The Secretary General of the
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# Proposed Advice on Possible Level 2 Implementing Measures for the Proposed Prospectus Directive

The Swedish Bar Association has been provided opportunity to respond to CESR's consultation paper of October 2002 on its proposed advice on possible Level 2 implementing measures for the proposed prospectus directive (the "Consultation Paper"). This following paper presents the comments of the Swedish Bar Association on the said Consultation Paper.

## 1 Overview

The Swedish Bar Association supports, without reservation, the introduction of the building-block approach as well as the new body of disclosure requirements based on IOSCO's International Disclosure Standards (the "IDS"). However, the Bar Association is of the view that the proposals do not achieve the intention of the building-block approach, *viz.* the separation of the information related to the issuer and that related to the securities to be issued. The introduction of multiple sets of registration documents in the Consultation Paper makes the distinction unclear between the building blocks — the registration document and the securities note — and make the entire body of rules unnecessarily complex with numerous overlapping requirements.

In many other ways, the proposed implementing measures appear not to have been true to the stated overall aims of the proposed Level 1 legislation. The rationale for what has served as guidance for the proposed measures in the instances where they do not correspond to the IDS is unclear. The level of detail and relevance of the proposed rules is uneven, prompting the need to reconsider whether some of the proposals should be included in Level 3 guidelines or recommendations instead of Level 2 implementing measures.

Furthermore, many issues need to be treated in a more nuanced way, such as documents on display. In relation to this issue, the Bar Association recommends that the implementing measures include a requirement to disclose certain information regarding the due diligence reviews undertaken. Knowing that *e.g.* an underwriter or legal or financial advisors have proceeded in assisting the issuer in the public offer or listing against the background of a due diligence review gives the prospective investor a certain reassurance as to the nature of all the undisclosed information about the issuer and its business operations. Information as to whether a due diligence review has been performed will according to corporate governance theory provide a positive signalling effect, which is believed to help overcoming some of the risk associated with asymmetric information in public offerings and listings. The proposed requirements, on the other hand, would strongly discourage issuers to reveal the existence of a due diligence report, in order to avoid having to make the report itself open for public inspection.

The flexibility of the format of the prospectus, while seemingly inconvenient to the issuer, does not in fact facilitate analysis and comparison. There is a need to come to terms with the purpose and intended audience of a prospectus and whether the prospectus is a marketing document or a disclosure document. The Bar Association feels safe in assuming that the intention is that the prospectus shall primarily be a disclosure document. The Bar believes that all investors, regardless of their knowledge and experience of analysing companies, would benefit from a transparent and easily analysable structure of the prospectus, including a standardised format of the document. Given the exhaustive nature of a prospectus drawn up according to the proposed rules, a majority of investors will probably rely even more than today on "mini-prospectuses", brochures and third-party investment advice. In fact, as the prospectus rules become more complex and the prospectuses longer and more detailed, there is a need to review the investor protection rules both in the area of financial marketing and advertising and in the area of investment advice.

As to the availability of the prospectus, the Bar Association believes that the top priority must be to establish at least one central information point, to be accessed free of charge in the form of a web site (cf. SEC's Edgar database), as previously suggested by FESCO.

In the comments below, references to paragraphs are to numbered paragraphs of the Consultation Paper, unless otherwise stated.

## 2 General Issues

### *2.1 Minimum Information*

2.1.1 The information contained in the draft schedules set out in Annex A corresponds closely to the disclosure requirements set forth in the IDS and the existing Directive 2001/34/EC. This is in line with the amended proposal for a Directive of the European Parliament and of the Council on the Prospectus to be published when securities are offered to the public or admitted to trading (the "Amended Proposal"). However, as a general point, the rationale behind the deviations between the draft schedules and the IDS are rarely explained and in many cases it is difficult to see what useful purpose would be served by these deviations. In order to be able to keep our comments as brief as possible it is important at this stage to explain in general terms our principles of evaluating the way the IDS has been implemented in the proposed disclosure requirements.

2.1.2 The stated principal purpose of the Amended Proposal is to minimise the cost of capital, by means of *inter alia* increasing the competition in an integrated European financial market, which in turn is to be achieved by reducing the costs of raising capital across borders. This purpose and the proposed means of attaining it are all familiar from contemporary economic thinking, whereby an optimal allocation of resources implies minimising the transaction costs in the economy, such as the cost of capital. The Bar Association has assumed that the implementing measures should be true to the purpose, spirit and theoretical foundation of the Amended Proposal.

