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FRANCE

CESR's Advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive

Swedish Securities Dealers Association (SSDA) wishes to present the following comments in respect of the CESR's October 2002 Consultation Paper regarding the Advice referred to above.

General Comments

In a properly functioning securities market, it is important that correct and sufficient information be provided to investors and potential investors. Not the least important is the provision of such information when an issuer is seeking to raise new capital in the form of equities or debt on the securities market, or where trading on the securities market is commenced in conjunction with an IPO or the flotation of new instruments on the market. Prospectuses play a material role in this context. The drafting of the prospectus and the requirements placed on the drafting must be balanced against the informational purposes of the prospectus, i.e. to provide reliable, correct, and sufficient information to the market, primarily the investors. As the Commission and CESR have stated, different requirements may be necessary in this context for different market segments. At the same time, one must avoid a situation in which the formal requirements are more far-reaching than these fundamental needs, since more far-reaching requirements would render it more difficult and expensive for an issuer to utilise the securities market as a source of financing.

In light of the above, SSDA has a number of general comments with respect to the CESR's draft.

Too many details

Firstly, SSDA believes that CESR's draft contains too many details, especially when considering that the rules in Level 2 are intended to supplement the directive and thus are included in the fundamental legal requirements. SSDA concurs with the comments of IPMA in this respect. Much of what is contained in CESR's draft ought to be assigned to Level 3 or, in several respects, could be left to the market itself to determine.

Building blocks

SSDA would like to discuss here the model which utilises what are commonly referred to as 'building blocks' and the structure of the prospectus in three stages which the CESR advocates. With CESR's proposal, a prospectus should be based upon three independent parts, namely:

- A registration document (company description);
- A securities note (description of the securities offered or which are intended to be listed and certain information about the company); and
- A summary note (regarding both of the previous documents which, according to the appendix to the draft directive, will be rather detailed).

SSDA certainly has no objections to a voluntary application of such a model. However, it must be emphasised that there must be absolute discretion regarding whether to use such a model. SSDA believes that, in most cases, it is sufficient to fulfil the fundamental information purpose in the best possible manner that one document be prepared. SSDA will briefly comment on this with respect to equity, debt, and derivative instruments.

Firstly, with respect to corporate actions regarding equities, one can proceed from the basis that a composite document will almost always be used. Thus, as a rule, it is most appropriate to publish a share prospectus as a composite document, which has usually been the case thus far. The breakdown of the prospectus into three parts is an innovation intended to be advantageous to the company. However, this will hardly be the case for companies issuing shares. On the contrary, the system will be more burdensome and difficult to understand. It also goes against the current practice.

With respect to debt instruments, one can assume that, with CESR's model, only that which is addressed in securities notes need be used. With respect to debt instruments issued by corporations, for example, no specific corporate information is necessary. The information which is necessary, in any event in the retail market, is intended to provide the conditions for assessing the general solvency of the issuer and can be fulfilled, for example, through ratings where such are available. When an issue is carried out in accordance with a programme, a basic prospectus is prepared to which reference is made in conjunction with the issuance of the individual tranches, as long as the basic document is current, which is normally deemed to be the case for twelve months.

With respect to warrants based on shares, for example, demands for information regarding the share issuer might create a problem since the issuer itself should be responsible for the information. Thus, information regarding the issuer of a basic document should not be provided in the prospectus. However, brief information should be provided in respect of the party issuing the actual derivative instrument. See below the answer to the question in 200.

In light of the background described above, SSDA believes that CESR has based its proposal to an unnecessarily high degree on the three-part model. CESR does not appear to have sufficiently considered the large differences which exist between equity, debt, and derivative instruments.

SSDA wishes here to add that SSDA believes that the model employing industry-specific annexes as proposed by CESR is unsuitable and unnecessary. Numerous identical requirements are dealt with both in the basic document as well as in various annexes, which would render more difficulties to the practical handling of such. Duplicate requirements in various documents should be avoided. SSDA will return to this matter under a separate heading.

With the changes which have been made in the directive proposal as compared with previous versions, there is actually no need to speak about securities notes. However, in the discussion below, SSDA will employ CESR's terminology.

SSDA's basic position as stated above makes it difficult to answer several of the questions posed by CESR which are based upon CESR's model. Nonetheless, SSDA will seek to answer the questions but wishes to emphasise strongly its fundamental view that one document should be capable of being the normal situation.

