
 - g. all information and explanations given to the auditor is accurate and neither false nor misleading.
- (5) A market intermediary or any financial group of which it is a part, shall not appoint an auditor without the approval of the Authority. The auditor shall have appropriate professional indemnity Insurance.
- (6) The Authority may make a determination that an auditor is not independent or is otherwise not suitable to carry out an audit of a market intermediary or any financial group of which it is a part and may thereby give a direction that an auditor may not carry out the audit. The Authority shall provide the market intermediary with an opportunity to make representations on this matter. If having considered the representations, the Authority considers that the auditor is not independent, it shall inform the market intermediary or financial group, as the case may be, who shall then appoint another auditor.
- (7) If a partner of a firm is carrying out the internal audit function of a market intermediary or any financial group of which it is a part, a different firm shall be appointed as external auditor.
- (8) A market intermediary and any financial group of which it is a part shall sign an engagement letter with the auditor that:
- a. defines the scope of the audit;
 - b. includes a requirement that the auditor should make a report to the Authority without delay if the auditor becomes aware of a material breach of the regulatory requirements that has not been reported to the Authority;
 - c. provides that, if the auditor resigns from the appointment as auditor to the market intermediary, or any financial group of which the market intermediary is a part, the auditor shall inform the Authority, within four weeks, of the resignation and the reasons for the resignation; and
 - d. includes an indemnity that, if the auditor chooses, in good faith, to make a report to the Authority about any matter in connections with regulatory obligations, neither the market intermediary nor any financial group of which it is a member shall take any action against the auditor for breach of confidentiality.
- (9) The audit shall be conducted according to the requirements of the Financial Reporting Act and the International Standards of Auditing as applied in Botswana according to the Botswana Institute of Chartered Accountants.
- (10) A market intermediary and any financial group of which it is a part shall give the auditor such facilities as he or she may reasonably expect.
- (11) The audit reports of the market intermediary and any financial group of which it is a part shall include, inter alia, the following statements, if the auditor believes them to be true:

- a. the financial statements have been prepared according to these rules;
 - b. the audited balance sheet, off balance sheet commitments, profit and loss and income and expenditure statements accord with the market intermediary's records or those of the financial group, as the case may be;
 - c. proper records have been kept throughout the accounting year;
 - d. the financial resource requirements are in accordance with the Regulations and rules at the financial accounting date,
 - e. the market intermediary has conducted regular reconciliations of client money and regular calculations of financial and working capital requirements in accordance with these rules and has kept the appropriate records of these reconciliations and calculations; and
 - f. there is no evidence that the financial resource requirements have been breached during the course of the year that is the subject of the audit.
- (12) If the auditor has submitted a letter to a market intermediary or any financial group of which it is a part with any observations on the audit, this letter shall be submitted to the Authority.
- (13) Where an auditor is removed by a market intermediary or any financial group of which it is a part, the market intermediary or financial group, as the case may be, shall notify the Authority and provide an explanation. The Authority may seek further explanations from the auditor. A failure to renew an appointment when the auditor was otherwise willing and eligible to continue the appointment shall be deemed to be a decision to remove an auditor for the purposes of this rule.
- (14) A market intermediary that is a company shall publish an annual report that includes its audited financial statements within five months of the end of the financial year to which the statements relate.

14. Conflicts of Interest

- (1) A market intermediary shall identify the conflicts of interest that are likely to occur in the course of its business and adopt appropriate policies designed to minimise the impact of any conflict of interest.
- (2) A market intermediary that is part of any financial group shall also consider the conflicts of interest that may arise as a result of its membership of that financial group.
- (3) Policies designed to mitigate conflicts of interest shall include, inter alia:
 - a. refusing to act in certain circumstances;
 - b. where it is appropriate to act, disclosing the conflict of interest to the client;
 - c. training staff in respect of the conflicts of interest and the procedures to avoid or manage such conflicts of interest;
 - d. obtaining undertakings from staff that they shall not seek to exploit information gained from clients for their personal benefit;
 - e. arranging appropriate internal barriers of communication or records;
 - f. ensuring that the client's interests are placed above those of the market intermediary; and