2.1.3 The disclosure requirements as set forth in the IDS and the schedules to the Consultation Paper do not purport to be the product of any attempt to statistically analyse the needs of investors at large, nor of any given groups or types of investors. Likewise no analysis of the expected costs and benefits of providing the proposed investor protection rules has been presented or referred to in the Consultation Paper. Not even a discussion of the trade-off between the interests of the investor and the interests of the person responsible for the prospectus has been included. As a consequence, it is difficult to perceive the proposed disclosure requirements as aiming to achieve an optimal level of investor protection according to any specific line of reasoning.

2.1.4 On the other hand and as evidenced by the Amended Proposal, the disclosure requirements are likely to enhance standardisation benefits by tying the requirements to the IDS. It may be argued that regardless of what the disclosure requirements are, the mere fact that the same set of information is to be disclosed irrespective of the nature and nationality of the issuer and, as far as possible, of the instruments to be issued will enable issuers to fulfil the disclosure requirements — whatever they might be — at a minimum cost. The lower the cost of complying with the disclosure requirements, the lower the cost of capital will be, which is exactly what the Amended Proposal has the aim of achieving.

2.1.5 In summary, the Bar Association suggests that unless the perceived benefits of any proposed discrepancies from the IDS can be reasonably expected to overweigh the loss of standardisation benefits, any such discrepancies should be avoided.

THE REGISTRATION DOCUMENT

2.1.6 The Bar Association supports the idea that certain kinds of issuers — due to their specific nature or the nature of the business conducted by them — require a modified set of information to be disclosed. However, the Bar suggest a more cautionary approach, whereby as few industry-specific disclosure requirements as possible are adopted. Any such requirements need to be well founded. In the event that CESR does not possess the specific knowledge of what issuers are to be affected and what additional information is to be disclosed, the Bar Association suggests that these issues be treated in Level 3 guidelines.

2.1.7 The Bar Association believes that the format laid down in the Amended Proposal, *i.e.* the separation of registration document, securities note and summary note, has to some extent been distorted in the Consultation Paper so that the benefit of the separation may well not be achieved. The idea behind the registration document, as reiterated in the Consultation Paper, is to separate from the prospectus all items related to the issuer and unrelated to any specific issuance. That information is to be provided on a continuous basis in order to save time, effort and money as well as to optimise the competent authorities' approval procedures. In the event of a public

offer or an application to the admission to trading on a regulated market the issuer would be required to issue a securities note with information specifically relating to the securities to be offered or traded. The securities note together with the registration document and a summary note would constitute a complete prospectus. The benefits of this building-block approach would not be achieved if there were to be multiple registration documents; one for each kind of securities to be issued.

2.1.8 A closer look at the schedules reveals that the schedule for the registration document for corporate retail debt (Annex I) contains very little additional information not contained in the schedule for the registration document for core equity (Annex A). This additional information is not irrelevant for equity investors and could easily be incorporated into the disclosure requirements for core equity. However, much of what is included in Annex A has been excluded in Annex I. As explained below, the Bar Association proposes that Annex A, further to the comments on it, be used for all issuers, with the exceptions mentioned in section 2.1.6 above, regardless of what securities are to be issued.

2.1.9 The Bar Association does not share the opinion that certain issuer information, such as the description of property, plants and equipment and the issuer's liquidity and capital resources, just to name a few examples, generally do not concern investors of corporate debt securities. It cannot, to give other examples, be generally said to be less relevant for debt investors than for equity investors to know whether the directors of the company has a history of bankruptcies behind them. Nor is information regarding dividends and capital reductions typically irrelevant for investors of debt instruments. Much of the information excluded from the disclosure requirement for debt is of vital importance to assess the credit risk of the investment. By enabling investors to make their own analyses based on the prospectus they would be less dependent on the advice of rating agencies, which may have access to other sources to procure such information suggested to be omitted in relation to debt securities.

2.1.10 As well as being arbitrary, the reduced disclosure requirements for debt would create information inequality between issuers with only a registration document for debt and issuers which has filed registration documents for both debt and equity. Investors in the latter case would have easy access to much more complete and coherent information than investors considering buying debt securities in a company which has only filed a registration document for debt. In addition to this, much of the information omitted from the debt registration document is available from the issuer's annual report; however, it would be more convenient if it were included in the registration document.