Specific comments regarding debt instruments

As to debt instruments it should be added that it is important to note that the following securities and topics are not within the ambit of the Consultation Paper but will be covered in the next consultation:

(a) Structured debt instruments (ABSs, MBSs, securitisations, convertible bonds)
(b) Debt securities aimed at wholesale investors
(c) Debt securities issued by SPVs
(d) Debt securities that would be covered by the 'base prospectus' concept according to the Prospectus Directive – securities issued under an offering programme, securities issued on tap.

CESR has defined their scope of review in this paper to debt securities which are aimed at both wholesale and retail investors and the issuers have an obligation to return 100% of the capital (together with any interest) – 'corporate retail debt'. To return 100 % of the capital is a normal legal requirement. CESR's approach seems confusing and unnecessary approach, and throughout the consultative paper the approach adopted by CESR is not always clear because of this definition, i.e. it is difficult to determine which type of debt securities that are included or excluded. In addition, the Directive itself excludes offers of debt securities,

(a) with a maturity of less than one year and not convertible or linked to a derivative
(b) offered to qualified investors
(c) offered to less than 100 investors in each Member State
(d) securities which have a minimum denomination of euro 5,000
(e) less than euro 2,500,000 in consideration paid over a period of 12 months.

Specific comments regarding derivatives

As a starting point, it is obvious that there is a need to define what kind of derivative securities should be covered by the described disclosure regime. However, as it stands now, the document lacks such a definition.

Another point is that the issuer is often a financial institution and not the issuer of the underlying security. This means that an investor in derivative products does not require same detailed information as an investor investing in equities. This fact should be reflected in the disclosure requirements. In particular, it is not suitable to use the equity disclosure standard as base for either debt securities or derivative products.

The nature of the derivative product must be taken into account, such as the underlying security (is there some form of payment or entitlement or obligation? Is the security issued for the purposes of raising capital? Is the derivative guaranteed or not guaranteed?).

Finally, disclosure in prospectuses should contain all the information that an investor needs in order to make a prudent investment decision regarding the securities but it should not contain superfluous information. It should be noted that derivative products are innovative products. Excessively detailed disclosure requirements will lead to inflexibility. The disclosure regime should be flexible enough to adapt to product innovation and market developments.

Incorporation of documents by reference

SSDA agrees with the principle that incorporation by reference should be allowed only to the extent that procedures are simplified for issuers but not complicated for investors in terms of comprehensibility and accessibility of the information. SSDA also agrees with the conclusion that, while adequately balancing the interests of issuers and those of investors, it should be possible to incorporate by reference as many documents as possible, provided that the interest of investors in receiving an easily analysable prospectus, at no cost, is duly protected.

The Consultation Paper includes provisions allowing an issuer to incorporate by reference documents containing the information required to be disclosed in a prospectus. However, the draft provisions include a number of important restrictions which limit the usefulness of the proposed opportunity to incorporate documents into a prospectus by reference.

The proposal requires that any documents to be incorporated by reference must have previously been filed and accepted by a competent authority in accordance with the proposed Prospectus Directive or the Listing Particulars Directive.

Obviously, this limitation would be of great importance to any issuer incorporated outside the EU since such issuers would typically not be able to make reference to any documents previously filed and accepted by a competent authority as defined by the relevant directives. In addition, it is difficult to understand why it should not be possible to allow incorporation by reference of all documents that are publicly available, particularly since it is also required that any documents so incorporated must be filed and made available in the same manner as the prospectus itself.

As an alternative to requiring actual filing of any documents incorporated by reference, it should be considered whether the mere fact that such documents are publicly available should be sufficient to allow for such incorporation.

Third country issuers

As an additional general comment, SSDA wishes to refer to the IPMA's comments regarding the prospectus requirements when the issuer comes from a third country and the problems which CESR's requirements may give rise to in this context.

Comments regarding the questions raised by CESR

SSDA will now address the various questions posed by CESR.

44 seeks comments regarding Annex A. SSDA has the following comments regarding this: With respect to the company description, Annex A is extremely reminiscent of applicable requirements which in Sweden are reflected in the regulations issued by the Swedish Financial Supervisory Authority regarding prospectuses. In addition to this, CESR has appended certain corporate governance-inspired points.

II.B appears to apply only to high-risk companies. However, the wording is such that it actually applies to all companies. It should be clarified whether this is intended.

The local authority should be permitted to grant exemptions on each individual point, as long as the prospectus does not thereby become misleading or incomplete, in which context a competent investor's requirements should be the yardstick.

It should be established that the information need only be provided if it is applicable to the company in question. However, this is stated in certain separate points.