- g. for market intermediaries who are brokers, asset managers or investment advisers, reviewing the client relationship no less frequently than annually to ensure that the client's interests are not being compromised and documenting the results of the review.
- (4) A market intermediary shall not take any fee, charge, commission or other payment from a third party that may encourage the market intermediary to act in a way other than in the best interests of the client.
- (5) A market intermediary shall not take advantage of information gained from services provided to one client to benefit another client, the intermediary itself, or any of its shareholders, staff or agents or any other companies in a financial group of which it may be a member.
- (6) A market intermediary that issues commentaries on trading results shall ensure that the commentary is accompanied by:
 - a. The name of the person who compiled it
 - b. Disclosure of the source from which it was obtained.
- (7) Where a market intermediary or a financial group of which it is a part has a material interest in a transaction to be entered into with or for a client, or a relationship which gives rise to a conflict of interest in relation to such a transaction, the market intermediary shall not knowingly either advise, or deal in the exercise of discretion, in relation to that transaction unless it has –
 - a. disclosed that material interest or relationship, as the case may be, to the client; or
 - b. taken reasonable steps to ensure that neither the material interest nor relationship adversely affect the interests of the client.
- (8) A market intermediary shall not receive any gift or benefit (and shall ensure that no staff or agent receives such a gift or benefit) that may be regarded as likely to conflict with the duties owed to the client.
- (9) The Authority may give details of circumstances where all market intermediaries shall decline to act or put special mitigating procedures in place and may direct any market intermediary to refuse to act where the Authority determines that a conflict of interest exists that cannot be safely managed in any other way. The market intermediary shall abide by any directions of the Authority.

15. Confidentiality and Security

- (1) All information in the possession of a market intermediary and financial group about a client or third parties shall be kept confidential unless disclosure is permitted by law, (which, for the avoidance of doubt, shall include disclosures to the Authority).
- (2) A market intermediary shall adopt a documented policy and procedures that are designed to ensure that information obtained from clients, about clients and their orders and confidential information obtained from or about third parties is kept confidential and secure.
- (3) The policies and procedures referred to in sub rule (2) shall include, inter alia, :
 - a. undertakings by staff, agents and other third parties who are engaged to provide services for the market intermediary to maintain confidentiality as part of the contract of employment or other contract;

- b. policies that determine which officers may have access to which information;
 - c. procedures which effectively restrict access to confidential information to such officers through the use of locked cupboards and encryption protected information within the market intermediary's information technology system;
 - d. procedures that ensure that, where information is passed to another person, that information remains subject to the same standards of security and confidentiality as are imposed by the market intermediary.
- (4) A market intermediary shall also have policies and procedures that are designed to safeguard the integrity of any electronic record or transaction recording system. The policies and procedures shall include but not be limited to:
- a. training the staff in the operation of the system, identifying which staff are permitted to make entries into the electronic system and restricting access to such staff;
 - b. identifying the officers who have the ability to make changes to electronic records, once created, and specifying the circumstances that permit this;
 - c. instituting appropriate double locking systems to prevent one person amending existing electronic records without the approval of another suitably qualified and senior officer; and
 - d. ensuring that the technology always keeps an audit trail of changes to the system and that such audit trail cannot be amended or deleted.

16. Advertisements

- (1) A market intermediary is responsible for the truthfulness, clarity, fairness and reasonableness of any advertisements that it issues or that is issued on its behalf.
- (2) A management company and a person operating a collective investment undertaking are also responsible for any advertisement issued on behalf of the undertaking.
- (3) A market intermediary shall not publish or cause or permit to be published
 - a. any advertisement which does not contain clear, fair and accurate information that can be sustained by the market intermediary on the basis of objective evidence;
 - b. any advertisement which hides, diminishes or obscures important statements or warnings;
 - c. any advertisement which makes a prediction, forecast or guarantee which cannot be justified by reference to objective data;
 - d. any advertisement that does not include a warning that past performance is not an indicator of future performance;
 - e. any advertisement which provides an indication of the benefits of a service or investment without also giving a clear, truthful and fair indication of the corresponding costs and risks, in a reasonably prominent manner;
 - f. any advertisement that is not capable of being readily understood by the group for which it is intended.

