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NETTING ANALYSER LIBRARY

The Futures and Options Association
2nd Floor
36-38 Botolph Lane
London EC3R 8DE

Stockholm, 2 April 2013
442837/FW/RDR

Dear Sirs

CCP Opinion in relation to NASDAQ OMX Stockholm AB

You have asked us to give an opinion in respect of the laws of the Kingdom of Sweden ("**this jurisdiction**") as to the effect of certain netting and set-off provisions and collateral arrangements in relation to NASDAQ OMX Stockholm AB, a limited liability company duly registered under the law of this jurisdiction with registration number 556383-9058 (the "**Clearing House**") as between the Clearing House and its clearing members (each a "**Member**").

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion letter.

References herein to "**this opinion**" are to the opinion given in Section 3.

1. **TERMS OF REFERENCE**

1.1 Except where otherwise defined herein, terms defined in the Rules of the Clearing House have the same meaning in this opinion letter.

1.2 The opinions given in Section 3 are in respect of a Member's powers under the Clearing House Documentation as at the date of this opinion. We express no opinion as any provisions of the Rules of the Clearing House other than those on which we expressly opine.

1.3 Where Contracts are governed by laws other than the laws of this jurisdiction, the opinions contained in Section 3 are given in respect of only those Contracts which are

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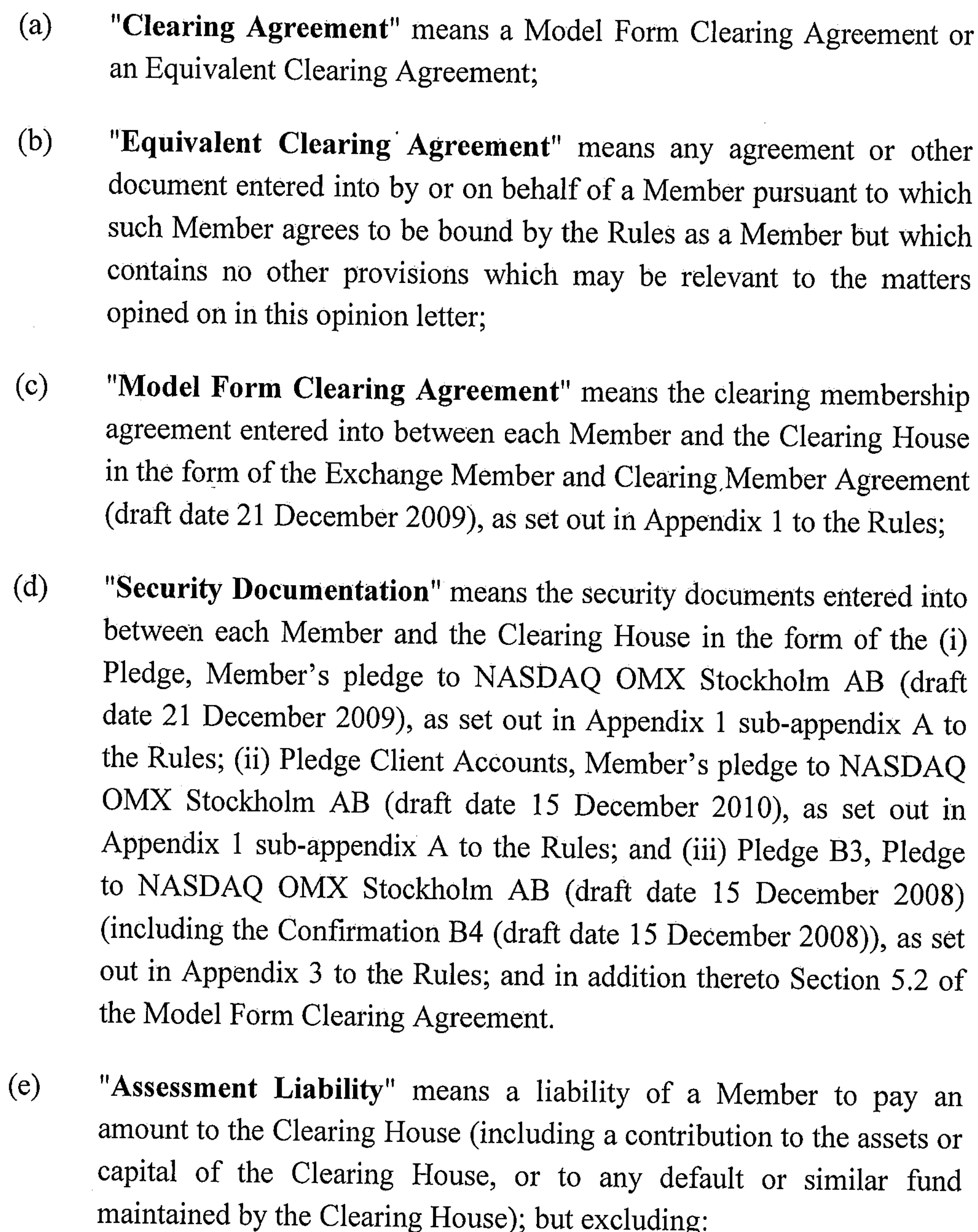
capable, under their governing laws, of being terminated and liquidated in accordance with the provisions of the Netting Provision.

1.4 The opinions given in Section 3.8 are given only in relation to non-cash Collateral comprising securities credited to an account.

1.5 **Definitions**

In this opinion, unless otherwise indicated:



(a) "**Clearing Agreement**" means a Model Form Clearing Agreement or an Equivalent Clearing Agreement;

(b) "**Equivalent Clearing Agreement**" means any agreement or other document entered into by or on behalf of a Member pursuant to which such Member agrees to be bound by the Rules as a Member but which contains no other provisions which may be relevant to the matters opined on in this opinion letter;

(c) "**Model Form Clearing Agreement**" means the clearing membership agreement entered into between each Member and the Clearing House in the form of the Exchange Member and Clearing Member Agreement (draft date 21 December 2009), as set out in Appendix 1 to the Rules;

(d) "**Security Documentation**" means the security documents entered into between each Member and the Clearing House in the form of the (i) Pledge, Member's pledge to NASDAQ OMX Stockholm AB (draft date 21 December 2009), as set out in Appendix 1 sub-appendix A to the Rules; (ii) Pledge Client Accounts, Member's pledge to NASDAQ OMX Stockholm AB (draft date 15 December 2010), as set out in Appendix 1 sub-appendix A to the Rules; and (iii) Pledge B3, Pledge to NASDAQ OMX Stockholm AB (draft date 15 December 2008) (including the Confirmation B4 (draft date 15 December 2008)), as set out in Appendix 3 to the Rules; and in addition thereto Section 5.2 of the Model Form Clearing Agreement.