2.1.11 The Bar Association also finds no need for a separate registration document for derivative securities. The Bar is not convinced that there are any reasons for excluding any issuer-related information from the registration document in relation to a public offer of derivative securities. However, it is not clear from the

Consultation Paper whether the registration document for derivative securities concerns information about the issuer of the underlying securities or the issuer of the derivative securities. Information regarding both is of importance in our opinion, as explained below.

2.1.12 As regards derivative securities with other securities as underlying assets, an investor of such derivative securities cannot be assumed to be less concerned with information relating to the issuer of the underlying securities, than would an investor considering investing in the underlying securities directly. Information about the issuer of the underlying securities could be provided simply by using the issuer's registration document. However, a problem not addressed in the Consultation Paper is the effect of a public offer of derivative securities where the underlying securities are issued by a company that has not previously made a public offer or applied for admission to trading and thus has not filed any registration document.

2.1.13 The Bar Association advice against the proposed definitions of "guaranteed return derivatives" and "non-guaranteed return derivatives". It is difficult to understand what useful purpose this categorisation and separate treatment would serve. The interest of an investor in the ability of the issuer of derivative securities to timely deliver the underlying securities or any equivalent cash amount requires information about such issuer in addition to the information about the issuer of the underlying securities. For this reason, the Bar Association suggests that a prospectus for derivative securities comprise of two registration documents: one for the issuer of the derivative securities and, where available, one for the issuer of the underlying securities. As the obligation of the issuer of derivative securities to deliver cash or underlying securities is similar in nature to the payment obligation of an issuer of debt securities, the same issuer-related information requirements should apply to the registration document for issuers of all kinds of securities, including issuers of derivative securities.

CERTAIN ISSUES RELATED TO THE REGISTRATION DOCUMENT

2.1.14 The Bar Association agrees that a comprehensive list of risk factors to be disclosed should not be provided in the Level 2 implementing measures but be dealt with in Level 3 guidelines or recommendations.

2.1.15 In accordance with the view presented above, the Bar Association believes that any disclosure requirements which cannot be explained on the basis of standardisation benefits requires a thorough investigation of how such requirements would serve the purpose of lowering the cost of capital. The discussion about pro forma information is much more developed than many other parts of the Consultation Paper. However, it amounts to a description of what CESR's members could agree about rather than an analysis of the pros and cons of the proposed requirements. Nor do they purport to capture any prevailing market practices in the area of pro forma reporting.

Unaccompanied by a satisfactory explanatory discussion the detailed rules appear too arbitrary for us to be able to give a reasoned opinion about them. The Bar Association therefore suggests that CESR make a renewed consultation in the matter or that the detailed pro forma requirements be referred to Level 3 guidelines. In any case, the Bar Association believes that the matter would best be resolved jointly with the IASC and its finance and accounting specialists.

2.1.16 The pro forma information as defined in the Consultation Paper appears not to capture the situation of a newly established company whose present operations has previously been performed through another legal entity. This kind of situation might also warrant pro forma information and should therefore be analysed in any renewed consultation or Level 3 guidelines as suggested in the previous section.

2.1.17 As a general point, the Bar Association believes that the competent authorities should not be given discretion to impose an obligation to provide pro forma information. Since the Amended Proposal does not facilitate regulatory competition, differing practices across Member States will only increase market fragmentation, thus being counterproductive to the aim of the proposed legislation. Instead the same requirements should rest on all issuers, regardless of the competent authority of their home jurisdiction.