That which is stated in the four last lines of **IV.D.3.a** ("…. and not relate …..") should not apply.

IV.A.I.b regarding major shareholder changes during the past three years is irrelevant and should be deleted. There may be many reasons for owners withdrawing.

VIII.G.I relates to facts regarding subsidiaries. With respect to subsidiaries (or at least wholly-owned ones) no description is necessary since such a description is included in the group description.

SSDA will return in more detail to the various annexes and thereupon also to Annex A in the discussion below.

47 seeks risk factors. SSDA agrees.

SSDA also agrees with **48** and **49**.

51 asks whether *pro-forma* accounting should be mandatory in certain cases, something with which SSDA agrees.

The question in **52** has the same meaning as the question in **51**.

In **53**, it is asked whether there should be a specific measurement which triggers the requirement for *pro-forma* accounting. SSDA believes that this should be determined taking into consideration the specific circumstances in each individual case.

In **55**, it is asked whether the authority or another party should be permitted to require *pro-forma* accounting. SSDA believes that the approving authority should be able to do so without any special provision in this respect, on the grounds that the prospectus would otherwise be incomplete.

It is stated in **59** that the *pro-forma* accounting should be limited to historical financial and interim financial statements, which is acceptable.

In **64**, it is asked whether Annex B regarding *pro-forma* accounting is justified. SSDA believes that portions of Annex B are acceptable. However, they should be incorporated in Annex A, see below.

In **65**, it is asked whether *pro-forma* accounting should exist only in securities notes, something which SSDA does not believe should be the case.

In **73**, the definition of forecast is addressed and is acceptable.

In **83**, it is stated that the prospectus must be updated in accordance with requirements contained in the Directive which have now, however, been deleted.

In **85**, it is asked whether a previously published forecast must be included in the prospectus, something which SSDA believes should be the case.

In **86**, information regarding forecasts is sought. SSDA has no objections but refers to that which is stated in respect of Annex A IV.D.3.a.

In **87**, it is asked whether an advisor's statement is necessary, something which SSDA believes should not be required. This accords with that which is stated in section **80**.

In **89**, information regarding "Directors" is addressed. This information is important and therefore should be set forth in the prospectus.

In **90**, restrictions on the control possibilities of major owners are addressed. If such restrictions exist, they must be described in the prospectus.

In **93**, accessibility of the cited documents is addressed. Since these documents, as a rule, are not as important as the prospectus and since the contents should reasonably be mentioned in the prospectus, it should not be required that the documents be published on the website.

95 and **96** deal with building blocks for various industries. SSDA believes in this context that it is wrong to place other, perhaps lower, requirements on small and middle-sized companies (SMEs). This might diminish the market's confidence in them. Annexes D – H, as well as B and C, are better suited as sub-appendices to Annex A since they would then be easier to work with. However, as mentioned in the introduction, prospectus rules should be drafted in general terms, and not excessively industry-specific. It is also not possible to predict all industry conditions. Therefore, it would be a better solution if the contents of Annexes B – H

were cleansed of some of the details, after which the remainder would be incorporated in Annex A. SSDA will return later to the Annexes.

100 – 102 deal with start-up companies. With respect to these, reference is first made to that which is stated in conjunction with **95** and **96**. One should not require independent expert evaluation of business plans. With respect to **102**, SSDA believes that, if there are restrictions on share ownership by management, this must always be stated in the prospectus.

In **105,** the question is raised whether we believe that SME's should only be required to provide details under disclosure requirement **II.A** for two years. In SSDA's opinion, there should not be any specific disclosure model for SME's. They should be treated like any other company admitted to trading on a regulated market.

The questions under **106** and **107** relate to the question in **105** and SSDA refers to the answer given there.

In **111,** CESR asks whether we agree that valuation reports as set out in Annex D should be required for property companies. SSDA believes that there should not be any specific disclosure model for property companies. A provision should be made generic to all companies. SSDA will come back to this when commenting on the annexes.

CESR asks under **112** if we consider it appropriate that the date of valuation must not be more than 42 days prior to the date of publication. SSDA does not consider the date of the valuation report to be of decisive importance. The information in the prospectus should be updated on the date of publication of the prospectus.

As to the questions in **113 – 123,** SSDA believes that no specific requirement should be placed on certain business activities. The association will touch upon this when commenting on the annexes.

In **129,** the question is posed whether we consider that the disclosure requirements for debt securities should be identical to those of equities. Generally, debt investors have different interests from equity investors. However, apart from the description of the securities and issues related to the shares, the scope of disclosure regarding the issuer should be the same.