- (4) If a market intermediary becomes aware that an advertisement it has issued does not or no longer complies with the rules, it shall withdraw that advertisement and take reasonable steps to inform those who may still be relying on that advertisement, that it is withdrawn.
- (5) Any advertisement issued by a market intermediary or on its behalf shall include the name and address of the market intermediary.
- (6) Any advertisement issued by a market intermediary or on its behalf shall include a statement that the market intermediary is regulated by the Authority.
- (7) A market intermediary shall determine and document which officers have authority to approve advertisements issued by the market intermediary.
- (8) A market intermediary shall provide copies of any advertisements it has issued, or which have been issued on its behalf to the Authority.
- (9) The Authority may specify the basis on which past performance may be calculated when used in advertisements;
- (10) The Authority may require a market intermediary to submit advertisements to it for approval prior to their being issued if the authority has reason to believe that this is necessary to ensure that the advertisements comply with these rules. The market intermediary shall comply.
- (11) If the Authority directs a market intermediary to withdraw an advertisement on the grounds that it does not comply with the requirements of the rules, the market intermediary shall do so.

17. Prevention of market abuse

- (1) Where a market intermediary has a client order to execute, or where it intends to publish to clients a price-sensitive recommendation or research or analysis, neither the market intermediary nor any financial group of which it is a part shall effect an own account transaction in the securities concerned or in any related investment until the order has been executed or until the clients for whom the publication was principally intended have had, or are likely to have had, a reasonable opportunity to react to it.
- (2) A market intermediary shall not –
 - a. deal or arrange a deal in the exercise of discretion for any client; or
 - b. advise a client to deal,if the dealing could in the circumstances reasonably be considered as too frequent or too large having regard to the trading activities, investment objectives, size and operations of such client .
- (3) A market intermediary shall not deal in securities on its own account where it may reasonably be supposed that the price at which the securities are dealt was influenced by transactions prompted by recommendations or statements made by the market intermediary or any person associated with the market intermediary.
- (4) A market intermediary shall take reasonable steps to ascertain if any of its clients are insiders and maintain records accordingly to assist in the monitoring of insider dealing.
- (5) On each occasion that a client places an investment order with a market intermediary, the market intermediary shall obtain from the client –

- a. details as to the origin and source of the money or funds used or to be used for the investment;
- b. where the money or funds originate from outside Botswana, a confirmation from the remitting entity of the nature of its business and details as to the source of the money or funds; and
- c. a written declaration by the client confirming –
 - i. the accuracy of all information given under subparagraph (a) or (b);and
 - ii. that the money or funds used for the investment in securities does not arise from the proceeds of any money laundering or other illicit activities.

18. Offences and Penalties

- (1) The civil penalties that may be imposed by the Authority in the event of a breach, in accordance with Section 79 of the Act shall include:
- a. fines up to a maximum of P50 000.00;
 - b. a public statement of censure;
 - c. a condition on a licence;
 - d. revocation or suspension of a licence; or
 - e. any other penalty provided for in Section 79 of the Act.

SCHEDULE 1
REPORTING TO THE AUTHORITY
RULE 4(4)

1. General requirement

- (1) A market intermediary and a financial group shall submit such reports to the Authority as the Authority may request.

2. Annual reporting

- (1) A market intermediary and a financial group shall inform the Authority of the financial year that it adopts for its annual accounts and shall not change that financial year without the approval of the Authority.
- (2) Within three months of the end of its financial year, a market intermediary and a financial group shall submit in such form as the Authority may direct its audited financial statements to the Authority and the financial statements shall include, but not be limited to:
 - a. the balance sheet as at the last day of the financial year, showing all assets and liabilities and demonstrating the market intermediary's compliance with the financial resource requirement imposed by the Authority;
 - b. any actual, or potential off balance sheet commitments, including inter alia, guarantees, that the market intermediary or financial group had incurred and which had not been extinguished at the end of the financial year;
 - c. the profit and loss and income and expenditure account; and
 - d. any opinion given by an auditor in relation to the accounts.
- (3) A market intermediary shall provide the Authority, annually, with an updated list of its key persons, shareholders and controllers, its address, a list of principal activities and any business names it uses.
- (4) A market intermediary shall provide the Authority with an update, annually, of the structure of any financial group, of which it is a part.
- (5) A market intermediary shall provide the Authority with a list of employees with their qualifications and experience where they are occupying a position for which certain qualifications and experience are specified.
- (6) A market intermediary shall provide the Authority with a report on the key decisions the Board has made in accordance with the Non Bank Financial Institutions (securities business) (corporate governance) rules 2012
- (7) A financial group shall provide financial statements on a consolidated basis for the group as a whole and shall also provide separate financial statements for the market intermediary forming part of the financial group.