2.1.18 An important point in relation not only to pro forma information is the significance of a due diligence review undertaken in connection with prospectus drafting. As suggested in paragraph 61, readers of the prospectus are provided with a certain comfort by knowing that a due diligence review has been undertaken. Rather than limiting the requirement to disclose any due diligence reviews to pro forma information, the Bar Association believes that the benefits of generally requiring disclosure of due diligence reviews greatly overweighs any costs that might follow from such disclosure. It should be noted that, in our opinion, such a requirement should not imply disclosure of the due diligence report itself. In fact the disclosure that a legal, accounting, financial, commercial or some other due diligence review has been performed gives the prospective investor valuable information regarding the accuracy of the underlying information as well as the risk involved in the investment. Not only does a due diligence review influence the allocation of liability between those involved in drafting, underwriting or issuing the prospectus in the event of litigation, but it also conveys an important signal about undisclosed information, similar in nature to that of a fairness opinion. Knowing *e.g.* that an underwriter who has performed a due diligence review before assuming settlement risk, or even price risk, as well as being prepared to risk its reputation, should the offer fail, provides the investor with a certain amount of reassurance as to the nature of the information about the issuer that has not been disclosed in the prospectus, without actually needing to know what that information is. Providing "signals" in the economic sense of the word thus helps overcoming the one of the two main kinds of problems related to asymmetric information — in this case between issuer and investor —, known in the economic literature as adverse selection problems. Solving adverse selection

problems lowers the agency cost, which is an important component of the cost of capital.

2.1.19 Since due diligence reviews are so commonplace and almost indispensable in cases where the issuer has engaged underwriters or legal or financial advisors in drafting a prospectus or making an offer, the Bar Association believes that a requirement to disclose any and all due diligence reviews performed in relation to the drafting of the prospectus will impose a *de facto* due diligence requirement. Rather than imposing such a requirement explicitly, the Bar Association believes it would suffice to require it to be disclosed in the prospectus whether, when, to what extent, with what methods, with what materiality requirements and by whom, such a review has been performed.

2.1.20 Much of the problems related to profit forecasts follows from the reluctance to accept that the prospectus, as discussed under sections 2.1.24–2.1.26 below, must be a disclosure document and not a marketing document in order for it to best serve its paramount purpose to lower the cost of capital. At the same time one has to be aware that it is not possible to evaluate an investment without an assessment of the future cash flows to be derived from it. In order to do so, investors are not obliged to confine themselves to the information provided in a prospectus. All information will be used in the assessment, whether it is found on the issuer's web site or received orally from a representative of the issuer or even from a third party. It would be impossible — and surely not desirable even if it was — to try to limit or regulate how investors obtain the information upon which they base their investment decisions. Thus it would not be possible to forbid or limit the marketing of financial instruments.

2.1.21 Rather than trying either to exclude profit forecasts from the prospectus or to require the issuer to disclose such forecasts in the prospectus, regardless of whether the issuer has any such forecast, comprehensive Level 2 implementing measures regarding the marketing of financial instruments should be adopted, as laid down in Article 15(7) of the Amended Proposal. The Bar Association believes that trying to define what a profit forecast is and require the issuer to publish numeric projections is a too binary approach of dealing with qualitative forecasts. The Bar Association therefore suggests that the issue of marketing of financial instruments be dealt with separately at Level 2 and Level 3 and that such implementing measures and guidelines are applicable to all information given by an issuer, including in prospectuses. Having said that, the Bar Association does approve with the view that forecast information, as well as any other numerical prospectus information, should be prepared co-terminus with the issuer's reporting period, that it should not be false or misleading, that it should be comparable over time and vis-à-vis the audited financial statements etc., see further paragraphs 76–79, although much of that is more appropriately included in Level 3 guidelines.

2.1.22 The Bar Association believes that the issue of documents on display has been treated too frivolously in the Consultation Paper. The distinction made between documents on display and documents to be incorporated by reference is not sufficiently clear. On the one hand, it seems obvious that an issuer who provides required prospectus information by referring to a separate document should be obliged to make such document available, since it is a part of the prospectus. On the other hand, if all documents mentioned in the prospectus were open to public inspection and every prospective investor, including the issuer's business competitors, were to be able to perform his or her own due diligence review, the economic cost in the form of lost business secrets and opportunities for the issuers would surely outweigh the benefits of investor protection. By making public all material contracts and all due diligence reports mentioned in the prospectus — keeping in mind that both these types of documents may need to be mentioned there — the interests of investor protection would be allowed to take almost full precedence over the interests of the issuer. However, in that extreme scenario, that all investors would be allowed to make their own private due diligence reviews, the issuers would have overwhelmingly strong incentives to avoid using European financial markets to finance their operations. In other words, full disclosure is not likely to reduce the overall cost of capital. See further our comments below.

THE SECURITIES NOTE

2.1.23 The disclosure requirements of the registration document and the securities note are in many instances overlapping. This makes sense only to the extent that the securities note updates information previously filed in the registration document.