(e) "**Assessment Liability**" means a liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House); but excluding:

(i) any obligations to provide margin or collateral to the Clearing House, where calculated at any time by reference to Contracts open at that time;

(ii) membership fees, fines and charges;

(iii) reimbursement of costs incurred directly or indirectly on behalf of or for the Member or its own clients;

(iv) indemnification for any taxation liabilities;

(v) payment or delivery obligations under Contracts; or

(vi) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty.

(f) "**Clearing House Documentation**" means the Clearing Agreement, Security Documentation and Rules;

(g) "**Client Omnibus Account**" means an Omnibus Account as defined in the Rules, being a segregated account with the Clearing House opened in the name of a Member in which Contracts relating to Contracts made by the Member with one or more clients of such Member are registered;

(h) "**Client Segregated Account**" means an Segregated Account as defined in the Rules, being a segregated account with the Clearing House opened in the name of a Member in which Contracts relating to Contracts made by the Member with only one client of such Member are registered;

(i) "**Contract**" means a Contract (being exchange traded derivative and OTC derivative transactions) which is registered at the Clearing House;

(j) "**Individual Customer Account**" means an Individual Customer Account as defined in the Rules, being a segregated account with the Clearing House opened in the name of the Customer being represented by the Member, in which the Contracts relating to the contracts made by the Customer represented by the Member are registered;

(k) "**Netting Provision**" means Section 1.10.1 of the Rules;

(l) "**House Account**" means and account with the Clearing House opened in the name of a Member that is not a Client Omnibus Account, Client Segregated Acccount or Individual Customer Account;

(m) "**Party**" means the Clearing House or the relevant Member;

(n) "**Set-off Provision**" means the non-contractual set-off possibilities generally available under Swedish law as set out Chapter 5 Section 15 of the Bankruptcy Act (as defined below) (as there are no explicit set-off provisions in the Rules, other than the "set-off" stipulated in the Netting Provisions);

(o) "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as margin under the Security Documentation;

(p) references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;

(q) "**Rules**" means the rules of the Clearing House in force as at 20 March 2013;

(r) references to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

2. ASSUMPTIONS

We assume the following:

2.1 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and Contracts are legally binding and enforceable against both Parties under their governing laws.

2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Contracts; to perform its obligations under the Clearing House Documentation and Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Clearing House Documentation and Contracts.

2.3 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Clearing House Documentation and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation in this jurisdiction.

2.4 That both Parties have properly executed either a) an agreement in substantially identical form to the Model Form Clearing Agreement or b) an Equivalent Clearing Agreement.

2.5 That, in the case of the opinion given at paragraph 3.7 and 3.8 only, both Parties have properly executed documentation in substantially identical form to the Security Documentation.

2.6 That the Clearing House Documentation has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.

2.7 That each Party acts in accordance with, and consistently applies, the powers conferred by the Clearing House Documentation and Contracts; and that (save in relation to any non-performance leading to the taking of action by the Members under the Netting Provision), each Party performs its obligations under the Clearing House Documentation and each Contract in accordance with their respective terms.

2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing Agreement or Security Documentation.

2.9 That the Member and the Custodian Institute are at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.

2.10 That (save as discussed at paragraph 3.5) the obligations assumed under the Clearing House Documentation and Contracts are mutual between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it.

2.11 That no provision of the Clearing House Documentation other than an Equivalent Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. PO

3. OPINION

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in Section 4 below, we are of the following opinions.

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are: a) a bankruptcy pursuant to the Swedish Bankruptcy Act 1987 (as amended) (*konkurslagen (1987:672)*) (the "**Bankruptcy Act**"), and b) compulsory liquidation pursuant to the Swedish Companies Act 2005 (as amended) (*aktiebolagslagen (2005:551)*) (the "**Companies Act**").

These procedures are together called "**Insolvency Proceedings**".

The legislation applicable to Insolvency Proceedings is: the Bankruptcy Act and the Companies Act.

3.2 Special provisions of law

The following special provisions of law, relevant to this opinion, apply to Contracts by virtue of the fact that the Contracts are, or relate to, exchange-traded derivative products and are cleared through a central counterparty:

(a) the Settlement Systems Act 1999 (*lagen (1999:1309) om system för avveckling av förpliktelser på finansmarknaden*) (the "**Settlement Systems Act**");

(b) the Financial Instruments Trading Act 1991 (*lagen (1991:980) om handel med finansiella instrument*) (the "**FITA**");

(c) Swedish Securities Markets Act 2007 (*lagen (2007:528) om värdepappersmarknaden*);

(d) Financial Instruments Accounts Keeping Act 1998 (*lagen (1998:1479) om kontoföring av finansiella instrument*);

(e) Asset Accountability Act 1944 (*lag (1944:181) om redovisningsmedel*) (the "**Asset Accountability Act**"); and

(f) Swedish Insurance Companies and Credit Institutions Insolvency Procedures (International Relations) Act 2005 (*lagen (2002:1047) om internationella förhållanden rörande försäkringsföretags och kreditinstituts insolvens*) (the "**Winding-Up Act**").

3.3 **Recognition of choice of law**

The choice of law provisions of Section 1.19.1 of the Rules and Section 10.3 of the Clearing Agreement, stipulating the laws of this jurisdiction to apply, would be recognised under the laws of this jurisdiction, even if the Member is not incorporated, domiciled or established in this jurisdiction.

3.4 **Netting and Set-off: General**

3.4.1 The Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, upon the occurrence of a bankruptcy (meaning an insolvency proceeding under the Bankruptcy Act, provided that the bankruptcy is caused by circumstances in relation to the exchange business of the Clearing House) in relation to the Clearing House:

(a) the Member would be entitled immediately to exercise and enforce its rights under the Netting Provision; and

(b) the Member would be entitled to receive or be obliged to pay only the net sum of the positive and negative mark-to-market values of the included individual Contracts, together with other losses or gains referable to the Contracts.

We are of this opinion because: for assessing whether provisions such as the Netting Provision will be upheld a determination has to be made whether the Contracts amount to "trade in financial instruments or in rights and obligations similar to financial instruments" (*handel med finansiella instrument eller med andra liknande rättigheter och skyldigheter*) ("**Qualified Contracts**"). "Financial instruments" is a term statutorily defined in the FITA. The definition of FITA will be adopted also in this legal opinion ("**Financial Instruments**") and includes: (a) "corporate securities": stocks; bonds; other instruments documenting ownership or debt issued for general trading; shares in investment funds; depository receipts and shares; and (b) "other securities": any other instrument documenting rights or obligations and which is designed for trade on the financial markets. The requirement that the instruments be

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"designed for trade on the financial markets" is not tantamount to a requirement that the instruments be negotiable. In practice options "traded" on an exchange by way of novation have been regarded a Financial Instruments.