In **134,** the question is asked whether we consider disclosure of the issuer's bankers and legal advisers, where the company has a continuing relationship with such entities, to be relevant to corporate retail debt. SSDA believes the answer should be 'no' and agrees with CESR's opinion that regardless of who the advisers are, the investor can make a decision on the issuer's solvency and ability to pay. For example, rating agencies, when rating the companies, do not rely on this type of information.

In **135,** CESR asks if we consider disclosure relating to the bankers and legal advisers who were involved in the issue of that particular debt instrument to be relevant. The answer is 'no'. The risk allocation is fairly well-established regarding prospectus liability and the roles should not be changed.

The questions in **137 – 139** read: Do you consider disclosure about a company's past/current/ future investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt? The answer should be: Yes, decisions to

merge with or take over an entity nearly always affect the credit rating of a company, which is directly linked to the issuer's ability to pay. Separate disclosure should be provided in such cases.

In **142,** CESR asks if we agree that these different interests should be reflected by different disclosure standards and, in particular, that retail bondholders do not require the same disclosure as shareholders in respect of these sections of the IOSCO IDS. SSDA considers the answer to be 'no', because liquidity, operating results and capital resources are all key indicators of a company's ability to pay its debts. For example, the credit rating agencies look to a company's operating profitability to determine its outlook. Cash flow generation is also linked to reduction of debts. The net debt to equity ratio is a way of determining the company's leverage.

CESR asks in **145** if we consider it necessary to have a disclosure requirement that stipulates when interim financial statements should be disclosed in the registration document and to also stipulate what the form and content of these statements should be. This is probably a question of good practice as well. At the moment, the market practice is to disclose the latest financial results in any case. These would also be required to be filed with the relevant stock exchange.

In **148,** the question is asked whether we feel that issuers should be required to put on display all documents referred to in the prospectus. A further question is posed whether this would cause problems in respect of privacy laws or practical problems as a result of having to review a large amount of documents for commercial information. SSDA wants to point on the fact that current listing rules require information about industrial, commercial, and financial agreements, or patents and processes for the issuers' activities or profitability. To require disclosure of these documents could adversely affect the business relationships with the issuers' business relations.

In **149,** the question reads: On review of the list of documents for the corporate retail debt building block, please advise with reasons (1) whether or not there are any documents that are listed that you consider need not to be put on display? (2) whether or not there are any documents that are not listed that should be put on display? In SSDA's opinion a summary of documents should be sufficient.

To answer the question in **150,** SSDA refers to the answers in **148** and **149**. The same language as the main document should be relevant. SSDA would add that English should be acceptable in Europe.

In **153,** CESR touches upon a review of the equity disclosure requirements (subsidiary information), and asks which, if any, of these requirements are relevant for corporate retail debt. Basically, all the requirements are part of the current listing rules. However, they are not as detailed. All information about shareholdings is unnecessary.

As to the questions in **154 – 156,** SSDA considers that the forecast requirements could be amended with a statement from the directors that it is their belief that the company possesses sufficient working capital for the next 12 months. Perhaps the related party transactions disclosure and the capital expenditure commitments are somewhat onerous and unnecessary for a debt issue.

In **160,** CESR asks if it is necessary to have specific derivative registration document requirements, or if this is unnecessary as the registration document requirements for debt securities should be used for derivative securities as well. SSDA sees no need to have specific derivative registration document requirements. SSDA agrees with IPMA in saying that the requirements for debt securities should be used and, with respect to covered warrants, that a short form of disclosure could be developed which requires minimum disclosure regarding the issuer and no disclosure regarding the underlying instruments where they are EU equity securities and very limited disclosure where they are non-EU equity securities.

In **170 – 173,** CESR asks if it would be useful to provide some form of definition for the derivatives securities and, in such case, which of the suggested approaches is preferable. SSDA agrees with IPMA that derivative products are innovative products and, as such, are difficult to define precisely and would therefore suggest a definition that provides broad guidelines on the types of products falling within this category. According to the broad definition suggested by CESR (in 166), SSDA suggests that the issuer should also be defined as suggested in 168.2)a)-b).

In **179 - 180** and **185,** CESR asks about the sub-categorisation of derivatives products. SSDA does not feel that it is necessary to have these two sub-categorisations of derivative products as the information needed for an investor about the issuer would be sufficient even for the "guaranteed return derivatives" if it were similar to the information for debt instruments (see also the answer above in 160).

