

KEY TOPICS

1. Confirmation of Market Transactions to clients
2. Retail Clients
3. Wholesale Clients

ASX Market Rules

1. 7.9

Cross-reference

1. S 761G – meaning of retail client and wholesale client
2. S 1017F(5) – provision of confirmations
3. S 601FB(2) – powers of responsible entity
4. S 1017F(5A) – standing facility

Guidance Note History

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REPORTING TO CLIENTS – Confirmations

Purpose

The purpose of this Guidance Note is to outline ASX's expectations in relation to a Market Participant's obligation to give a confirmation to a client in accordance with the ASX Market Rules (the "Rules").

Background

This Guidance Note sets out ASX's interpretation of the following key principles of compliance with Rule 7.9:

- to whom and in what circumstances a confirmation must be given;
- when a confirmation must be given; and
- how a confirmation must be given.

Additionally ASX sets out guidelines in relation to confirming Market Transactions to clients.

This Guidance Note is not exhaustive and does not provide guidance in relation to all circumstances that might arise. ASX recommends that Market Participants obtain independent legal advice in relation to their obligations under the Rules as necessary.

To whom and in what circumstances a confirmation must be given

Section 1017F of the Corporations Act (the "Act") specifies that confirmations of transactions must be provided where the person acquiring the financial product is a retail client within the meaning of s. 761G. The Act does not require a confirmation to be sent to a client that is not a retail client.

The underlying policy principles of Market Rule 7.9 are that:

- a confirmation must be sent to all Retail Clients (as defined in the Rules). There are no provisions in the Rules that permit a Retail Client to opt out of receiving a confirmation; and
- it must be a term of the contract with all clients that Market Transactions are entered into subject to the conditions set out in Rule 7.9.1(b).

In order to achieve this policy objective, the structure of Rule 7.9 is that:

- A Market Participant must give a confirmation to a client irrespective of whether the client is a Retail Client or not;
- However, a Market Participant is not obliged to give a confirmation to a client that is not a Retail Client (that is, a “wholesale client”) provided that it has notified the client that Market Transactions entered into on its behalf are subject to the conditions set out in Rule 7.9.1(b). ASX will be satisfied that such notice has been given where the Market Participant is able to produce that notice and demonstrate it was given to the client before the Market Participant entered into the relevant Market Transaction(s); and
- As a consequence, if a Market Participant has not notified a wholesale client that Market Transactions entered into on its behalf are subject to the conditions set out in Rule 7.9.1(b), the Market Participant must provide a confirmation to that client in accordance with Rule 7.9.1.

Where a Market Participant relies upon the wholesale client “carve-out” afforded by Rule 7.9.3, the form and content of the provision of any confirmations becomes a matter for the commercial terms of trade between the Market Participant and the wholesale client. The terms on which transactions may be accumulated or price averaged for reporting purposes is also a matter for the commercial terms of trade.

ASX will consider that a Market Participant has satisfied its obligation under Rule 7.9.1 to give a confirmation when it has sent the confirmation:

- directly to a client;
- to an agent appointed, or a person otherwise engaged, by a client that is a responsible entity of a managed investment scheme or an Investor Directed Portfolio Service. In such circumstances the agent must be appointed, or the person engaged, either pursuant to s.601FB(2) of the Act or pursuant to ASIC Class Order 02/294;
- to a guardian of a client; or
- to a person that is a trustee in respect of a client.

ASX will not consider that a Market Participant has relevantly complied with Rule 7.9.1 if it sends a confirmation to an intermediary such as, and without limitation, a “wholesale intermediary” (for example, a financial planner), a person with power of attorney, an accountant, a person authorised to place orders on behalf of a client or a client’s employee.

Nor does ASX consider a confirmation to be given when the Market Participant or its employees retain it on behalf of a client.

The Rules do not prohibit a Market Participant from giving a copy of a confirmation to an intermediary in circumstances where a client has given the Market Participant permission and the original confirmation has been sent to the client.

When a confirmation must be given

A confirmation must be given by sending it “*as soon as practicable after the Market Participant enters into the Market Transaction*”.