The need for this classification arises from the fact that provisions such as the Netting Provision contracted for in connection with Qualified Contracts is subject to a separate statutory regime that provides legal certainty under Chapter 5, Section 1 of FITA (the "**Netting Law**"). Outwith the Netting Law the legal position is not free from doubt.

OTC derivatives in general fall within the scope of the Qualified Contracts, which provides legal certainty in relation to the Netting Provisions. With regards to commodity derivatives our view is that only Contracts which only allow for settlement by physical delivery of commodities would fail to be characterised as Qualified Contracts and would thus inhibit a legal uncertainty in relation to the Netting Provision.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Member.

3.4.2 The Set-off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that upon the occurrence of a bankruptcy (meaning an insolvency proceeding under the Bankruptcy Act) in relation to the Clearing House;

(a) the Member would be immediately entitled to exercise its rights under the Set-Off Provision; and

(b) any and all amounts owed by the Member to the Clearing House (including the termination amount (once calculated) and initial margin) would be set off against any such amounts owed by the Clearing House to the Member.

We are of this opinion because Chapter 5 section 15 explicitly permits set-off against a bankruptcy estate irrespective if so has been contractually agreed between the parties.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Member.

3.5 Netting and Set-Off: House Accounts etc

Where a Member has exercised its rights under the Netting Provision, a Termination Amount payable on any of the types of accounts listed below would not be aggregated with or netted against a termination amount payable on any of the other types of accounts listed below:

(a) House Account;

(b) Client Omnibus Account;

(c) Client Segregated Accounts; and

(d) Individual Customer Account.

This is because, as the accounts are held segregated with the Clearing House either on behalf of the client to the account or by a Member, acting as a trustee (*syssloman*) on behalf of a client, each account constitutes a separate claim in its own right against the Clearing House. The party to each claim would in accordance thereto and in accordance with the Assets Accountability Act, differ between the accounts. Therefore a set-off or netting between the accounts would verge on a multilateral netting arrangement, which as set out in Chapter 5 Section 1 of FITA are permissible under Swedish law only if it is in relation to a clearing system and the rules of the clearing system explicitly provide for multiparty set-off or netting. As there are no multiparty netting or setting arrangements stipulated in the Rules (rather the opposite, as section 3.5.21 of the Rules explicitly prohibits consolidation for clearing purposes between certain accounts) no such inter account netting would occur (however, if one client were to hold several accounts the termination amounts under these accounts may be netted according to the Rules, which we note is not in compliance with Article 39 of the Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties ("**EMIR**")).

3.6 Netting and Set-Off: Cross-Product Netting

The effect of the Netting Provision is to apply close-out netting to all Contracts cleared and registered on the same account (subject to that the Clearing House may, as set out in paragraph 3.5 apply netting over several accounts held by the same client), by the Member with the Clearing House.

We are of this opinion because there is no provision under Swedish law that would entail a different analysis, including thereto pertaining qualifications, in this respect than as stipulated in Section 3.4 above.

3.7 **Cash Collateral**

Payments made by a Member to the Clearing House as cash margin constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash would not be treated as the property of the Clearing House available to its creditors generally.

However, the amount of cash so provided would not constitute a debt owed by the Clearing House to the Member as principal.

This is because, cash is transferred to a designated Custodian Institute which holds the cash on behalf of the client or Member as collateral under the Security Documents on a segregated account separate from the Clearing House's assets and separate from other clients of the Custodian Institute. As such the transfer would in its own right constitute an absolute transfer. However, as the cash would be deemed as assets held separable in accordance with the Assets Accountability Act and in accordance with long-standing principles of Swedish law any cash which is not used against claims under the Contracts, as provided for in the Security Documents, would upon the Clearings House's bankruptcy be available to and recoverable by the Member or client as applicable.

3.8 **Non-cash Collateral**

Any securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral would not be treated as the property of the Clearing House and would be returnable to the Member, even in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member satisfying its obligations to the Clearing House.

This is because, non-cash collateral is transferred to a designated Custodian Institute which holds the non-cash collateral on behalf of the client or Member as collateral under the Security Documents on a segregated account separated from the Clearing House's assets and separated from other clients of the Custodian Institute. The transfer would in its own right not constitute an absolute transfer (as the non-cash collateral will be held by the Custodian Institute on behalf of the Member or client). The non-cash collateral would be deemed as separable held assets in accordance with the Assets Accountability Act and in accordance with long-standing principles of Swedish law, any non-cash collateral which is not used against claims under the Contracts, as provided for in the Security Documents, would upon the Clearings House's bankruptcy be available to and recoverable by the Member or client as applicable.

3.9 Members' Assessment Liabilities

A Member's Assessment Liability is as follows.

The Default Fund – Calculations and Timing

As set out in Section 1.9A.6 of the Rules, each Member shall provide contributions to the Default Fund in the amount calculated by the Clearing House. The calculated amount is a function of inter alia the exposures of the Members' outstanding Contracts. The Clearing House performs new calculations at least quarterly, and the member is required to post additional funds (if the new calculations so require) to the Clearing House on the relevant contribution day for each quarter (being 1 March, 1 June, 1 September and 1 December). The Clearing House shall notify the member at least ten days prior to any relevant contribution day. Also, the Clearing House may carry out additional calculations throughout the year if it so pleases. Such additional calculations may lead to a requirement for the Member to contribute additional funds to the Clearing House, and the member is required to provide such contributions ten days after receiving notice of the increased fund contribution requirement.

If a Member's contribution for any reason is lower than the current fund requirement, the Member has an obligation to provide additional contributions in order to meet the requirement within one business day following notice from the Clearing House.

The Default Fund consists of three subsections: the Commodity Default Fund, the Financial Default Fund (the default funds under Commodity Default Fund and the Financial Default Fund the "**instrument-specific funds**" and the Mutual Default Fund. The Member shall contribute to the Commodity Default Fund and the Financial Default Fund depending on what instruments its clears – either "commodity instruments" or "financial instruments". A proportion of the funds contributed to the instrument-specific funds are also contributed to the Mutual Default Fund.

If the member clears both commodity instruments and financial instruments, it may in accordance with section 1.9A.24 and 1.9A.25 of the Rules be subject to a separate fund contribution requirement or a joint fund contribution requirement. For the purpose of the below discussions we assume that the member is subject to a joint fund contribution requirement. The specific questions arising in relation to a separate fund contribution requirements structure is discussed under the heading "Separate or Joint Requirements" below.

