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## Discharge from liability under Swedish company law

### Executive summary

In this letter, we describe the Swedish rules regarding discharge from liability for the board of directors and the managing director (*i.e.*, the CEO) of a Swedish company.

Discharge from liability is a special feature of Swedish company law and a mandatory matter at the AGM of a Swedish company. Discharge from liability is granted unless the majority at the AGM, *or* a minority representing at least 10% of all shares in the company, votes against discharge.

If a board member or the CEO is granted discharge from liability at the AGM, *the company* (or shareholders acting on behalf of the company) may not claim damages from that individual concerning his or her management of the company during the relevant financial year, which is the year covered by the annual report presented at the AGM. However, there are some exceptions to this rule, for example where, in the annual report or the auditor's report or otherwise, materially correct and complete information was not provided to the general meeting regarding the resolution or the measure on which the claim is based, or if the company has incurred damage because of a crime.

In the audit report, the auditor is obligated to provide his or her recommendation to the AGM regarding discharge from liability.

A resolution to grant discharge from liability does not prevent a shareholder from claiming damages in its own name and on its own account from the relevant individual(s).

**Key facts on “Discharge from Liability” (item 10 on Swedbank’s agenda for the 2019 AGM)**

1. A decision on discharge from liability precludes Swedbank AB<sup>1</sup> from bringing actions against its CEO and board members for their management of the company, subject, however, to the following conditions.
2. The decision on discharge from liability at the 2019 AGM pertains to actions and omissions that occurred between 1 January 2018 and 31 December 2018.
3. Acts or omissions subject to discharge are limited to matters for which materially correct and complete information has been provided *to the AGM* in the annual report, auditor’s report or otherwise, *e.g.*, in the CEO’s presentation or as a response to a question from a shareholder.
4. Even if discharge has been granted, the board may commence an action against a board member or the CEO where the damage was incurred as a result of a crime.

Examples of matters outside the scope of the vote on discharge from liability at the 2019 AGM:

- A. Management decision/action/negligence by the CEO during 2018 which has not been properly disclosed to the AGM (cf. item 3 above).
- B. Management decision/action/negligence that occurred before 2018.
- C. Criminal activity by the board or the CEO during 2018 or earlier.
- D. A shareholder’s capacity to bring actions on its own behalf against a board member and/or the CEO.

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<sup>1</sup> Including claims made by a minority of not less than 10% of all shares acting in their own name but on the company’s behalf.

## 1 Background

In this letter, we describe generally relevant law and the legal consequences of a resolution to grant or not to grant discharge from liability at the annual general meeting (an “AGM”) of a Swedish company.

It goes without saying that a shareholder is free to exercise its vote as it deems appropriate in its sole discretion and a shareholder may freely vote for or against discharge with or without reason.

## 2 Discharge from liability

The matter regarding discharge from liability for the board members and the CEO vis-à-vis the company is a special feature of Swedish corporate governance and a mandatory matter at an AGM in a Swedish company. According to the Swedish Companies Act (the “**Companies Act**”), discharge from liability is granted if shareholders representing a majority of the votes cast at the AGM support the resolution, unless a minority representing at least 10% of all shares in the company votes against the resolution.<sup>2 3</sup> The resolution whether to grant discharge is made with respect to each board member and the CEO. Thus, the general meeting may resolve to grant discharge from liability for certain board members, but to deny discharge for others. However, in practice, most companies address the question of discharge as a single consolidated matter (and thus not individually for each person subject to discharge).<sup>4</sup>

A discharge resolution at an AGM is granted with respect to the management by the board and the CEO *during the particular financial year covered by the annual report and the auditor’s report presented at such AGM.*

If a board member or the CEO has been granted discharge from liability with respect to their management **during a particular financial year**, no claim may, as a main rule, be brought against that individual for damages to the company *based upon acts or omissions during that financial year.*

However, this rule is not without exceptions. For example, notwithstanding discharge having been granted, a claim for damages to the company may nevertheless be brought (i) where, in the annual report or the auditor’s report or otherwise, materially correct and complete information was not provided to the general meeting

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<sup>2</sup> According to some scholars, discharge is granted as soon as a majority of the votes cast support the resolution, but a claim may still be made if a minority representing at least 10% of all shares in the company votes against the resolution. However, this distinction is of little relevance for the purpose of this letter.

<sup>3</sup> Abstentions do not count as votes against discharge.

<sup>4</sup> In this regard, we note that Swedbank has addressed discharge as individual decisions for the last three years, but that it is proposed as a single consolidated matter for the upcoming 2019 AGM.

regarding the resolution or the measure on which the claim is based, or (ii) by the board where the damage was incurred as a result of a crime.