In **190,** the question is if we consider that disclosure regarding the issuer's senior management, as set out in IOSCO reference I.A, is relevant for these products. An investor in derivative products does not have the same need as a shareholder for detailed information regarding the senior management. In most cases, this would be unnecessary provided that there is a clear statement regarding who has responsibility for the information contained in the registration statement.

In **192,** CESR asks if we consider disclosure regarding the issuer's advisers, as set out in IOSCO reference I:B, to be relevant for these products. SSDA is of the opinion that if the issuer engages advisers, their names should be disclosed.

In **195,** CESR asks if we have any views at this stage regarding CESR's provisional guidance in this area. SSDA is in agreement with CESR that there are certain types of risk factors that should be disclosed, such as the issuer's ability to meet its obligations in terms of delivering the underlying instrument to which the derivative is linked, or to make a cash payment. For retail investors, those risks that affect the value and the trading price of the derivative itself, and which relate to the nature of the underlying instrument itself, should be disclosed. The description of the risk factors should be more comprehensive for retail investors than for professional investors.

In **196,** CESR asks if there are any other sections of the Key Information sections in section III of IOSCO that we deem as being relevant disclosure for these products. SSDA deems risk factors to be relevant in section III.D. In addition, the prospectus should include a risk warning on the front page and a cross reference to the pages where risk factors are described in full.

In **197,** CESR asks if there are any sections of the Key Information section in section III of IOSCO which we consider superfluous as regards the disclosure of these products. SSDA considers section III.A.2., selected financial data, to be so. It is sufficient to establish that the issuer is solvent.

CESR asks in **199** if we consider the level of detail set out in IOSCO disclosure standard IV. A to be inappropriate for these products. SSDA deems the level of detail to be excessively high considering that the investor in derivative products is not investing in the company the same way as a shareholder.

In **200,** CESR asks which particular items of IOSCO disclosure in this section we consider to be relevant for these products. Information on the issuer is important. However, when the issuer is not the same as the issuer of the underlying instrument, some information might still be of interest, such as IV A 1. (the legal and commercial name of the company), IV A (the date of incorporation and the length of life of the company, except where indefinite), IV A.3 (the domicile and legal form of the company), the legislation under which the company operates, its country of incorporation and the address and telephone number of its registered office (or principal place of business if different from its registered office). Provide the name and address of the company's agent in the host country, if any.

CESR asks in **202** if we consider that a general description of the issuer's principal activities is a more appropriate level of disclosure for these products. SSDA believes that a detailed description of the issuer's business is not necessary when the issuer is an entity other than the issuer of the underlying instrument.

In **203,** CESR asks for advice regarding which, if any, other items of Section IV B of IOSCO we consider to be of relevance for these products. Cf. 202 should be one.

The answer to the question in **205** should also be Cf. 202.

In reply to the question in **207** whether we consider Section IV D. of IOSCO to be relevant disclosure, SSDA does not believe there is any need to disclose in such detail information regarding property, plants, and equipment.

In **209,** CESR asks if we consider Section V D of IOSCO to be relevant disclosure for these products. In agreement with CESR, SSDA deems that the appropriateness of IOSCO disclosure standard for these products should be questioned. This is only relevant when the security is issued for the purposes of raising capital.

CESR asks in **210** for advice on what, if any, other disclosure requirements set out in Section V of IOSCO we consider to be relevant for these products. SSDA deems Cf. 209 to be relevant.

In **212,** CESR asks if we consider the name and the function of the directors of the issuing company to be an appropriate level of disclosure for these products. In agreement with CESR, SSDA deems that the appropriateness of the IOSCO disclosure standard regarding the name and function of the directors of the issuing company should be questioned for these products.

In **213,** CESR asks for advice regarding what, if any, other items of Sections V of IOSCO we consider to be of relevance for these products. SSDA does not consider any other items to be of relevance.

In **215,** the question reads: Do you consider that a statement setting out whether or not the company is directly or indirectly owned or controlled by another entity and the name of that entity to be the appropriate level of disclosure for this product? SSDA believes it is questionable whether this kind of disclosure is necessary for these products.

In **217,** the question reads: At this stage, do you have views about whether the following types of financial information about the issuer are relevant and as such should be disclosed in the registration for these products? In most cases the investor does not need the same extensive information as the shareholder regarding financial information, see IOSCO VIII. However, there is a need for information on the issuer's solvency and ability to meet its obligations. In order to establish the solvency of the issuer, it is sufficient to include the balance sheet. Based on this, the information in question 217, b) to f) becomes irrelevant as well as the following question 218.