THE FORMAT OF THE COMPLETE PROSPECTUS

2.1.24 When the registration document, securities note and summary note are put together to form a prospectus it is important, as stated in the Amended Proposal, that the information is presented in easily understandable and analysable form. It is also clear that a full prospectus will be an exhaustive document that is not adapted to the needs of all investors. It is an inescapable fact that a prospectus will not be easily understandable to all. There will still be need for professional investment advisors to do the work of explaining and give advice on the basis of the information provided in the prospectus. However, the prospectus itself will not be a marketing document. In fact, the proposed disclosure requirements as well as the IDS on which these are based makes it clear that the prospectus will be a disclosure document rather than a marketing document. The Bar Association does not believe it is a good idea to try to achieve both in the same document, if not for any other reason than the fact that a marketing document needs a defined audience and a prospectus is a source of data relevant to professional analysts and small-time investors alike. For this reason, it is desirable to promote greater analysability of the information provided in the

prospectus not by requiring *e.g.* more tables and graphs or pictures of the directors, but by standardising the format of the document.

2.1.25 Once recognised as a disclosure document, any attempts to dilute the document with promotional and marketing information will only make it harder for reasonably informed investors and analysts to correctly understand and analyse the issuer and the issuance. On the other hand, it may be very difficult to cleanse the document from promotional features. This would not be necessary in the event that the prospectus were to be drafted in accordance with a stipulated format, where *e.g.* headings and individual items and the order in which they appeared in the document were to correspond with the information schedules of the disclosure requirements. Promotional language would still exist, but would be more easily recognisable as such, since it would stand out more from the context. The Bar Association therefore suggests that prospectuses should be required to be prepared in the same format, as laid down in the schedules of disclosure requirements.

2.1.26 A fixed format would also increase standardisation benefits. If the same kind of information were always to be found under the same heading it would greatly speed up the analysis of a prospectus and also the comparison of prospectuses over time and across issuers, both for investors and competent authorities. Greater uniformity would also enable non-professional prospective investors to eventually become more familiar with the typical prospectus format and to know where to find what in the document. This would facilitate independent analysis without sacrificing clarity. Prospectuses would become fungible, just like the securities that they are intended to provide information about, thus increasing the potential standardisation benefits, while at the same time help keeping the document as brief and stringent as possible.

### *2.2 Incorporation by Reference*

2.2.1 As a general point, it is obvious that there is a great deal of confusion as to the distinction between documents on display and documents to be incorporated by reference. In the Consultation Paper incorporation by reference is discussed as a new concept introduced by the European Commission. In our experience the practice has existed for many years. Prospectus information can be provided in one document or in several documents, in which case all the other documents are incorporated into the main prospectus document by reference. Quite apart from this practice, certain documents mentioned in the prospectus may be available on display, without being a part of the prospectus.

2.2.2 It is evident from the Level 2 advice on incorporation by reference that in the event that there is not a uniform fixed format of the prospectus, an issuer would be able to publish as a prospectus a one-page document referring to a multitude of publicly available documents. In that event there would be no benefits at all to be derived from facilitating the analysis and comparability of prospectuses. In other words, the

interest of issuer would take precedence over both the interests of investor protection and the interest of standardisation.

2.2.3 As explained above, the Bar Association believes that standardisation benefits would greatly increase if the prospectus were to be drafted pursuant to a laid-down format. If the prospectus were to consist of a reference to a set of different documents, the analysability of the prospectus would be negatively affected. On the other hand, incorporation by reference would undoubtedly be cost-efficient for issuers. However, the benefit to the issuers does not necessarily have to be at the expense of the investors. Using a format of fixed items, it should be possible to include under the relevant heading a cross-reference to the exact place in an attached document where the relevant information is to be found. A separate matter is that a copy of the document included by reference should be made available to investors in conjunction with the main document. However, the re-use of documents — which is the benefit to be derived from incorporation by reference — could thus be achieved without sacrificing analysability, provided that a uniform format is required. Since the documents that may be incorporated by reference are documents that have previously been filed in accordance with the Amended Proposal, it is difficult to see the additional cost of simply pasting text and figures from one computer document to another instead of incorporating by reference. Once again, the issue of incorporation by reference will become much less pivotal in case the prospectus is perceived as a disclosure document rather than a marketing document. A disclosure document would primarily exist as an information source, cheaply accessed over the Internet (cf. SEC's Edgar database) and perhaps be provided simply as a paper print-out from the Internet. The costs of drafting and distributing a marketing document printed on glossy paper would probably still exist but would be unrelated with the publication of a prospectus, and there would be no cost savings to be derived from incorporation by reference in case the prospectus were to exist primarily in electronic form.

