



ACH Clearing Rules Guidance Note No. 5

KEY TOPICS

1. Conditions
2. Electronic Methods
3. “Written Agreement”.
4. Requirement for a signature
5. The method must be as reliable as appropriate in the circumstances
6. Execution by joint holders
7. Execution by Companies
8. Copy of Client Agreements

ACH CLEARING RULES

1. 7.1

Guidance Note History

Revised:

11 March 2004 – New Rule introduction

Previously:

11 August 2003
OCH Derivatives Clearing Rules

NEW CLIENTS – ELECTRONIC CLIENT AGREEMENTS

Purpose

The purpose of this Guidance Note is to provide assistance to ACH Clearing Participants (“Participants”) in relation to their obligations when executing client agreements for Derivatives Market Transactions.

Background

The ACH Clearing Rules and Procedures (“Rules”) require Participants, to enter into a written Client Agreement for Derivatives Market Transactions (“Client Agreement”).

Historically, the requirement to enter into a **written** agreement has been interpreted as a hard copy agreement signed by the client. However to provide consistency with international and Australian trends towards electronic commerce, the Australian Clearing House (“Clearing House”) will permit electronic agreements subject to minimum standards to protect investors, promote investor confidence and commercial certainty.

The Clearing House’s policy in relation to electronic Client Agreements – Derivatives Market Transactions is based on three principles:

Functional equivalence

Paper Client Agreements and electronic Client Agreements are treated equally by the Rules and not given an advantage or disadvantage against each other.

Investor Protection

Ensure that investors entering into electronic Client Agreements are no worse off than those entering into paper based agreements (and vice versa).

Technological neutrality

The Rules do not discriminate between different forms of technology.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 1 of 7



Clearing House Policy

The Clearing House prescribes the minimum terms Participants must incorporate into their Client Agreements, although the Rules do not prescribe what mediums Participants are permitted to use in executing these agreements.

The Clearing House does not intend to prescribe particular acceptable electronic technologies, as it is of the view that it is more appropriate for Participants to assess suitable technology for their particular purposes.

Subject to the Participant complying with the conditions set out below, the Clearing House is of the belief that Participants will discharge their obligations under the Rules. Failure to comply with the stated policy may be taken into account in determining whether a Participant has breached the Rules.

Conditions

The Participant's Client Agreements must contain the minimum terms prescribed by the Clearing House;

1. The Participant must obtain executed hard copies of the Addendum to the Client Agreement – Derivatives Market Transactions (Paperless Collateral) from its clients, and provide the original completed Addendum to the Clearing House;
2. The client must view the terms and conditions of the Client Agreement before executing the Client Agreement. The Participant must provide a hard copy of the Client Agreement if requested by the client.
3. The Participant must provide an explanation of the effect of the Client Agreement (that the client is entering into a contract) and the client must acknowledge that they understand the explanation. The explanation must be provided prior to the applicant entering into the Client Agreement. The explanation may be provided electronically and the acknowledgment may be made electronically.
4. Prior to the client executing the Client Agreement, the Participant must inform the applicant that they can discuss the terms and conditions of the Client Agreement with the Participant. The Participant must provide the client with contact details of a person at the Participant who can explain the effect of the Client Agreement and the terms and conditions. The contact details must be stated in the Client Agreement; and

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 2 of 7



5. Within 3 Business Days after execution, the Participant must provide the client with a copy of the executed Client Agreement including details of the time and date of execution and name and address of signatories. This may be provided electronically although the Participant must provide a paper copy if requested by the client.

Possible Electronic Methods

Detailed below are some possible methods which a Participant may wish to consider fulfilling its minimum requirements in relation to electronic Client Agreements. Participants are advised that these methods are merely a guide, and that the Clearing House recognises that other methods may fulfil the minimum standards.

The requirement for a “Written Agreement”

Interpretation

The Rules require a written Client Agreement between a client and its Clearing Participant. Neither the Rules nor statutory legislation defines a “written agreement” although the Corporations Act and the Commonwealth Acts Interpretation Act (Cth) contemplates writing and documents in electronic form.

The Clearing House considers that the Rule is fulfilled by a paper document or through using electronic methods that are reliable, appropriate, and valid at law. The applicant must view a paper document, an electronic image capable of being printed out or viewed electronically, or an electronic image on-line, before executing the Client Agreement.

Possible Methods

Participants may:

- incorporate the Client Agreement into their web-site; or
- send applicants the Client Agreement by electronic mail, or hard copy.