If a board member or the CEO has *not* been granted discharge from liability with respect to his or her management during a particular financial year, the company itself (represented by the board), or shareholders representing at least 10% of all shares acting in their own name but on the company's behalf (by way of a so-called derivative action), may bring a claim against the relevant individual for damages to the company. Such claim must (i) be *based upon acts or omissions during that particular financial year* and (ii) be made by way of proceedings being commenced not later than one year from the date on which the annual report and the auditor's report for such financial year were presented to the general meeting. Thus, a one-year limitation period applies. However, longer limitation periods apply under certain circumstances, for example, in the two exceptional cases referred to in the preceding paragraph (*i.e.*, (i) information at the AGM not being materially correct or complete, or (ii) where a crime has been committed).

Typically, a shareholder votes against discharge *either because* it has reason to believe that the board or the CEO has caused damage to the company by certain acts or omissions during the relevant financial year and therefore wishes to reserve the company's right to bring a claim for damages against the board or the CEO, *or because* the shareholder wishes to express strong disapproval of one or more board members' (or the CEO's) management of the company, but without seeking to hold the board members or the CEO liable for damages. Commonly, a shareholder who votes against discharge also votes against re-election of relevant board members.

In a listed company, it is extremely unusual that discharge is not granted for the board members and the CEO.

It should be noted that a claim by a shareholder itself, on its own behalf, against a board member or the CEO for damages (thus payable to the shareholder and not to the company) does not have to be submitted to the general meeting and is not affected by a resolution regarding discharge from liability. Nor is such a claim subject to the relatively short limitation periods of the Companies Act, but to the general ten-year limitation period. Thus, the discharge from liability mechanism is only relevant with respect to *liability vis-à-vis the company, i.e.*, regarding damages *payable to the company*, by a board member or the CEO.

Finally, a matter that is sometimes subject to confusion is the period for which discharge is granted. This is so because the board of directors' term of office usually extends from one AGM to the next, whereas discharge is granted for a financial year (often, as in Swedbank, the calendar year). As an example, if a board member is elected at an AGM in 2018, his or her term of office will extend up until the

2019 AGM. However, the resolution on discharge at the 2019 AGM will only concern the board member's management of the company up until 31 December 2018. The board member's management of the company from and including 1 January 2019 up until the date of the 2019 AGM will be subject to the resolution on discharge at the 2020 AGM.

*To summarise*, when the AGM decides on discharge from liability, it effectively decides whether the company, or shareholders representing at least 10% of all shares acting in their own name but on the company's behalf, should be able to claim damages from the person concerned by the resolution on discharge (within one year from the date on which the annual report and the auditor's report for such financial year were presented to the AGM):

- (i) for his or her management of the company during a specific financial year,
- (ii) based on information that was presented to the AGM in the annual report, the auditor's report or otherwise;

provided that

- (a) such information was materially correct and complete, and
- (b) the damage was not incurred as a result of a crime (in which case the board can make a claim).

### **3 The auditor shall provide a recommendation**

According to the Companies Act, the auditor's report must contain a recommendation from the auditor on whether the board members and the CEO be granted discharge from liability vis-à-vis the company.

Where the auditor, in the course of his or her audit, becomes aware of any acts or omissions by any board member or the CEO, *which may give rise to liability* (*Sw. som kan föranleda ersättningskyldighet*), the auditor is obligated to note such fact in the auditor's report. The same applies where the auditor, in the course of the audit, finds that a board member or the CEO has otherwise acted in contravention of the Companies Act, applicable annual reports legislation, or the articles of association.

On very rare occasions, the auditor may find himself or herself unable to recommend for or against a discharge resolution, for example for reasons of insufficient information. Under such circumstances, the auditor will state that this is the case.

In this regard, it can be noted that Swedbank's auditors, Deloitte, have in their auditor's report dated 19 February 2019 recommended to the AGM that the board members and the CEO be granted discharge from liability for the financial year

2018.<sup>5</sup> We also note that the auditor's report does not contain any note of the auditors having become aware of any acts or omissions by any board member or the CEO that may give rise to liability.

#### 4 Further reading

The Swedish Corporate Governance Board (Sw. *Kollegiet för svensk bolagsstyrning*) has published helpful information about the Swedish corporate governance model on its website, for example a Q&A document concerning Swedish corporate governance (which includes further references). The Q&A is available at:

[http://www.corporategovernanceboard.se/Userfiles/Frequently\\_asked\\_questions\\_on\\_the\\_subject\\_of\\_the\\_Swedish\\_corporate\\_governance\\_model.pdf](http://www.corporategovernanceboard.se/Userfiles/Frequently_asked_questions_on_the_subject_of_the_Swedish_corporate_governance_model.pdf)

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This letter may be disclosed to shareholders and other third parties as you deem appropriate, but it may not be relied upon by – and we shall have no liability against – anyone except you.

Kind regards,



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<sup>5</sup> See page 213 of the bank's publicly available annual report for 2018.