2.2.4 The Bar Association has no objections to raise against the Level 2 advice given in paragraph 279, but believe that the other advice in this area should be referred to Level 3 guidelines.

### *2.3 Availability of the Prospectus*

2.3.1 In order to facilitate for investors to analyse an issuance of securities it would be desirable if, in addition to the proposed advice concerning electronic publication of the prospectus, CESR and the competent authorities kept all filed documents available free of charge over the Internet, cf. SEC's Edgar database.

2.3.2 In our experience it is very rare for an entire prospectus to be published by insertion in a newspaper. This alternative offers an alternative for the issuer and might thus be kept; however, it will probably be used only in very exceptional cases.

2.3.3 The Bar Association agrees with the Consultation Paper that a notice should be made public stating where the prospectus is available. However, the Bar Association believes that regardless of the means chosen for the publication of the prospectus, the notice announcing the publication of the prospectus needs to be made available at a central information point. The notice could be published in several newspapers provided that it should also always be published in the official gazette of the relevant Member State and on the gazette's web site as well as on the web site of the competent authority.

2.3.4 Ideally and as an alternative to section 2.3.3, there ought to be one central information point for the entire European Union, where all filed documents of all competent authorities were available free of charge and where information could be given about newly filed and published prospectuses.

## 3 Summary of Key Points

ANNEX A

I.A.2 No indication is given as to whether the declaration is to be signed on the original registration document to be filed.

I.C.2 The need for this disclosure rule, which has no counterpart in the IDS, is not explained. Also, it is not sufficiently clear what details are asked for. It is furthermore desirable to minimise the use of "if material" for clarity and ease of compliance.

II.A.1 According to the IDS, selected historical financial data should be presented for the five most recent financial years, where available. The reasoning behind the proposed shortening of this period to three years in the Consultation Paper is not disclosed. The Bar Association advice against this discrepancy; in particular against the background that five years is normally held to represent a business cycle.

II.A.3 According to the IDS, information should be disclosed regarding the dividends declared per share in both the currency of the financial statements and the host country currency, including the formula used for any adjustments to dividends declared. However, the Bar Association has noted that the reference to foreign currency has been dropped out from the disclosure requirements in Annex A. The Bar Association advice against this, since such restatement will be of continued great importance in relation to cross-border offers and listings involving countries outside the Euro zone.

III.A.2 This requirement, which does not appear in the IDS, seems to assume that all issuers will have a place of registration and a registration number. This may not always be the case with issuers outside the E.U.

III.A.4 In the corresponding standard in the IDS, there is a requirement to provide the name and address of the company's agent in the host country, if any. By excluding this requirement in the proposed disclosure requirements, it seems like the existence of non-E.U. issuers has once again been ignored.

III.B.3 This requirement is recognised from Paragraph 4.7.2 of Annex 1 Schedule A of Directive 2001/34/EC. To include it in the disclosure requirements will be a significant deviation from the IDS. Unfortunately no reasoning has been presented in support of the inclusion of this requirement. The Bar Association suggests that it be reconsidered. In order to fulfil the requirement, issuers normally provide only non-committing plans and projections about the future, mostly in the form of an investment budget. To require an issuer to disclose any information of value about its future investments implies that the issuer needs to reveal information about its unfinished business that almost certainly would ruin the chances of those future investments ever becoming reality. It will be of little cost for the issuer to provide its hopes and guesses about the future, but such information will also be of negligible importance to the investor. If on the other hand real information is given about intended future investments, those investments will probably not take place. For these reasons and since budgets generally are not to be disclosed in a prospectus, this requirement should not be reintroduced.

III.C.3 This addition in relation to the IDS might be interpreted as being already covered by III.B.1–2 but could nevertheless be included to the benefit of investors at what might be assumed to be a low cost to the issuer.