Participants must provide a hard copy if requested by the client.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 3 of 7



The requirement for a signature

Interpretation

There is no definition of the word “Signed” in either the Corporations Act or the Commonwealth Acts Interpretation Act. Whilst there is no express requirement for a signature contained in the Rules, under the law the requirement to enter into an *agreement* requires a “signature”. It is expected that entering into a Client Agreement will form part of Participants’ account opening procedures, and Participants should continue to have sufficient identification procedures in place to be able to identify their client. The methods used to “sign” a Client Agreement must comply with the minimum requirements below:

The method must identify each party sufficiently for the purpose of the communication

Paper-based Client Agreements do not require a witness under the Rules. They require the applicant to provide their name and other identification required by the Participant. The electronic method is no more onerous. The electronic method need only identify the applicant it does not require a witness.

Possible Method

Each applicant types their name onto the electronic Client Agreement and provides any additional identification required for Participants to sufficiently verify the identity of their client, such as age, drivers’ licence, passport number, ABN and/or ACN for a company.

Each electronic communication must incorporate a method to identify the person signing the Client Agreement and indicate the person’s approval of the information contained in the message

The method must indicate each applicant’s approval of the terms and conditions communicated

The applicant must review the Client Agreement terms and conditions before execution and have the opportunity to accept or reject the terms. An electronic Client Agreement should clearly state that the contract will be accepted if the client clicks on an acceptance button such as “I agree” or “Yes” on the website. If the applicant does not accept the terms and conditions of the Client Agreement, the applicant should not be able to proceed any further.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 4 of 7



Possible method

The terms and conditions must be located before the execution section and each applicant must be able to accept or reject the terms and conditions. For example by having the option of clicking a button to indicate “I do not agree to be bound by the terms and conditions” or “I have read, understood and agree to be bound by the terms and conditions”. The Client Agreement is valid only if each applicant executes the contract by providing a digital signature or clicking on an acceptance button.

The method must be as reliable as appropriate in the circumstances

The Clearing House recognises that there are several methods for electronic execution available at present and that other methods may be developed in the future. It is inappropriate for the Clearing House to prescribe a particular electronic execution technology. Participants are able to require execution of electronic Client Agreements using their preferred technology. However the method must be appropriate and reliable.

Possible method

Each applicant provides a digital signature, or each applicant types their name and clicks on a button indicating that they have read, understood and agree to be bound by the terms and conditions.

The Clearing House recommends that Participants include a procedure which is able to show that only the person intended to be bound could have clicked the “I agree” button (such as password access through a Trading Account).

Whatever the method and whether the Client Agreement is in hard copy or electronic form, it must be valid and enforceable at common law.

Execution by joint holders

Interpretation

Where a Participant enters into a Client Agreement with joint holders on paper, each applicant is identified by writing their own name or their name is pre-printed on the document. Each applicant indicates their approval by signing the Client Agreement. On an electronic Client Agreement there should be provision for each applicant to separately provide their identity and indicate their approval of the terms and conditions.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 5 of 7



Possible method

If execution is by clicking a button, there should be a separate place for each applicant to type their name and a separate button for each applicant to click to accept the Client Agreement. The Client Agreement must not proceed unless each applicant has provided a digital signature or there is a name and acceptance for each applicant and any further identity details required.

The Clearing House recommends that Participants include a procedure which is able to show that only the person intended to be bound could have clicked the “I agree” button (such as password access through a Trading Account).

Execution by Companies

Interpretation

Where a Client Agreement is entered into with a company, the Participant is entitled to make the assumptions in section 129 of the *Corporations Act* in relation to dealing with a company. The Participant is advised to ask how the company executes contracts. That process should be adopted for executing the Client Agreement. The Participant may include a separate acknowledgment, to the effect that the Company has complied with its constitution and any provisions of the *Corporations Act*. The Clearing House advises Participants to seek independent legal advice should they require clarification.

Possible method

The Participant should follow the process that the company requires for executing contracts. One possible method is to have two separate boxes for names to be typed (director and director/secretary), two acceptance buttons, and a declaration the Company has complied with its constitution and any provisions of the *Corporations Act*.

Copy of Client Agreements

Interpretation

The Participant must be able to provide each applicant with a copy of the Client Agreement terms and conditions that the applicant executed.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 6 of 7



Possible method

The Participant may provide a method for the applicant to print a copy, make arrangements to send a copy, or a copy may be posted on the Participant's web-site in an area accessible only by the applicant. If the holder provides an e-mail address, a copy may be sent in electronic form to the e-mail address provided. The Participant must provide a hard copy of the Client Agreement to the holder if the holder requests one or if the holder does not provide an e-mail address. The copy must include the time and date of execution, the name and address of all signatories and all account numbers that have been allocated to the holder.

Qualification

The Clearing House has published this note to promote commercial certainty, and assist Participants. Nothing in this note necessarily binds the Clearing House in the application of the Rules in a particular case. In issuing this note the Clearing House is not providing legal advice and Participants should obtain their own advice from a qualified professional person in respect of their obligations. The Clearing House may replace this Guidance Note at any time. Readers may contact the Clearing House to ensure they have the latest version.

24 June 2005

GN 5 - New Clients – Electronic Client Agreements

11 March 2004

Page 7 of 7