In **219,** CESR asks if we believe that there should be a disclosure requirement that the notes to the accounts be included in the registration document for these products. SSDA refers to Cf. 218.

In **220,** CESR seeks the following advice: Please advise which (if any) of the other CESR disclosure standards set out in Sections VII.C-VII.I. of the Corporate Retail Debt building block at Annex I you deem to be relevant disclosure for these products. SSDA believes that this disclosure regime is more suitable for guaranteed derivatives.

SSDA believes that it is questionable whether such detailed disclosure as mentioned in **222 - 238** is appropriate for these products.

CESR asks in **232:** Should all guaranteed derivative securities, irrespective of the percentage return they offer an investor, be treated in the same way, or should there be some form of minimum return that is guaranteed for these instruments in order for the product to be classifiable as a guaranteed return derivative as opposed to a non-guaranteed return derivative? SSDA believes that some form of minimum percentage might be useful for these products since they are similar to debt securities. It is therefore natural that the disclosure requirements for such derivative products should follow the disclosure regime for debt products.

As to the question in **233,** SSDA believes that a 5% benchmark would probably be reasonable since the guaranteed return for these products is around 10%.

In **234** it is asked: Do you consider that in addition to the percentage return on the investment, the life of the product should be taken into consideration, so that an instrument that has a 100% capital guarantee return with only a 6 month life cycle should be treated differently, for disclosure purposes, than a product with 100 % capital guarantee but with a 10 year life cycle? SSDA's answer is that there is information on the issuer’s solvency which is sufficient. What the investor needs to know is that the issuer is solvent enough to take on a long-term obligation. Disclosure regarding the issuer's solvency has been established elsewhere, namely IOSCO VIII.

Items **235 – 262** deal with Securities Note (in the following SN). SSDA considers that the SN must have an early and prominent part where all items in the Registered Documents that have been changed or need amendments, shall be disclosed (**262**). There is a risk that, especially retail investors, should make use of any difference between the SN and the Registered Documents to sue the seller, the issuer or the investment bank involved for wrongful statements in the Registered Documents, and that even if the SN is updated. The Registered Documents should have a disclaimer for all information that is changed in the SN. It can even be argued that there is need for a safe-harbour legislation.

As stated in the following answers, SSDA thinks that CESR requires too many details in the SN, especially in the Derivatives SN. Much of it can be passed on to Level 3. There is no need for further SN:s covering, for example, sectors, not even at Level 3.

SSDA gives it support to the method described in **235 – 241**, but will again underline that the content in the SN:s is too detailed. SSDA does not see the reasons to prescribe at Level 2 what is mentioned in **240**.

The answer to the question in **249** is no. One cannot obtain flexibility with the indicated detailed level.

The format touched up in the question in **250** seems acceptable as long as the content is adequate.

SSDA wonders why **251** is limited to items from any schedule. Any item which the issuer has overlooked could be inserted in order to improve the document.

As to the question in **252** SSDA wonders who would be willing to judge beforehand whether or not someone could be held liable. The issuer has to decide what seems to be appropriate for the case.

The answer to the question in **253** should be no, but any criticism would be deemed to be material and subsequently disclosed.

Also the answers to the questions in **254 – 256** should be no. As to **256** it is disputable for debt.

The question in **257** should be answered as follows:
1) For certain securities it could.
2) Probably.
3a) Yes.
3b) Yes.

The answer to the question in **258** is no.

What is asked in **259** could be of some interest, but rather at Level 3.

As to the question in **260** SSDA thinks disclosure on the whole should vary with the product. Depending on whether it is retail or institutional business, risk level, complexity, underlying instruments or other factors should be dealt with by the issuer, who has to judge and decide

what to disclose. Box-ticking is not a good practice instead of considering case by case what should be included.

The answers regarding **261** are:
KI 1. founders
KI 2. except for sponsor and legal advisor to the issue
KIII A. last sentence
KIII B. too detailed
KV A 3. covered by 13
KV B 4. covered by C 4h
KV E 6. too detailed
KV J 1. Always include the development of the share capital, including issued convertibles and warrants, over the last five years
KVI C. too detailed

As to **279,** SSDA believes that documents which become incorporated by reference in a prospectus should, in addition to meeting the characteristics provided for by article 11 of the Commission's Directive proposal, be made available in the same language as that of the prospectus. However, it should not be a requirement that such documents be filed with the competent authority either previously or together with a prospectus, but rather it should be sufficient that such documents are publicly available.