III.C.4–6 In comparison with the IDS a materiality threshold has for no stated reason been explicitly introduced. As described above, this only increases uncertainty while not adding much. Materiality is an overriding principle, which could well have been treated in greater detail as such in the Consultation Paper. In any case, where the issuer is to provide a description in general terms, there will be a materiality threshold to be passed regardless of whether or not it is explicitly mentioned.

III.C.8 This rule corresponds to Standard IV.B.7 of the IDS. However, the Bar Association has noted that the following Standard IV.B.8 has not been included in the proposed disclosure requirements. According to Standard IV.B.8 a description should be given of the material effects of governmental regulations on the company’s business, identifying the regulatory body. This kind of information is of importance not only in cases where the issuer is incorporated outside the E.U. but also in cases of intra-E.U. offers. To include this information would not only give information about the regulatory regimes of the countries where the issuer operates, but would also provide information likely to enhance jurisdictional and regulatory competition, which in turn can be expected to lower the cost of capital. Since the Bar Association knows of no reason why this standard should not be included the Association believes it should not have been omitted from the proposed disclosure requirements.

III.D.2 In this instance the Bar Association believes that corporate registration number where applicable should be given. As company information in many countries is

more easily accessible using registration numbers rather than company names, this information would greatly facilitate the verification of the prospectus, using information provided in public registers at a negligible extra cost for the issuer.

IV.A.5 This requirement corresponds to Standard V.A.4 of the IDS with the omission of the reference to "similar factors that have affected or may affect investments by host country shareholders". This requirement should in our opinion not deviate from the IDS, unless for a good reason. As far as the Bar Association can envisage no such reason exists.

IV.B.1.a In the corresponding standard of the IDS, the issuer is also required to include a statement that, in its opinion, the working capital is sufficient for its present requirements, or, if not, how it proposes to provide the additional working capital needed. The Bar Association would be interested in getting to know why the requirement does not correspond to this standard. In absence of such an explanation and for the sake of standardisation the Bar suggests full conformity with the IDS.

IV.B.1.c This rule inexplicably deviates from the IDS. It may be that the additional information required serves a purpose, although it may not always be applicable. Full conformity with the IDS might be preferable unless this rule is extended in order to provide for a merger of Annex A and I, as proposed above.

IV.B.2 An additional materiality threshold has been introduced, which should be removed.

IV.C In the IDS, the corresponding standard is qualified by the significance of the policies. In the proposed disclosure requirements, a materiality threshold has been substituted for this qualification. However, the materiality unless specified refers to the investment decision of prospective investors, while the significance qualification in the IDS is related to the policies themselves.

IV.D.2–3.b The issue of profit forecasts has been discussed above.

V.A.1 Compared with the IDS, corresponding information should also be given regarding any employees, such as scientists or designers, upon whose work the company is dependent. In the cases where such dependence exists — which probably is rather rare in all but a few industries — the Bar Association believes that corresponding information should be disclosed. Among the disclosure requirements that are omitted in the Consultation Paper is also information about the area of experience and the age or date of birth of the relevant persons. Age and experience are not irrelevant in assessing the suitability of a director. As for the additional requirements in the Consultation Paper, not included in the IDS, such information regarding Swedish company functionaries is available from public registers with the exception of past criminal convictions. For Swedish purposes, such information could not be disclosed without the co-operation of persons concerned. In our opinion, this rule would need to be accompanied by a requirement for having all directors and senior managers undergo personal due diligence reviews to be performed by the legal advisors to the issuer in

accordance with the code of conduct for lawyers operating in the relevant jurisdiction.

V.A.2 The Bar Association believes that this rule is important to the interest of prospective investors. However, it is also very difficult to fulfil the disclosure requirement in a useful way at a reasonable cost to the issuer. The Bar Association would have welcomed an extended analysis regarding the trade-off of interests in respect of this rule.

V.C.4 The problem with this rule is that a deviation from the corporate governance regime of the country of incorporation — regardless of what should be read into this — may be rationally motivated. In addition to an affirmative or negative statement, investors would benefit from a brief explanation of the corporate governance model chosen and how it compares to the relevant corporate governance regime of the home jurisdiction.

V.D A materiality threshold has been introduced. See further the previous discussions on this matter.

