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Decision 2019/7

# DECISION OF THE BOARD OF SUPERVISORS

## to adopt a supervisory measure in respect of an infringement by Nordea Bank Abp and to repeal its decision of 11 July 2018

**The Board of Supervisors ('the Board') of the European Securities and Markets Authority ('ESMA'),**

**Having regard to the Treaty on the Functioning of the European Union,**

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[1], and in particular Article 60(5) thereof,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[2], and in particular Article 24 thereof,

**Whereas:**

1. Following preliminary investigation, the Supervision Department within ESMA concluded, in a report dated 15 December 2016, that with respect to Nordea Bank AB there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.

2. On 12 January 2017 ESMA's Executive Director appointed an investigating officer ('IIO') pursuant to Article 23e(1) of Regulation (EC) No 1060/2009 to investigate the matter.

[1] OJ L 331, 15.12.2010, p. 84.
[2] OJ L 302 17.11.2009, p. 1.

3. The IIO sent her initial statement of findings dated 16 June 2017 to Nordea Bank AB that set out her findings that Nordea Bank AB had committed the infringement set out at point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.

4. By written submissions dated 9 August 2017, Nordea Bank AB responded to the findings of the IIO.

5. On 27 September 2017, the IIO submitted to the Board her file relating to the case, which included an amended statement of findings.

6. The Board discussed the IIO's findings and the case at its meeting on 14 December 2017.

7. On 2 March 2018, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file.[3]

8. The Board discussed the case further at its meeting on 22 March 2018.

9. On 17 May 2018, on behalf of the Board, ESMA sent a Statement of Findings to Nordea Bank AB.

10. On 7 June 2018, Nordea Bank AB provided written submissions to ESMA in relation to the matter.

11. The Board discussed the case further at its meeting on 11 July 2018.

12. On the basis of the file containing the IIO's findings and having considered the submissions made on behalf of Nordea Bank AB, the Board found that Nordea Bank AB negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009. Thus, the Board adopted a decision on 11 July 2018, imposing a supervisory measure and a fine on Nordea Bank AB (the 'Appealed Decision').

13. In particular, pursuant to Article 24 of Regulation (EC) No 1060/2009, the Board adopted a supervisory measure in the form of a public notice and pursuant to Article 36a of Regulation (EC) No 1060/2009, the Board also imposed a fine of EUR 495,000.

14. On 10 September 2018, Nordea Bank AB filed a Notice of Appeal addressed to the Board of Appeal of the European Supervisory Authorities (the 'Board of Appeal'), contending that the Appealed Decision was wrong, and that the case should be remitted to the Board for an amended decision.

15. On 1 October 2018, via a cross-border reversed merger between Nordea Bank AB and Nordea Bank Abp ('Nordea'), all Nordea Bank AB's assets and liabilities were transferred to Nordea, head-quartered in Finland. Nordea requested thus that the Board of Appeal

[3] Ruling of the Enforcement Panel (ESMA-2018-CONF-7104).

address its decision to Nordea.[4] The Board also considers Nordea the legal successor of Nordea Bank AB in all matters.

16. On 9 October 2018, the Board of Appeal directed that Nordea's appeal would be heard together with the appeals notified by Svenska Handelsbanken AB, Swedbank AB, and Skandinaviska Enskilda Banken AB, as these raised issues, which were the same or similar.

17. On 20 November 2018, ESMA served its response to Nordea's Notice of Appeal.

18. On 22 December 2018, Nordea served its reply to ESMA's response to the Notice of Appeal.

19. On 23 January 2019, ESMA served its rejoinder.

20. On 6 February 2019, pursuant to Article 60(4) of Regulation (EU) No 1095/2010, the parties' oral representations were heard by the Board of Appeal in Frankfurt a. M., Germany.

21. On 27 February 2019, the Board of Appeal issued its decision[5] (the 'Board of Appeal Decision') that Nordea had committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009, however had not acted negligently and remitted the decision to the Board pursuant to Article 60(5) of Regulation (EU) No 1095/2010.

22. The Board considered the Board of Appeal Decision and the case at its meeting on 11 July 2019.

23. On the basis of the file containing the IIO's findings, the submissions made on behalf of Nordea, and the Board of Appeal Decision, the Board found that Nordea, without intent or negligence, committed an infringement listed in Section I of Annex III of Regulation (EC) No 1060/2009.

24. Pursuant to Article 24 of Regulation (EC) No 1060/2009, where the Board finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

[4] See the email from Nordea's counsel to the Board of Appeal of 6 March 2019.
[5] For an electronic version of the Board of Appeal Decision, please see https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf.

**HAS ADOPTED THIS DECISION:**

**Article 1**

Nordea Bank Abp, without intent or negligence, committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.

**Article 2**

The Board of Supervisors adopts a supervisory measure in the form of a public notice to be issued in respect of the infringement referred to in Article 1.

**Article 3**

This Decision shall enter into force on the date of its adoption.

**Article 4**

This Decision is addressed to Nordea Bank Abp, Satamaradankatu 5, Helsinki, FI-00020 Nordea, Finland.

**Article 5**

The decision of the Board of Supervisors of 11 July 2018 to adopt a supervisory measure and impose a fine in respect of an infringement by Nordea Bank AB is repealed.

Done at Paris on 11 July 2019

[Personal Signature]

*For the Board of Supervisors*

*Steven Maijoor*

*The Chair*

# ANNEX

## STATEMENT OF FINDINGS OF THE BOARD

1. Further to a cross-border reversed merger between Nordea Bank AB and Nordea on 1 October 2018, all Nordea Bank AB's assets and liabilities were transferred to Nordea.[6] Thus, in this Statement of Findings, the references to Nordea are to be understood as references to Nordea or to Nordea Bank AB (as relevant).