Also, in order to trade Generic Rates Instrument a Member would be required to enter into Loss Sharing Custody Account Agreement and thereby being subject to the Loss

Sharing Rules, which in essence entails that the Member is required to provide funds to the Loss Sharing Pool which follow the same principles as the Default Fund, but applied to issues in relation to the Generic Rates Instruments.

The loss carrying order upon a Member's default, guarantee and replenishment

Upon a Member's default any collateral and margin provided by that member shall be applied firstly to cover any losses arising in relation to that Member's default. In general, with regards to any losses exceeding that collateral and margin, as set out in section 1.9A.26 of the Rules, the following pecking order, or waterfall if you so will, applies:

> *first*:, the contributed default fund assets of the defaulting Member shall be applied to cover the losses;
>
> *second*: junior capital (funded by the Clearing House's own assets) in the amount of MSEK 100 shall be applied to cover the losses;
>
> *third*: non-defaulting members' contributed assets to the relevant instrument-specific default fund shall be applied to cover the losses arising with regards to the commodity instruments or the financial instruments, as applicable;
>
> *fourth*: senior capital (funded by the Clearing House's own assets) shall be applied to cover the losses (the senior capital amount is not a fixed amount);
>
> *fifth*: non-defaulting members' contributed assets to the Mutual Default Fund shall be applied cover the losses;
>
> *sixth*: members' guarantee commitments shall be applied to cover the losses; and
>
> *seven*: capital replenished during an period of 90 days after a member's default shall be applied to cover the losses.

We note that although the third step only entails that non-defaulting members' contributions to the instrument-specific default fund may be applied towards losses with regards to those specific instruments, any surplus amounts may be used by the Clearing House to perform the Members' guarantee commitments in step six.

According to the guarantee commitment as set out in Section 1.9A.27 through 1.9A.30 of the Rules, a Member is required to pay in cash to the Clearing House an amount sufficient to cover any losses not covered by steps one to five (inclusive) in 20

the waterfall. The amount to be paid by the individual member is determined as the member's pro rata share of the aggregated default fund assets required to cover the loss. However, amounts payable under the guarantee is capped at 100% of the amount specified as the member's required default fund contribution. The maximum guarantee amount to be paid under the guarantee shall be reduced by any replenishment amounts paid by the member for any period. The guarantee shall be paid in cash to the Clearing House within two days following notice to the Member.

In accordance with Section 1.9A.31 through 1.9A.36 of the Rules, each Member is required, following a replenishment request from the Clearing House, to contribute its pro rata share of the utilised default fund in order to restore that default fund to its intended size. However, funds contributed by a Member by replenishment during the 90 days following another member's default will rank in the seventh step in the waterfall during that 90-day period. After the 90 day period, the funds will be allocated to their normal priority in the waterfall. It should also be noted that the any required replenishment amounts reduces the amount that can be drawn under the guarantee.

Also, as set out in Section 1.9A.32(i) of the Rules the Member's replenishment obligation is cancelled for as long as any amount is utilised under the guarantee commitment. There seems to be two main interpretations as to the cancelling of the replenishment obligation. The first meaning is that the replenishment obligation is cancelled upon the first utilisation of the guarantee and may not be reinstated. The second meaning is that the guarantee could be repaid and upon such repayment the replenishment obligation would be reinstated. However, as the Rules do not explicitly set out any details regarding repayment of any payments made under the guarantee commitment we believe that the first meaning is more reasonable and that a Swedish court should interpret the Rules in accordance therewith.

A Members maximum exposure under the Default Fund

Two scenarios need to be explored with regards to a member's maximum exposure under the Rules to the Clearing House. The first scenario is that several members default within a 90 day period and the second scenario is that several members default but with more than 90 days in between each default.

In the first scenario it could be envisaged that steps one to five (inclusive) are fully depleted to cover losses. The Clearing House may thereafter issue a replenishment request for the full default fund amount. The members provide these funds, which are then counted against the seventh step in the waterfall structure (as it is still 90 days following the default of the member). The Clearing House thereafter calls upon the

guarantee commitment for the full amount of the default fund as set out in step six of the waterfall structure. However, the guarantee amount is reduced by any amount replenished, in accordance with clause 1.9A.39(ii) of the Rules, and the members are not obliged to pay any additional funds to the Clearing House. Had the Clearing House instead not issued replenishment requests but immediately called upon the guarantee, the outcome would in the end have been the same as the replenishment obligation is terminated on the date any mount is utilised under the guarantee. In this scenario, we believe that the maximum amount a Member could be required to pay is twice the amount calculated as the members required default fund contribution.

In the second scenario it could be envisaged that steps one to five (inclusive) are fully depleted to cover losses. The Clearing House thereafter issues a replenishment request for the full default fund amount. The Members provide these funds which are then absolved as the seventh step in the waterfall structure (as it is still 90 days following the default of the member). However, 90 days pass and step six and seven are not required to cover any losses. The replenishment funds placed in step seven during the 90 day period are reallocated to steps one to seven (inclusive). Thereafter another Member defaults. Steps one to five (inclusive) are once again depleted to cover losses and this time the Clearing House calls upon the full amount under the guarantee to be paid. As apparent in this particular scenario the individual member's exposure was three times the amount calculated as the member's required default fund contribution. However, we note that there is no maximum exposure as long as the members default with more than 90 days apart.

There seems to be two main interpretations as to the meaning of the 90 day period when replenishment funds are locked to step seven. The first is that any replenishment amounts paid during a 90-day period following a member's default should remain as allocated to the seventh step. Thus, if there are several member defaults the replenishment amounts will not be reallocated to the other steps in the waterfall until 90 days after the most recent member-default. The second interpretation is that the replenish funds should be reallocated to the other steps in the waterfall 90 days after the member-default to which such replenishment payment relates. Perhaps the first interpretation is the more reasonable as it would be difficult to determine which replenishment amounts are related to which member default.

In summary, we believe (i) that there is no maximum amount for required replenishments if several members default with more than 90 days apart, (ii) that if Members default with less than 90 days apart, the aggregated amount an member would need to provide to the Clearing House is twice that of the required default fund

contribution for the individual member (the first amount as the actual default fund contributions and the second amount as the guarantee or the replenishment amounts).

Separate or Joint Fund Requirements

As set out in Section 1.9A.24 through 1.9A.25 of the Rules, two forms of funds requirements obtain: the separate fund requirement and the joint fund requirement.