3. Quarterly reporting

- (1) No later than one month after the end of each quarter of its financial year, a market intermediary shall submit to the Authority:
 - a. unaudited management accounts showing the balance sheet for the end of the quarter, off balance sheet commitments, the profit and loss and income and expenditure accounts for the quarter, and the calculation of the financial resource requirements for the end of the quarter;

- b. the number of complaints received by the market intermediary during the specified period and the number outstanding for over three months;
 - c. any changes to the information given by the market intermediary in respect of its name, address, key personnel, nature of business; and
 - d. any change in other information that would reasonably be regarded as relevant to a determination of the market intermediary's continuing fitness and properness.
- (2) A market intermediary shall report the total number of clients for which services are being provided in respect of each licensed activity that the market intermediary provides
- (3) A market intermediary that is a management company or a person operating a collective investment undertaking should also report:
- a. the number and name of undertakings that are being managed;
 - b. the assets of each undertaking as at the first and the last business day of the reporting period;
 - c. the value of each undertaking on the first and last business day of the reporting period;
 - d. in the case of interval and open ended undertakings, the number and value of participations in issue on the first business day of the reporting period, the number and value of participations sold in the period and the number and value of participations in issue on the last business day of the reporting period;
- (4) A market intermediary that is an asset manager should report the amount of funds under management.
- (5) A market intermediary that is a trustee or custodian shall report the names of the collective investment undertakings for which services are provided and the total value of the assets held for each collective investment undertaking.

4. Advance notification

- (1) A market intermediary shall provide the Authority with four weeks advance written notification of the following matters:
- a. any change in the name, business name (if different), business address, or nature of business, including any decision to withdraw from any area of business;
 - b. any new appointments to the key personnel;
 - c. any change to the external auditor;
 - d. any decision to seek a licence from another regulatory authority in Botswana or abroad;
 - e. any change to its financial year and hence to its annual reporting date;
 - f. any change in controller or shareholder;
 - g. a substantial acquisition;
 - h. any change to its premises and any new premises it may acquire;
 - i. any other material change in the information supplied in any application for a licence or any other matter; or
 - j. a decision to surrender its licence.

- (2) The advance notification shall be accompanied by an application for permission to make the change if required by the Non-Bank Financial Institutions (Market Intermediary)(Licensing) Regulations 2012.
- (3) If a market intermediary becomes aware that it has failed to give advance notification in respect of any the matters specified in this rule, the market intermediary shall give immediate notice of the matter to the Authority, together with an explanation of the circumstances that resulted in a failure to provide the prescribed advance notice.

5. Immediate notification

- (1) A market intermediary shall inform the Authority immediately should any of the following events occur:
 - a. any event which could reasonably be expected to affect the Authority's assessment of the ongoing fitness and properness of the market intermediary, its controllers, shareholders or key personnel;
 - b. a breach of the regulatory requirements applicable to the market intermediary or a change, misstatement or error in any of the information provided to support the licence application that might reasonably be expected to affect investors' interests or the Authority's assessment of the ongoing fitness and properness of the market intermediary, its controllers, shareholders or key personnel;
 - c. a reduction in financial resource requirements below 120% of the minimum specified in the Regulations or rules or a reduction in 50% since the previous report to the Authority;
 - d. any concern by the market intermediary that it may not be able to meet obligations, including obligations to clients, as they fall due;
 - e. any shortfall in the funds held in the client account as compared with the total obligations to clients;
 - f. any discrepancy between the records of assets held on behalf of clients and the evidence held of legal title to those assets;
 - g. any inability to comply with any instruction or direction of the Authority imposed in accordance with the Act, Regulations or rules;
 - h. any fraud on the market intermediary (including a fraud that affects money or assets held on behalf of clients) by any person including, inter alia its employees or clients;
 - i. any disciplinary action against any of the key personnel of the market intermediary;
 - j. any investigation, finding or conviction relating to the market intermediary, any of its controllers, shareholders or any of its key personnel by a law enforcement authority, regulatory authority (including, inter alia, a self regulatory organisation), or professional association;
 - k. any civil claim against the market intermediary in excess of 25% of the market intermediary's minimum financial resource requirement;
or
 - l. any litigation instigated by the market intermediary.
- (2) A market intermediary shall make public the information described in sub paragraphs (g), (h), (i), (j) or (k), unless the market intermediary informs the Authority and the Authority is satisfied that such public disclosure would not be in the interests of the Botswana capital markets.