VI.A.1.a The Bar Association strongly advice against tying the shareholder information to the reporting requirements of shareholdings that rest upon the shareholders. This is only confusing and creates problems for the issuer. The issuer does often not have knowledge about all beneficial owners, since they may not appear in the share register. The Bar Association therefore suggests that the requirement be tied to the information available to the issuer, which is in line with the IDS. The Association also sees no reason to avoid the 5 per cent threshold of the IDS.

VI.A.2 Information is missing corresponding to Standard VII.A.2 of the IDS concerning the geographical profile of the shareholdings. Such information should be of benefit to the investor, while normally available from the issuer's share register. The Bar Association also believes that the inclusion of information regarding possible measures to overcome problems related to controlling entities will be valuable to reduce the agency costs related to conflicts of interest between incumbent and prospective shareholders and thus facilitate for the investor to make an accurate assessment of the risk involved in investing in the issuer.

VI.C The reference to the offering should be omitted, since the registration document is not drafted in relation to any specific offering.

VII.B This requirement does not follow from the IDS and does not in our opinion add any information of importance. It would be more appropriate if this kind of rules were dealt with in Level 3 guidelines, if at all.

VII.D This rule deviates from the IDS. It corresponds to Directive 2001/34/EC. In order to conform to the IDS, the Bar Association believes it should possibly be kept as a Level 3 guideline.

VII.E Although the rule about true and fair view deviates from the IDS, the Bar Association prefers to include it. However, it should be clarified by Level 3 recommendations and guidelines.

VII.F.3 This rule, which deviates from the IDS, may offer greater flexibility to issuers, without necessarily sacrificing the interests of the investors. However, the Bar Association believes it would make more sense to require a statement as to *whether* the data is unaudited rather than a statement *that* the data is unaudited.

VII.H.1 No explanation has been given for the nine-month threshold instead of the eight-month threshold of the IDS. The Bar Association prefers conformity with the IDS on this point.

VIII.A Information under this heading should, according to the IDS, be given as of the latest practicable date, not only as of the date of the most recent balance sheet included in the financial statements.

VIII.A.4 It is a significant shortcoming of the IDS, that so little information is required to be disclosed regarding the issuer's outstanding convertible securities and warrants. The Bar Association believes it is of great importance to include comprehensive information about derivative instruments issued by the issuer, such as convertible securities and warrants. However, more detailed rules should be included, at least corresponding to the information to be provided in accordance with Directive 2001/34/EC.

VIII.A.6 The wording of this requirement, as well as the corresponding standard in the IDS, is unclear as to whether it refers only to options issued by the company and its subsidiary or if the requirement refers to all options, including options issued by a third party. Reasonably this requirement would need to be qualified by adding "to the extent known to the company".

VIII.B.8 The effects of differences in law should be described, as set forth in Standard X.B.9 of the IDS. Such differences prevail within the E.U. and are also of great importance as regards non-E.U. issuers.

VIII.C The second paragraph should be omitted, for the sake of the integrity of the issuer's business. A convincing analysis of the costs and benefits of extending the disclosure requirements needs to be put forward if such an addition is to be included.

VIII.F As discussed in section 2.1.22 above, the Bar Association believes that the requirements concerning documents on display has been made far too wide. The Bar Association suggests that rule VIII.F.b–c be dropped for the sake of the integrity of the issuer. Inclusion of this information is likely to be counterproductive to the aim of reducing the cost of capital, as described previously.

ANNEX I

II.A.3 This requirement deviates from II.A.3 of Annex A, but could easily be merged with the corresponding requirements in Annex A.

II.B This requirement deviates from II.B of Annex A, but could easily be merged with the corresponding requirements in Annex A.

III.A.5 This requirement deviates from III.A.5 of Annex A, but could easily be merged with the corresponding requirements in Annex A.

ANNEX K

III.A This rule deviates for some reason from Standard III.B of the IDS. The Bar Association suggests that the rule should conform to the IDS.

IV.A This rule is largely overlapping the requirement in VI.C of Annex A.

V.A.6 This requirement is unclear and appears to be generally inapplicable to equity securities.

V.C.2 The requirement to provide details should limit itself to preferential allocation agreements, in line with Standard IX.B.4 of the IDS.

V.H.2 Information corresponding to Standard IX.D.2 of the IDS has been omitted.

THE SWEDISH BAR ASSOCIATION

Mr Axel Calissendorff
Chairman

Ms Anne Ramberg
Secretary General