As an alternative to a more restrictive approach, it should be sufficient that the documents to be incorporated by reference are filed (but not reviewed) by the relevant competent authority and made available in the same manner as the prospectus itself.

In view of the comments in item **279** there is no need for an enumeration of documents mentioned in **280** which may be incorporated by reference into a prospectus.

SSDA has no comments regarding **281** and **282.**

The requirements in items **287** and **288** seem reasonable provided that it is not required that copies of any documents incorporated by reference be made available in the same places as the prospectus itself. Rather, it should be sufficient that such documents are made available through the competent authority.

In relation to **289,** SSDA believes there are no other relevant aspects concerning the accessibility of the documents incorporated by reference to be considered.

As to the question in **290,** it is SSDA's opinion that there is no need for CESR to provide additional technical advice on other aspects of incorporation by reference.

In **307,** CESR asks if there should be technical implementing measures at Level 2 further defining what is deemed to be "easy access" and which specific file formats are accepted for this purpose. SSDA sees no need for that.

In **314,** CESR asks if there are any additional factors and/or requirements that should be taken into account at Level 2 concerning availability via the press. SSDA does not believe there are.

In **325,** CESR asks if we consider appropriate the requirement to publish the said notice in the absence of a specific provision in the Directive proposal. SSDA does not consider this appropriate.

In **326,** CESR asks if the minimum content of the notice should be determined at Level 2 legalisation. This is too detailed for Level 2.

In **327** the question is: When the prospectus is made available by its insertion in one or more newspapers or in the form of a brochure, besides the publication of a specific notice, should the list available at the web-site of the competent authority (see Introduction) mention where the prospectus is available? The answer should be 'yes'.

In **331,** CESR asks which other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR's technical advice. SSDA is of the opinion that there should be no additional issues.

In **334,** CESR asks if we agree that the issuer should not ask the investor to cover the payment of the delivery or mailing costs. SSDA agrees.

In **335,** CESR asks if additional issues regarding the delivery of a paper copy of the prospectus should be dealt with by Level 2 legislation. SSDA does not believe there is any need for that.

Specific comments regarding Annexes A – H

Overall comments regarding the annexes

As SSDA has already stated, a share prospectus is most suitably published as a composite document. A breakdown of such prospectus into three documents is almost always meaningless since listed companies relatively seldom publish share prospectuses and therefore have no use for a prospectus.

Both the market, as well as the issuing companies, would probably prefer a composite document prospectus. A breakdown into three documents would become, in practice, cumbersome and difficult to understand.

The Prospectus Derivative proposal allows for a composite prospectus; see Article 5, section 3. For the sake of clarity, this should be pointed out in Annex A.

Annex A is well-considered and non-industry specific, which is an advantage. However, some of the Annexes B-H are industry-specific, which should be avoided for the following reasons:

a) Industry-specific regulatory compilations do not function well. There are many companies which do not fit into any specific industry description or which otherwise have characteristics which are difficult to capture in detailed regulatory systems.

b) Instead, a hold-all paragraph should be included in Annex A which states that anything of material significance for an investor in the specific company must be reported and explained in the prospectus. Any person wishing to avoid this requirement cannot be

regulated with detailed lists of the particulars which must be mentioned. As a rule, it is possible to provide such information in a formalistic and meaningless manner such that it does not provide any value to the investor despite having fulfilled the formal requirements.

Thus, detailed rules beyond a certain level cannot replace the principle that the prospectus must be complete and accurate.

c) Thus, the contents of Annexes B – H should be severely cut back and the remainder incorporated into Annex A. Set forth below is a description of which portions of Annexes B – H should be incorporated in Annex A and which ones should be deleted.

Annex A should contain a number of hold-all paragraphs:

Anything of importance in the specific case must be included – see b) above.

Anything which is not of importance in the specific case should not be mentioned, unless otherwise specifically stated. CESR states "if material" with respect to certain information.

Local authorities should be able to permit that certain information not be included provided this does not result in the prospectus becoming misleading or incomplete. See the Directive proposal, Article 8, point 2.

Annex A addresses the company description in conjunction with the issuance or listing of shares. It should also be stated that:

The same requirements for company description apply to the issuance of debt instruments which are convertible into shares in the company, of debt instruments the yield on which is dependent upon earnings or dividends in the company, or of warrants to subscribe for shares in the company.