A Market Participant is afforded a degree of flexibility in respect of when it is required to send a confirmation. However, this does not mean a confirmation may be sent at the Market Participant’s convenience. As a general principle a Market Participant should ensure that confirmations are sent in a timely fashion so as to inform the client that the Market Transaction(s) have been conducted on the client’s behalf. ASX will consider factors such as, but not limited to, the following when assessing whether a Market Participant has relevantly complied with its obligation:

- the time the Market Transaction was entered into;
- whether the client’s order was filled as a result of multiple Market Transactions and the time at which the Market Transactions were entered into;
- the overall volume of trading conducted on behalf of the client and the extent to which the Market Participant has kept the client informed by way of sending confirmations; and
- any reasons the Market Participant has documented in relation to the time at which the confirmation was sent.

In general, ASX expects that a confirmation would be despatched to a client on the day on which the transaction is executed. However, ASX recognises that there are circumstances where this is not practicable, such as, for example, a futures transaction executed after the daily clerical operations that produce confirmations have been completed for the day or a systems malfunction.

How a confirmation must be given

A Market Participant must give a client a confirmation in writing by sending it:

- by post;
- electronically; or
- in another form permitted by ASX (ASX does not currently permit other forms).

Rule 7.9.1 requires a Market Participant to give a confirmation to a client in respect of “*each Market Transaction*”. ASX acknowledges that there are numerous ways in which this may be

satisfied. Traditionally, this obligation has been satisfied by despatch of a paper confirmation or electronic message per transaction. Rule 7.9.2 addresses how these obligations may be satisfied where Market Transactions are accumulated and/or price averaged for a client as permitted by the Act.

ASX notes that s.1017F(5) of the Act provides that confirmations may be provided on a transaction-by-transaction basis or by means of a “standing facility”.

In relation to sending a confirmation electronically for the purpose of Rule 7.9.1 ASX does not permit the sole use of a “standing facility”. ASX is of the view that the sole use of a “standing facility” may increase risk to the investor, compromise investor protection and compromise market integrity. A “standing facility” requires a client to actively seek out the relevant information relating to their confirmations and, if the client fails to do so it may not be aware of the nature and extent of any activity on its account(s). In this case, the client would be unable to identify, for example, unauthorised transactions in a timely manner. However, ASX considers it acceptable for a Market Participant to utilise a standing facility, pursuant to s.1017F(5A), if it also advises the client by e-mail (or other electronic message) each time there is activity on the client’s account and on each of those occasions the client is directed to the “standing facility”. A Market Participant that adopts this method should retain records of the electronic communications it sends to its Retail Clients so that it can demonstrate to ASX that it has discharged its obligation.

PRACTICE GUIDELINES

ASX acknowledges that there is not a single approach to ensuring compliance with Rule 7.9. The following guidelines are intended to assist Market Participants identify relevant areas of risk that may arise in relation to the giving of confirmations:

- ASX considers that the function of sending confirmations should be segregated from advisers and others with a supervisory conflict who should not have access to a confirmation prior to it being sent. Such segregation will assist in ensuring that only appropriate staff have access and that confirmations accurately reflect the trades requested by the client.
- Where confirmations are sent to a guardian or trustee a Market Participant should ensure that it has obtained suitable documented evidence of the guardian or trustee relationship.
- Market Participants should be careful to verify that the address provided is the correct address for the client rather than a third party.
- ASX recommends that Market Participants regularly check addresses of clients with a view to identifying:
 - addresses of staff (to ensure that only the relevant confirmations go to such addresses); and
 - excessive use of any individual address (for example, where a number of accounts all use the same address the Market Participant should consider the

circumstances and be proactive in considering whether there is mischief in how individually or collectively these accounts are being operated).

Qualification

ASX has published this note to promote commercial certainty and to assist Market Participants. Nothing in this note necessarily binds ASX in the application of the Rules in a particular case. In issuing this note ASX is not providing legal advice and Market Participants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may replace this Guidance Note at any time without further express notice to any particular person. Readers may contact ASX to ensure they have the latest version.