The joint fund requirement means that although the member has contributed funds to both of the instrument-specific default funds, the allocations of losses between the default funds should be done according to the specific scheme as set out in the waterfall. This means, among other things, that the defaulting member's own contributions -- regardless of to which default fund the contributions have been made -- should be applied to cover any losses due to the default of that individual member (as step one in the waterfall), before any of the Clearing House's funds or other members' default fund contributions are applied.

The separate fund requirement means that an individual member's contributions to both the Commodity Default Fund and the Financial Default Fund should be treated as separate for the purposes of the waterfall and should be viewed in practice as being contributed by two different members. We believe that this means that the Clearing House funds and the funds of other members will be applied to cover the losses of an individual member before all the funds contributed by the defaulting member have been depleted. With this structure, the defaulting member's additional funds will only be used in step six of the waterfall.

The Clearing House may change the Rules unilaterally

We believe that as a general matter the Clearing House has the right to change or add its rules unilaterally. However, to the best of our knowledge, we understand that historically and as a matter of course the Clearing House has indeed notified the Swedish Securities Dealers Association (the "**SSDA**") of any major changes to the Rules. Depending on the precise course of events, there may be an argument that the historic behaviour of the Clearing House and the SSDA have modified the Rules by their concerted action to the effect that the SSDA's consent may be required for the changes to become effective.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

Recognition of choice of law

4.1 The Clearing House Documents specify that the law of the Kingdom of Sweden shall apply. The contractual choice of law would normally be respected by the courts of the Kingdom of Sweden and in addition thereto choice of law provisions such as the set out in the Rules have explicit protection in accordance with Section 12 of the Settlement Systems Act in relation to the insolvency of any of the Members or the Clearing House.

Netting and Set-off: General

4.2 There has been a debate among Swedish legal experts whether arrangements such as the Netting Provisions would be recognised and enforceable in Insolvency Proceedings. The discussions have centred on two legal issues: (i) the applicability of Section 63 of the Sale of Goods Act 1990 (*köplagen (1990:931)*) and (ii) certain general principles of the insolvency laws of this jurisdiction.

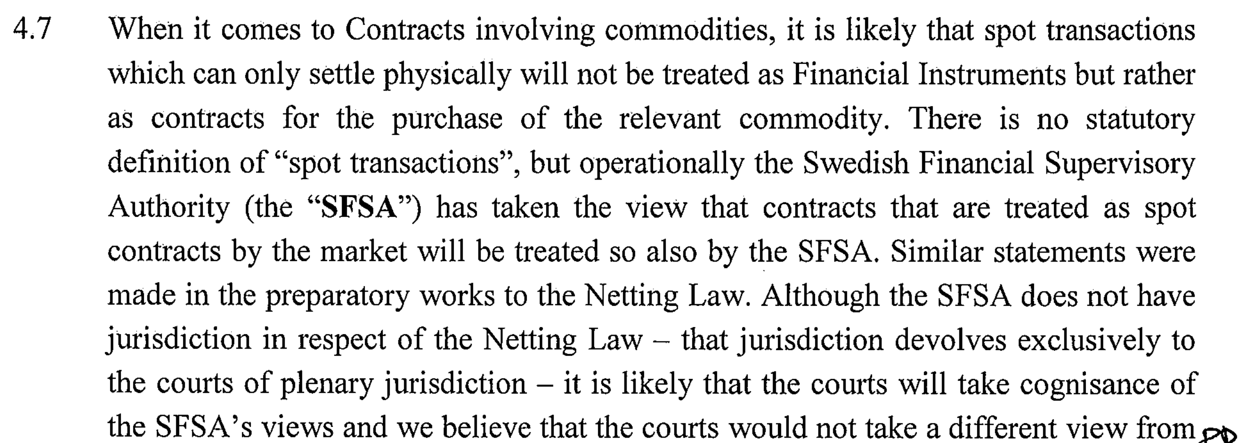
4.3 Section 63 of the Sale of Goods Act 1990 permits the administrator-in-bankruptcy to "enter into" an agreement made by the bankrupt debtor and also to refuse to "enter into" such agreements (cherry picking). It has been argued that Section 63 of the Sale of Goods Act 1990 is mandatory in the sense that it cannot be contracted out of by the parties to an agreement prior to bankruptcy. This view has been questioned by other authors. It could be pointed out, in particular, that Section 3 of the Sale of Goods Act 1990 provides that the Act may be set aside by the parties' agreement, any normative practices developed by the parties (really a subspecies of contractual abrogation) or customary law. No strong consensus has emerged on this point.

4.4 It is a general principle under Swedish law that parties to a contract may agree upon whatever rights and obligations they see fit, subject to the general limitation that a Swedish court may not enforce agreements on criminal acts or acts contrary to Swedish public policy or measures designed solely or primarily designed to have an effect upon the creditors of any of the parties. It should be pointed out that the Supreme Court in a series of recent cases has upheld and fully enforced contracts designed to facilitate tax evasion. This principle creates a level of legal uncertainty in respect of procedures such as the Netting Provisions, as it may be argued that where such procedures become operative by virtue of the subject party's insolvency, the procedures are directed against other creditors. On the other hand, it may be argued that procedures such as the Netting Provisions, which may become operative in a number of situations (including, but not being limited to, insolvency) are not primarily, but merely incidentally, directed against other creditors. RD

4.5 To remove the legal uncertainty discussed above in respect of certain types of transactions (Qualified Contracts) the Netting Law was enacted as amendments to the FITA. The statutory amendments now read in relevant parts (in our translation into English):

> "An agreement between two parties in conjunction with trade in financial instruments or in rights and obligations similar to financial instruments or currencies, pursuant to which a final settlement shall take place of all outstanding obligations in the event of one of the parties' entering bankruptcy shall be valid against the bankruptcy estate and the bankruptcy creditors. [...]
>
> Where an agreement pursuant to the first paragraph contains a condition whereby a final settlement shall take place of all outstanding obligations in the event of a granting of an order in respect of company reconstruction proceedings pursuant to the Company Reconstructions Act 1996 in respect of one of the parties, such a condition shall be valid against the debtor and any creditors whose claims are subject to a composition."

4.6 The Government committee responsible for the original draft of what later became the Netting Law came out in favour of the view that the uncodified common law would uphold procedures such as the Netting Provision. The committee was careful to point out that its proposal should not be construed to imply that, in the absence of legislation, procedures such as the Netting Provision would not be upheld. The preparatory works to the Netting Law accepted the analysis and arguments of the committee. One practical effect of the enactment of the Netting Law is that the discussion under Section 4.7 has now become redundant in respect of Qualified Contracts; but it remains of relevance for other types of agreements, including, in our view, Contracts that only allow for physical settlement.