Annex I applies when the company issues non-share-related debt instruments. According to SSDA, this should be restricted to the level which applies today.

When a party other than the company issues covered warrants, i.e. call options which, as a rule, are the subject of cash-settlement on the expiry date and where the underlying share is listed on the exchange, no company description is required. However, as mentioned in the introduction, certain information regarding the issuer is required since the market is taking a risk that such party is able to fulfil its obligations on the expiry date.

Views regarding Annex A

Reference is also made here to that which is stated in the introduction regarding Annex A.

Hold all paragraphs should be included in Annex A in accordance with that which is stated above.

The contents of Annexes B – H should, following extensive deletions, be incorporated in Annex A in various places, see below.

The persons responsible for the prospectus must have taken "all reasonable care to ensure" with respect to the contents. This is a welcome expansion compared with the currently applicable directive.

II.B Risk factors must always be mentioned, not merely when an offer is "speculative or one of high risk". All share investments have speculative characteristics.

The last line of **IV.B.1.a.** should be deleted. It is not meaningful to describe generally applicable lending and other financing possibilities.

The last portion "and not relate … etc." of **IV.D.3.a.** should be deleted. The opposite probably applies.

V.C – Salaries, etc. need not be stated on an individual level for persons under the level of the Managing Director.

VI.A.1.b – One should not be required to report major shareholder changes. Reported sales by major shareholders might be interpreted as criticism of the company, whereas the sale might be for entirely different reasons.

VI.B, point 1, fourth line. The words "or the related party" should be deleted since this might be important to the party but entirely insignificant to the company.

In **VII.L**, it should be explained what is meant by "trading position".

VIII. F.b. and c – The stated documentation may need to be kept secret after the existence of such and the most important contents are mentioned. SSDA refers here to that which is stated above in relation to the question under **149**.

VIII.G.I should be deleted where the prospectus' financial portions and business description relate to the group of companies in which the subsidiaries in question are included. In this context, it is sufficient if subsidiary information is provided in accordance with III.D.2.

Comments regarding Annexes B – H

Following deletion of all industry-specific detailed provisions, the text should be incorporated in Annex A.

Annex B – *Pro forma*

In section 6.b. and c., the word "most" is deleted. Certain *pro-forma* information may relate to more than one past operating year.

The text is otherwise appropriate. A certain thoroughness may be justified with respect to *pro-forma* accounting.

Annex C – Start-ups

Strategy, overall business concept (or suchlike) should be stated for all companies. The text should be incorporated into Annex A, point III.A.

The text should otherwise be deleted.

Annex D – Management companies, etc.

In Annex A, it should be stated that when assets of major significance have a market value of interest to a stock investor – and do not relate to real property, machinery, etc. used in the business – the market value, as calculated by an external expert, must normally be stated. The book value of the assets and deferred tax liabilities must be stated. The valuation must be broken down into categories. A summary of the appraiser's report must be included in the prospectus.

If there is no up-to-date external valuation, this must be stated as well as the reasons therefor. In this context, the company must present its opinion of the market value and the grounds for this assessment, provided this can be done with a reasonable degree of certainty.

Otherwise, no detailed regulations should be provided.

Annex E – Mineral companies

Under **III.E** in Annex A, a requirement should be included such that the scope, estimated mining period, license issues, etc. must be mentioned when the company's mineral assets (own or those otherwise at its disposal) are of significance to the business.

Annex E should otherwise be deleted.

Annex F – Mineral companies, to be included in Securities Note

SSDA arrives at the same conclusion as with respect to Annex E, which means that the annex can be deleted.

Annex G – Investment companies

For all companies, the business in other more significant companies (where a company owns a significant share without thus being the parent company) should be described to a suitable extent. Such a rule can be incorporated in Annex A, **VIII.G**.

Annex H – Research companies

For all companies in which research is of major significance, a report on the focus and scope of the research should be provided as well as patent protection and the value of this protection, etc. This should be included as a requirement in Annex A, **IV.C**, a point which should thus be expanded upon somewhat.

Otherwise, Annex H should be deleted.

Annex 9 – Revised CESR Proposal for the SN Derivative Schedule

Derivatives are normally issued by financial institutions. The annex should not ask for information which is linked to the underlying assets but focus on the derivative itself and on the issuer of the derivative. Risk is obvious an area to cover. Much of section VI could be deleted.

Supplement of statement

Since, during the consultation period, CESR has provided supplements comprising additional documents, SSDA intends to supplement this statement.

SWEDISH SECURITIES DEALERS ASSOCIATION

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