**SCHEDULE 2
CLIENT AGREEMENTS
RULE 5(4)**

An agreement between a market intermediary and a client shall include, but is not limited to, the following matters:

[Explanatory Note: This schedule does not apply to the constituent documents of collective investment undertakings that govern relations between the undertakings and its functionaries.]

1. Short form agreement

- (1) Where a market intermediary engages in a single transaction with a client, the agreement shall include, but not be limited to:
- a. essential information about the market intermediary, including its name, address and contact information.
 - b. the services to be provided, including, inter alia:
 - i. a statement as to whether the market intermediary is providing advice or acting solely on the instructions of the client); and
 - ii. if the intermediary is providing advice, the nature and scope of that advice;
 - c. the fees or other charges to be levied by the market intermediary (or the way in which the fees will be calculated), so that the client is able to understand the total cost of the services being provided.

2. Agreements for all other clients

- (1) Where a market intermediary provides services to clients on a longer term basis, or where it is envisaged that there may be two or more single transactions, the agreement shall include, inter alia:
- a. essential information about the market intermediary, including:
 - i. its name and address;
 - ii. Its contact information;
 - iii. Its licence category; and
 - iv. scope of activity;
 - b. the services to be provided, including inter alia:
 - i. a statement as to whether the market intermediary is providing advice or acting solely on the instructions of the client);
 - ii. if the market intermediary is providing advice, the nature and scope of that advice;
 - iii. If the market intermediary is providing investment advice or asset management services, the performance of the market intermediary; and
 - iv. The status of the client – as an expert client or otherwise.
 - c. the fees or other charges to be levied by the market intermediary (or the way in which the fees will be calculated), so that the client is able to understand the total cost of the services being provided;
 - d. the nature or basis of commissions (if any) to be received by the market intermediary from third parties where these are related to the services provided to the client;

- e. the obligations of the client, including, inter alia, the way in which instructions shall be given and the timing of payments to be made to the market intermediary in respect of fees, charges, commissions and transactions;
- f. the rights of the client, including inter alia:
 - i. the right to ask for information on the experience, qualifications, and disciplinary history of the market intermediary, its key personnel and the officer providing services to the client;
 - ii. the rights to interest on funds held by the market intermediary (or if there is no such right, the fact that this is so); and
 - iii. the right to make a complaint and to have that complaint dealt with fairly and promptly;
- g. the obligations of the market intermediary in respect of the services to be provided, including, where relevant to the service, inter alia:
 - i. any limitations on the ability of the market intermediary to obtain the best terms available for any investment;
 - ii. any limitation on the type, geographical location of class of investment products about which advice shall be given;
 - iii. any other limitation on the capacity of the market intermediary to give impartial and independent advice;
 - iv. the frequency of reviews of the client's investment portfolio and performance; and
 - v. The method of securing the client's title to assets purchased;
- h. the arrangements for securing title to and the arrangements for custody of securities bought including the use of nominee accounts, the use of a custodian (where appropriate) and other matters;
- i. any other terms and conditions of the agreement, including the notice to be given in respect of any changes to it or its termination;
- j. any connections between the market intermediary and other relevant third parties that could affect the services being provided, such as a requirement on the part of the market intermediary only to deal through certain third parties or only to recommend certain investment products;
- k. information on the market intermediary's complaints procedure as established in accordance with these Rules; and
- l. the fact that the market intermediary is regulated by the Authority.

**SCHEDULE 3
DECLARATION BY EXPERT CLIENT**

I certify that I am

In possession of P1000 000.00 of assets which are available for investment and which do not include my main residence;*

A financial services business licensed to conduct regulated activity*

A bank licensed in(please state jurisdiction) by
.....(please state licensing authority)*

An institutional investor*

and that I recognise that:

some the protections afforded to clients by the Market Intermediaries' Conduct of Business rules 2012 will not apply;

I may be advised to engage in transactions that may not be regarded as suitable for the generality of investment clients.

Name.....Date.....

- Delete that which does not apply