4.7 When it comes to Contracts involving commodities, it is likely that spot transactions which can only settle physically will not be treated as Financial Instruments but rather as contracts for the purchase of the relevant commodity. There is no statutory definition of "spot transactions", but operationally the Swedish Financial Supervisory Authority (the "**SFSA**") has taken the view that contracts that are treated as spot contracts by the market will be treated so also by the SFSA. Similar statements were made in the preparatory works to the Netting Law. Although the SFSA does not have jurisdiction in respect of the Netting Law – that jurisdiction devolves exclusively to the courts of plenary jurisdiction – it is likely that the courts will take cognisance of the SFSA's views and we believe that the courts would not take a different view from

that of the SFSA. In cases where the courts have had to determine whether investment firms and banks have complied with their contractual and extra-contractual obligations of care the views of the SFSA as to what would count as the effective standard against investment firms and banks are to be assessed have been accepted by the courts.

4.8 In respect of commodity options, the legal position is not free from doubt; the SFSA has not formed a conclusive view. In our view, however, commodity options and futures the terms of which only allow physical delivery would not be regarded as being Qualified Contracts. Commodity options and futures the terms of which allow for a choice between physical or cash settlement, or the terms of which only allow for cash settlement, would in our view, if the other elements of the definition of Financial Instruments have been met, be regarded as Financial Instruments or, if the other elements in the definition of Financial Instruments have not been met, very probably as "rights and obligations similar to financial instruments" under the Netting Law. In our view, only Contracts which only allow for settlement by physical delivery of commodities would fail to be characterised as Qualified Contracts.

The definition of Clearing House as set out in the Rules

4.9 The Rules utilise "Exchange" as the definition of the Clearing House, and the definition is set out in the Rules as:

Swedish	**English**
"Börsen" NASDAQ OMX Stockholm AB, org. Nr. 556383-9058 i dess egenskap av börs.	"Exchange" NASDAQ OMX Stockholm AB, organization no. 556383-9058, in its capacity as a securities exchange.

4.10 By way of background the Clearing House operates both an exchange and a central counterparty clearing business and holds authorisations in accordance thereto. The Rules is divided in separate sections for inter alia the exchange and central counterparty clearing business. In light of this and the definition of Clearing House as set above, there would seem to be two main possible interpretations of the Netting Provision. The first that the Netting Provision should only apply if the Clearing Houses bankruptcy is a consequence of is exchange business, and that any bankruptcy caused by other circumstances would fall outside of the scope of the Netting Provision. The second interpretation of the clause would be that no real distinction should be made with regards to the different businesses of the Clearing House in this

RD

respect. The first interpretation has some merit as one could query what the explicit carve-out in the definition of "Exchange" would otherwise mean, especially in light of the fact the Rules have a corresponding explicit definition for the Clearing House when acting in its capacity as a clearing house. However irrespective that a strict reading of the section would imply otherwise, it could be reasonable to interpret the definition of "Exchange" that it should in this occurrence rather be viewed as a scrivener's error so that the Netting Provisions would apply to more than just a select universe of circumstances entailing the bankruptcy. However, we cannot express any certainty on this on this point and a prudent interpretation of the Rules would imply that only a select universe of circumstances entailing the bankruptcy of the Clearing House would entail an application of the Netting Provisions.

<u>The language of the Netting Provision</u>

Swedish	**English**
1.10.1 För det fall Börsen försätts i konkurs skall samtliga Kontrakt omedelbart fullgöras och Börsens och Motparts samtliga förpliktelser enligt detta Regelverk avräknas.	1.10.1 In the event the Exchange is placed in insolvent liquidation, all Contracts shall be settled immediately and any and all of the Exchange's and the Counterparty's obligations under these Rules and Regulations shall be set-off.

4.11 We note that the Netting Provision stipulate that upon the bankruptcy of the Clearing House the Contracts shall be "settled" (*fullgöras*) and that all of the obligations between the parties under the Rules should be set-off. We also note that the Swedish language version of the Rules stipulate "fullgöras" which would typically be translated to performed, executed, fulfilled, completed, carried out etc. In other instances in the Rules the term "fullgöra" is indeed translated as such. In clause 1.1.6, 1.1.10 (both first and last sentene), 1.7.2.3 it is translated as "performace", in clause 1.8.3 and 1.8.4 it is translated as "meet his obligations", and in clause 1.9 the failure to "fullgöra" is translated as default (and in 1.9.16 as "in breach"). We also note that the Swedish language version of the Netting Provision state "avräknas" (which would typically be translated as final settlement or netting) whilst the English version of the clause states "set-off".

4.12 We also note that the precise procedure for "settlement", and the valuation of the Contracts in relation thereto, is not stipulated in the Netting Provision or the Rules.

4.13 The ambiguous utilisation of the terms in the Netting Provision and the somewhat awkwardly terse language entail that the precise meaning of the Netting Provision is not evidentiary. Although a certain legal risk arises in relation thereto as to the actual and implied meaning of the Netting Provisions in this respect, we believe that a Swedish court should reasonably interpret the Netting Provision to mean that the Contracts should upon the bankruptcy of the Clearing House be valued at their net present value and the parties mutual claims should be netted, entailing that only a the netted value of the net present value of the Contracts should be paid to the payee. However, there is little guidance as to at what date or in what manner valuation other related actions should be carried out.

Cross-currency set-off

4.14 As a general matter the Set-off Provision are enforceable under Swedish law (this is set out in chapter 5 of the Bankruptcy Act). The provisions in the Set-Off Provisions entailing cross currency set-off following an Event of Default are, to the extent the circumstances surrounding the Event of Default fall under Chapter 8 Section 10 of the Bankruptcy Act or under Chapter 5 Section 1 of the FITA, as a general matter valid and enforceable under the laws of the Kingdom of Sweden in accordance with the provisions. However, if the circumstances surrounding the Event of Default fall outside side the scope of the before mentioned legal sections, the matter is not entirely clear as there is no outright legislative provision nor a court ruling on the matter on point. Two lines of argument have developed both with support in preparatory works and legal doctrine, one arguing that claims in different currencies cannot be set-off as they represent values in different nominations and thus do not express value within a system providing immediately mutually exchangeability; the other line arguing that that the main prerequisite for a set-off is the certainty and immediacy with which a valuation can be established, often directly dependant on the assets homogeneity and liquidity with which they are traded, entailing that, inter alia, cross-currency (and indeed any liquid homogeneous asset such as certain raw materials, T-bills and other financial assets) set-off is consistent with the underlying purposes that from the outset restrict the permitted scope of set-off. It is our opinion that the later line of argument is more coherent with the purposes of the above mentioned legal sections and that a court of the Kingdom of Sweden or arbitral tribunals sitting in, or applying the procedural laws of the Kingdom of Sweden should judge accordingly.

