SWEDISH SECURITIES DEALERS ASSOCIATION

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European Securities and Markets Authority

Response to the Consultation Paper Draft technical standards on the Regulation(EU) xxxx/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps.

ESMA /2012/30

The Swedish Securities Dealers Association (SSDA)[1] has the following comments.

Q1: Do you agree with the approach of providing an exhaustive list of types of agreement, arrangement and measure that adequately ensure shares or sovereign debt instruments will be available for settlement and setting out the criteria these should fulfil?

An exhaustive list seems to be the right way to provide certainty and clarity. However, there are risks with an exhaustive list. Such list must be able to cope with market evolutions. It is therefore necessary with a mechanism for a review and update of the list on a regular and frequent basis to ensure that future development are taken into account.

Q2: Do you agree with the proposed list of agreements and enforceable claims and the criteria they should meet? Are there any other types of agreement or enforceable claims or criteria which should be added?

[1] SSDA represents the common interest of banks and investment-services-firms active on the securities market. The mission of SSDA is a sound, strong and efficient securities market in Sweden. SSDA promotes member's view in regards to regulatory, market and infrastructure-related issues. It also provides a neutral forum for discussing and exchanging views on matters which are of common interest to its members.

SSDA have a close cooperation with other trade associations in Sweden, in the Nordic area and in the UK. SSDA is also active on European arena via EBF (European Banking Federation) and EFSA (European Forum of Securities Associations) and globally through ICSA (International Committee of Securities Associations).

The providing of lending pools and collateral arrangements are important arrangements and should, as recognized in Recital 18, be specifically stated in the list.

"11 d stock lending agreements, lending pools, collateral arrangements and other standing agreements or rolling facilities."

Next to the explicit reference to futures and options, a reference to swaps, forwards and many other derivative financial instruments should also be added.

Paragraph 11 f. in the consultation document should be changed, first to include arrangements and secondly, by deletion of the word physical. There are very seldom physical exchanges of securities.

"11 f. Other claims, agreements or arrangements leading to ~~physical~~ exchanges of the shares or sovereign debts."

Regarding paragraph12 we have the following observations. The reasons and the impact of the criteria that the agreement should specify an execution date consistent with ensuring that the settlement of the short sale in question is met is not clear to us. The requirement seems to be superfluous as the first criteria already clearly states that the agreement should ensure that the securities should be available for the settlement of the short sale.

The criteria that the agreement or the enforceable claim should be legally binding for at least the duration of the contract is not clear to us. It should be clarified that the requirement should not be read as a limitation to use open ended securities lending arrangements. Furthermore, the proposed requirement can have a negative impact of the willingness to take part in securities lending and thereby have negative effect on the liquidity and increase the costs.

Obviously the short seller must be able to provide evidence of the arrangements for the short sale but we have some doubts if the last criteria really are covered by the mandate to ESMA.

Q3: Do you consider that these criteria will entail additional costs as compared to current practices on the market? If so, could you specify the drivers for those additional costs and any indication of their amount?

Yes, obviously the new set-up and maintenance of new arrangements will create administrative costs. Furthermore, there is a fear that the costs will have a negative impact of the willingness to take part in securities lending and thereby have negative effect on the liquidity.

There hasn't been any possibility to specify the costs because of the very limited consultation period.

Q4: Do you agree with the proposed list of third parties which may be parties to the arrangements or measures and the criteria proposed by ESMA that they should fulfil?

Central securities Depositories (CSD) and International Central securities Depositories (ICSD) should be added to the list. It is important the list cover institutional investors like pension funds and for example the AP-funds in Sweden.

The concept any other person subject to authorization or registration in accordance to EU law is too limited geographically.EU banks and investment firms must be able to cover themselves with help of non EU entities.

Q5: Are there further criteria which should be added?

No

Q6: Does the fact that a third party should be a distinct legal entity from the entity entering into the short sale entail costs? If so please provide estimates of those costs.

