**Swedish Securities Dealers Association response to the joint ESAs consultation paper on risk-mitigation techniques for OTC-derivatives contracts not cleared by a CCP (JC/CP/2015/002)**

**July 10, 2015**

The Swedish Securities Dealers Association (SSDA) welcomes the opportunity to comment on the joint ESAs consultation paper on draft RTS on risk-mitigation techniques for OTC-derivatives contracts not cleared by a CCP. The SSDA represents the common interest of 29 banks and investment firms active on the Swedish securities market. The mission of the SSDA is to promote a sound, strong and efficient securities market.

We support the response by the European Banking Federation (EBF). In addition to the support to the EBF, we would like to add two comments regarding question 1.

**Question 1: Respondents are invited to comment on the proposal in this section concerning the treatment of non-financial counterparties domiciled outside the EU**

* Treatment of non-EU non-financial counterparties (Art. 2 GEN):

We welcome the equality of treatment to level the playing fields internationally.

It comes out of the ESAs public hearing material that “the identification of the status of a non-financial counterparty and whether that counterparty is above/below the clearing threshold is left to the European Counterparty”. This is not consistent with the treatment of EU based NFCs, where the FCs are authorised to rely on representations obtained from their NFC counterparties detailing the NFC status to satisfy their regulatory compliance (ESMA Q&A OTC Question 4, Answer 4). Such a “safe harbor” is essential to eliminate the regulatory risk FCs would otherwise face when trading with NFC entities, as they do not have the capacity in practice to determine the trading volumes of their counterparties at group level. The proposed treatment imposes an unacceptable and unmanageable risk for FCs, thus in practice detracting from trading with third country entities. This aspect waters down the positive developments in view of re-establishing the equality of treatment between EU and non-EU based NFCs.

* European counterparties have the obligation to assess the legal enforceability of the netting and segregation agreements

We understand the need for legally effective and enforceable netting and segregation arrangements. We welcome that the original requirement for the legal opinion on effectiveness of the IM segregation has been replaced by a less cumbersome requirement of an internal legal review.

However, we note that the requirement for legal review with respect to the netting arrangement is a new one and its implications may detract from trading with counterparties in non-netting jurisdictions - thus creating a competitive disadvantage for the European banks. Indeed, it is difficult to see what “alternative arrangement” can be put in place to account for the negative netting status in the counterparty´s jurisdiction. The only way to comply with the requirement of a “clean” legal analysis supporting the enforceability of netting arrangements even upon the counterparty´s bankruptcy is to stop trading with counterparties established (or having branches) in the non-netting jurisdictions. The requirement is discussed in connection with the third countries, but we note that even within the EU, not all countries have satisfactorily implemented the Collateral Directive and therefore are treated as non-netting jurisdictions without a clean legal opinion when it comes to the netting arrangements. This is therefore a major issue.

Our suggestion is to clarify that while it is required to perform the legal analysis of enforceability of netting arrangements, the “clean” status of such analysis should not be a precondition for trading and margining and should not be subject to requirements of alternative arrangement.