The Definition of Contracts, Transactions and Registration

4.15 The definition in the Rules of Contracts, Transactions and Registration is circular, as Contracts is defined as "when a Transaction is Registered... ...the Transaction is 20

replaced by one or more Contracts" and Transactions is defined as "a trade with respect to an [instrument] which is Registered..." and Registration is defined as "documentation of a Transaction with regard to [instruments] on a [account] whereby the Transaction is replaced with one or more Contracts.". Although this creates some interpretational difficulties we do not believe that this would lead to any materially adverse interpretation for the Members.

Members' Assessment Liabilities

Definition of Contributed Assets and Default Fund

4.16 The definition of Contributed Assets and Default Fund is circular, as Contributed Assets is defined as "means all assets contributed... to the Default Fund" and Default Fund is defined as "the sum of all Contributed Assets...". Although this creates some interpretational difficulties we do not believe that this would lead to any materially adverse interpretation for the Members.

Cash Contributed to the Default Fund

4.17 The member may provide funds in the form of cash to its default fund custody account. According to the Terms, the cash contributions are to be transferred to certain designated bank accounts. As the bank accounts are not member specific we assume that the bank accounts are in the name of the Clearing House and not in the name of the individual member. This would mean that the account represents a claim on the bank by the Clearing House. As set out in Section 8.1 of the General Terms for Custody Accounts the cash contributed to the custody account are pledged to the benefit of the Clearing House with regards to the member's obligations under the default fund rules. Further, Section 4.4 of the General Terms for Custody Accounts explicitly states that cash contributions will be co-mingled with other members' cash contributions and with the Clearing House's own funds, and that the member acknowledges that the Member will rank *pari passu* with other unsecured creditors with regards to cash contributions. Clauses 4.4 and 8.1 of the General Terms for Custody Accounts are consistent with our assumption that the account is maintained in the name of the Clearing House; but would not be consistent with a structure in which the account is maintained in the Member's name.

4.18 We note some irregularities with regard to the proposed pledge (the term pledge typically refers to, in a strict and formal sense, the term "pant" in Swedish) over the cash contributions. Upon transferring the cash from the Member's bank account to the specified bank accounts, the Clearing House becomes the *de jure* and *de facto* holder of those cash funds in the form of a claim against the relevant bank in the relevant RD

amount. In these circumstances, no cash amounts are being held by the member over which that member could create a pledge in a strict and formal sense (Sw. *pant*) to the benefit of the Clearing House. We believe the security structure is tantamount to margining. It follows, then, that the intended security interest over the cash contributions in accordance with the General Terms for Custody Accounts would not in fact be a pledge in a strict and formal sense (*pant*), as the cash amounts would consist of the Clearing House's claims against the bank operating the relevant account.

4.19 Under a pledge in the strict and formal sense (*pant*), the enforcement measures available to the pledgee are limited to the right, upon default of the obligations secured by the pledge, to realise the pledged assets by turning them into money by sale to a third party or by appropriating the assets in satisfaction of the secured obligations (provided, however, that any surplus of the value of the collateral assets over the secured obligations should be returned to the pledgor). The parties may limit these options by contract. If, however, the security arrangement is not in fact a pledge in the strict and formal sense (*pant*), where the collateral-provider has given the collateral-taker wider rights – in particularly, where the collateral-taker has been give rehypotecation (reuse) rights – the arrangement is no longer a pledge in the strict and formal sense (*pant*). The enforcement measures available would then be those set out in the contract between the collateral-provider and the collateral-taker. In arrangements of a repo nature or margining – such as the security interest created in respect of cash provided as collateral to the Clearing House – "enforcement" has in a manner of speaking already taken place, again subject to a return of any excess value in the collateral provided. Whereas a member would be entitled to receive the assets provided as collateral under a pledge (and that have not in fact been comingled with the pledgee's assets) back from the bankruptcy estate of the Clearing House against the discharge of the secured obligations, the claims by the member for the return of cash collateral provided by way of margining (as in the present case) or for the payment of excess value would be simple unsecured claims in the bankruptcy of the Clearing House.

4.20 Based upon the above we believe that a member will rank *pari passu* with other unsecured creditors with regard to the return of cash contributed by the member to the default fund upon the insolvency of the Clearing House.

4.21 Additional interpretational difficulties regarding the proposed pledge over cash contributions are discussed below.

<u>The Definition of Securities Interest</u>

4.22 Securities Interest in the General Terms for Custody Accounts is defined as:

English
(i) any mortgage, charge, pledge, assignment (whether or not expressed to be by way of security), hypothecation, lien, encumbrance or other priority or any security interest whatsoever, howsoever created or arising; (ii) any deferred purchase, title retention, trust, sale-and-repurchase, sale-and-leaseback, hold back or "flawed asset" arrangement or right of set-off; (iii) any other agreement or arrangement whatsoever having the same or a similar commercial or economic effect as security; and (iv) any agreement for any of the foregoing.

4.23 The definition is broad and includes a catch-all component. This definition closely corresponds to definitions used in the loan market for the purposes of negative pledge clauses (clauses prohibiting the creation of encumbrances, and the term is indeed used in that context: see Sections 7.2 (ii) and 8.2 (i) of the General Terms for Custody Accounts) and for permitting certain types of encumbrances where the creation of encumbrances would otherwise be prohibited.

4.24 The breadth of the clause gives rise to certain interpretational difficulties and there would seem to be two main possible interpretations of the clause when used in the General Terms for Custody Accounts. The first that the term would mean only the Security Interest actually created under the General Terms for Custody Accounts. The second that the term would mean all or any of the security interest set out in the definitions catalogue. However, the term is generally used in the Terms in a context as "Securities Interest created under this Agreement" (see Sections 8.4, 13.3. and 18.3 of the General Terms for Custody Accounts) or as "NASDAQOMX's Security Interests" or similar (see Sections 3.2, 3.3, 5.5 (v), 6.1, 9.1, 11.1(iv) and 11.2(i) of the General Terms for Custody Accounts).

4.25 We believe that, with the exception of clauses 7.2 (ii) and 8.2 (i) of the General Terms for Custody Accounts, the term should in these contexts be interpreted to mean solely the security interests created under the General Terms for Custody Accounts. Notwithstanding the before said, the ambiguity regarding the interpretation of the definition and usage of the term securities interest entails a legal risk regarding the actual and implied meaning of the Terms in this respect. However, we believe that a EP

Swedish court would not construe the before mentioned terms in a manner that would be materially adverse for the Member.