We support the answer from EBF. Besides that we want to state the following.
The aim of article 12 and 13 in the regulation is to reduce risks of settlement failure with uncovered short selling of shares and sovereign debt. According to article 12 ESMA shall develop draft implementing standards to determine the types of agreement, arrangements and measures that adequately ensure that the shares will be available for settlement. That mandate is in line with the purpose of article 12, to ensure settlement. The concept third party is not defined in the regulation and the definition of third party is not mentioned in the mandate to ESMA in the regulation. From a legal view the right for ESMA to define third party can be discussed. There are no clear reasons why ESMA should make such a definition in the draft standards. Furthermore the proposal of ESMA can make arrangements for banks and investment firms both more costly and more complex without adding anything to the purpose of the article.

Furthermore we are also of the same opinion as EBF that the reference to third party should not mean that such party should be a separate legal entity. Therefore, a trading desk located in the same entity as the securities financing desk should not be forced to contact a third party in order to cover his short sale.

From a cost perspective a requirement of an external transaction or arrangement would of course be both inefficient and costly.

Q7: Do you agree with the approach proposed by ESMA on the standard/same day/liquid shares locate confirmation arrangements and measures and the criteria that they must fulfil?

We support the answer from EBF.

Q8: In circumstances other than intraday short selling or short selling on liquid shares, can you suggest any additions to the methods for effective allocation set out in this consultation paper which would provide the necessary comfort that shares can be delivered for settlement in due time?

We support the answer from EBF.

Q9 In relation to the approach suggested for liquid shares, do you consider it appropriate to use the MiFID definition of liquid shares? Do you think ESMA should consider different approaches to determine the reasonable expectation test for liquid and illiquid shares? If not, can you provide indications as to the criteria to consider to define liquid shares or to take into account the liquidity of the shares in these circumstances? Is securities lending activity an additional factor to consider when determining liquidity of a share?

We support the answer from EBF.

Q10: Do you agree with the approach proposed by ESMA on the location confirmation and reasonable expectation arrangement in relation to sovereign debt and that the reasonable expectation test should only apply in the case of intraday short selling of sovereign debt?

We support the answer from EBF.

Q11: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?

The SSDA very much agree and wish to emphasis the importance of one standard format without any national exemptions or adds-on. For a cost-effective and efficient EU-system the same standard must be used throughout the Union.

Q12: Do you agree that there should be one standard form for public disclosure of information on significant net short position in shares?

The SSDA very much agree and wish to emphasis the importance of one standard format without any national exemptions or adds-on. For a cost-effective and efficient EU-system the same standard must be used throughout the Union.

Q13: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?

Yes

Q14: Do you agree with the proposed way to notify and disclose the size of the relevant position?

We support the answer from EBF and consider that publication and maintenance by ESMA of a list of the total issued share capital for each in scope equity would be useful.

However SSDA would like to add that there could be some difficulties reporting the correct figures if the issued share capital simultaneously is changed as a result of corporate actions or that the issuer has bought back its own shares resulting in a smaller base.

Q15: Do you have any comments on the proposed way to identify the issuer in relation to which the relevant net short position is held, including how to use the ISIN code in this matter?

We support the answer from EBF.

Q16: Do you agree with the ISO 8601 2004 standard use to notify and publicly disclose the date on which relevant position was created, changed or ceased to be held?

Yes

Q17: Do you agree that the additional information as described above should be provided?

We support the answer from EBF.

Q18: Do you agree that information on the central website should be provided at least in a machine-readable format?

SSDA do not mind having machine-readable formats on the website.

Q19: Do you agree that information on the central websites should at least include data as provided in Annex 1 of the draft implementing standard presented in appendix to this consultation paper?

Yes. However, it is still not clear how to report holdings in different types of shares and derivatives in the same company, all with different ISINs, where the total position will result in a reportable Net short position.

Q20: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?

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