

TERMS & CONDITIONS RELATING TO ELECTRONIC TRADING (“TERMS”)

The Terms can expose financial institutions to risk for the following reasons:

- (1) Terms are displayed on websites by suppliers. In order to trade, a dealer must click and accept the Terms. The Terms provide that the financial institution will be automatically bound by the Terms as soon as the end user clicks acceptance or uses the service. In a treasury environment, dealers would not have authority to accept legal terms.
- (2) The Terms usually provide that substituted terms / amendments will apply as soon as they are displayed on the website without any further action. This gives rise to legal risk as it is difficult to monitor amendments.
- (3) The Terms are usually one sided. It is difficult to negotiate meaningful provisions to ensure that a one sided agreement is more balanced. This means that organised and coordinated review and negotiation is required.
- (4) The Terms are often poorly drafted, on the broad side, and are not restricted to access to the trading platform, placement of orders, security (i.e. passwords, codes etc). In fact, they often encroach into the underlying negotiated terms of business governing the trades. In some cases they provide that additional terms contained in other sections or pages on the system/website will also apply. The Terms often include a disclaimer applicable to information content. The Terms rarely address issues of conflicting documentation or provide language to address inconsistent terms.
- (5) The Terms are sometimes expressed to be governed by New York law and not the governing law agreed by the parties in the existing terms of business.

The above is a brief outline of some of the issues which give rise to concern. IT legal issues have not been addressed in this note.