4.26 Also, the term Security Interest seems to be incorrectly used in Section 9.3 of the General Terms for Custody Accounts. It is not the Security Interest that is appropriated but rather the assets posted as collateral. However, we believe that a Swedish court would interpret the clause as referring to appropriation of the assets. It should also be noted that the clause does not entail any very substantial obligation of the Clearing House as the obligation is stipulated as "will endeavor".

Additional implications of the proposed Pledge over Cash Contributions

4.27 As discussed above the pledge over cash contributions as stipulated under Section 8.1 of General Terms for Custody Accounts is not a pledge in a strict and formal sense (*pant*) but rather a margining or similar security interest with respect to section 8 of the General Terms for Custody Accounts. It could be argued that the term pledge should be interpreted to mean a pledge in a strict and formal sense (*pant*) with regards to other aspects of the General Terms for Custody Accounts. Such an interpretation would be unfavorable for the Members and as one could argue that the Member would (i) be deemed to be in a breach of the General Terms for Custody Accounts with regards to Section 6.1 of the General Terms for Custody Accounts which set outs a general undertaking for the member not to act or omit any act which could reasonably impede or diminish the Clearing Houses Security Interest in the Contributed Assets; (ii) be required to execute additional documents with regards to clause 6.2 of the General Terms for Custody Accounts which set outs an obligation to execute and deliver such documents to give effect to the agreement; and (iii) be deemed to be in breach of Section 7.2 (i) through (iii) and 7.3 of the General Terms for Custody Accounts in which the Member represent and warrant that the obligations are valid and impose an obligation to inform the Clearing House if this ceases to be true and correct.

4.28 However, we believe that a Swedish court would in accordance with Swedish judicial conventions not interpret the clauses in such a manner but rather interpret the meaning of pledge with regard to cash contributions consistently in General Terms for Custody Accounts. This is partly as another interpretation could not reasonably have been the parties intent and also partly as the Rules and the General Terms for Custody Accounts are written by the Clearing House, who should then, unless there are arguments with a certain weight in favor of other interpretations, carry the risk arising due to any ambiguities of the Rules and the General Terms for Custody Accounts.

Release of Fund subject to the Clearing House's Approval

4.29 In accordance with section 1.9A.18 of the Rules, the Clearing House approval is required for the release of contributed funds even in circumstances were the member's contributed funds exceed the member's contribution requirements. As the Rules do not set out conditions for the release of the funds, it would then ultimately be an arbitrary decision for the Clearing House whether to release excess funds. The issue should especially be seen in light of section 1.9A.27 of the Rules, which enables the Clearing House to use any exceeding contributions for the performance of the guarantee commitment as set out in 1.9A.27 of the Rules.

4.30 Although EMIR emphasises the systematic risks inherent in clearing houses and as a general matter provides additional powers and flexibility to the clearing houses to manage such risks, it could perhaps be arguable that the Rules in this respect is unreasonable and should not be enforced by the Swedish courts. If that view was indeed shared by the courts, and the courts would establish that the Clearing House would be obliged to release excess funds to the member, the member's claim for the release of excess funds would be unsecured in the Clearing House's bankruptcy.

General Qualifications

4.31 Pursuant to the Swedish Contracts Act 1915 (*lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*) and general equitable principles of the law of contract and obligations, a contract term may be modified or set aside if it is adjudged to be unreasonable. Where any party to an agreement is vested with a discretion or may determine a matter in its opinion or at its discretion, the laws of this jurisdiction may require that such discretion be exercised reasonably or that such opinion be based on reasonable grounds and a provision that a certain determination is conclusive and binding will not serve to prevent or preclude judicial enquiry into the merits of any claim by an aggrieved party; and the effectiveness of any provision which allows an invalid or unenforceable provision to be severed to save the remainder of the relevant document and its provisions will be determined by the courts of this jurisdiction or arbitral tribunals sitting in, or applying the procedural laws of this jurisdiction in their discretion. However, it should be noted that it is highly irregular for the courts to utilise such equitable power in matters between two professional parties.

4.32 The enforcement of any agreement, guarantee or instrument may be limited by the provisions of the Moratorium Act 1940 (*lag (1940:300)* ang. *förordnande om anstånd med betalning av gäld m.m. (moratorielag)*) (which provides for a moratorium on the performance of obligations by persons or entities domiciled or resident in Sweden when the Kingdom is at war; where extraordinary circumstances obtain in the RD

Kingdom as a result of war; or in retaliation for corresponding or commensurate measures in another state in respect of claims by Swedish creditors) and the Emergency Powers (Defence of the Realm) Act 1978 (*förfogandelag (1978:262)*) (which provides that property and assets situate in Sweden may be requisitioned or otherwise compulsorily disposed of by the authorities of the Kingdom when the Kingdom is at war; when there is a risk of the Kingdom becoming at war; where extraordinary circumstances obtain in the Kingdom as a result of war; or where there is an imperative need for the defence of the Kingdom).

4.33 Provisions in an agreement specifying that its provisions may only be amended or waived in writing may not be enforceable to the extent that an oral agreement or implied agreement in trade practice or course of conduct has been created modifying provisions of the agreement; and to the extent that any matter is expressly to be determined by future agreement or negotiation, such provision may be unenforceable or void for lack of certainty.

4.34 Certain appendices of the Rules and this opinion are expressed in the English language whilst addressing and explaining institutions and concepts of the laws of Sweden; and such institutions and concepts may be reflected in or described by the English language only imperfectly; and we express no opinion on how the Swedish would construe contractual language expressed in English where the contract would be subject to the laws of Sweden. However, we believe that such courts would pay attention to the meaning and import in the laws of any pertinent jurisdiction in which the English language is normally or habitually employed of the expressions used in construing what the parties intended to put in writing for the purposes of the laws of Sweden.

There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

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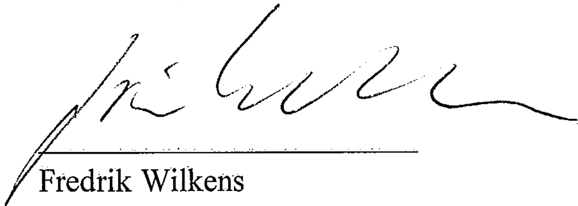
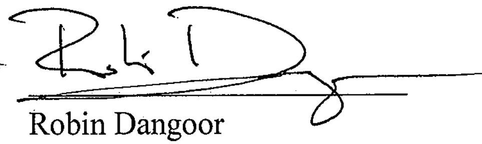
Yours faithfully

ADVOKATFIRMAN VINGE KB





Fredrik Wilkens Robin Dangoor