2. Having considered the statement of findings of the IIO, the submissions made on behalf of Nordea in connection therewith, the material in the IIO's file, and the Board of Appeal Decision, the Board sets out its findings and the reasons for its findings as follows.

## A. Findings of the Board with regard to the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009

### Legislative provisions

3. Under specific circumstances a credit rating agency ('CRA') must apply to ESMA to be registered. Article 14(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ('the CRA Regulation') states[7] that "A credit rating agency shall apply for registration for the purposes of Article 2(1) provided that it is a legal person established in the Union".

4. This requirement refers to Article 2(1) of the CRA Regulation, which states that the CRA Regulation "applies to credit ratings issued by credit rating agencies registered in the Union and which are disclosed publicly or distributed by subscription".

5. Article 2(2) of the CRA Regulation sets out exemptions regarding the scope of the Regulation. Among others, Article 2(2)(a) states that the CRA Regulation does not apply to "private credit ratings produced pursuant to an individual order and provided exclusively to the person who placed the order and which are not intended for public disclosure or distribution by subscription".

6. A "credit rating agency" is defined by Article 3(1)(b) of the CRA Regulation as a "legal person whose occupation includes the issuing of credit ratings on a professional basis".

7. A failure to apply to be registered as a CRA (where required to do so) is an infringement of Article 14(1). Point 54 of Section I of Annex III of the CRA Regulation provides that a "credit

[6] See Nordea's press release in this regard of 1 October 2018, https://www.nordea.com/en/press-and-news/news-and-press-releases/press-releases/2018/10-01-07h30-nordeas-re-domiciliation-is-completed.html.
[7] Earlier versions of the Regulation referred to the "Community" rather than the "Union".

rating agency, where it is a legal person established in the Union, infringes Article 14(1) by not applying for registration for the purposes of Article 2(1)" ('the Infringement').

8. A constituent part of the definition of a CRA is that the credit ratings issued by it must be credit ratings as defined by Article 3(1)(a) of the CRA Regulation. Article 3(1)(a) defines a credit rating as "an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories".

9. The term "rating category" is defined by Article 3(1)(h) of the CRA Regulation, which states that it "means a rating symbol, such as a letter or numerical symbol which might be accompanied by appending identifying characters, used in a credit rating to provide a relative measure of risk to distinguish the different risk characteristics of the types of rated entities, issuers and financial instruments or other assets".

10. Article 3(2) of the CRA Regulation states:

"2. For the purposes of paragraph 1(a), the following shall not be considered to be credit ratings:

(a) recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC;

(b) investment research as defined in Article 24(1) of Directive 2006/73/EC and other forms of general recommendation, such as "buy", "sell" or "hold", relating to transactions in financial instruments or to financial obligations; or

(c) opinions about the value of a financial instrument or a financial obligation."

11. Commission Directive 2003/125/EC[8] ('2003 Commission Investment Directive'), which implements Directive 2003/6/EC[9] ('MAD'), referred to in Article 3(2)(a) of the CRA Regulation as set out above, thus defines recommendations. MAD was applicable during most of the relevant period and was repealed by Regulation (EU) No 596/2014[10] ('MAR'). Both legal texts provide a definition of recommendations. For example, Article 1(3) of the 2003 Commission Investment Directive provides that:

"'recommendation' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments

[8] Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, OJ L 339, 24.12.2003, p. 73-77.
[9] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16.
[10] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.06.2014, p. 1. For most of its provisions, MAR applies from 3 July 2016.

or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public".

12. Further, Article 1(4) of the 2003 Commission Investment Directive specifies that:

"'research or other information recommending or suggesting investment strategy' means:

(a) information produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce recommendations or a natural person working for them under a contract of employment or otherwise, that, directly or indirectly, expresses a particular investment recommendation in respect of a financial instrument or an issuer of financial instruments;

(b) information produced by persons other than the persons referred to in (a) which directly recommends a particular investment decision in respect of a financial instrument".[11]

13. Article 3(2)(b) of the CRA Regulation refers to the definition of investment research that appears in Directive 2006/73/EC[12], which implemented Directive 2004/39/EC[13] ('MiFID'). Article 24(1) of Directive 2006/73/EC states:

"'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:

(a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;

(b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2004/39/EC."

[11] From 3 July 2016, MAR provides the following definitions in Article 3(1): "(34) 'information recommending or suggesting an investment strategy' means information: (i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or (ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument;
(35) 'investment recommendations' means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public".

[12] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p. 26.

[13] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L145, 30.4.2004, p. 1.

**Facts and analysis**

14. Between 1 June 2011 and 29 August 2016 ('the relevant period'), Nordea's predecessor, Nordea Bank AB, was a credit institution established in Sweden and authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities, which include issuing investment research and other forms of general research relating to transactions in financial instruments. On 1 October 2018, via a cross-border reversed merger between Nordea Bank AB and Nordea, all Nordea Bank AB's assets and liabilities were transferred to Nordea, head-quartered in Finland.[14] Nordea is not a registered CRA and has not applied for registration.

15. During the relevant period, Nordea conducted credit research activities, which included the issuing of documents that Nordea has described as credit or investment research reports.[15] These reports related to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included opinions that were variously described as a "Corporate rating", a "Company Rating", a "Bond rating" or a "shadow rating" ('the Ratings'). Approximately 1,558[16] of the Ratings were issued by Nordea during the relevant period.

16. Nordea has stated that its predecessor group's Capital Markets unit had started to include "shadow ratings" in its investment research in 1999, the credit quality of several Nordic issuers of short term debt instruments being typically summarised using Standard & Poor's K-scale: "When these issuers sought to issue longer-dated debt instruments [and] investors started to require a view on the credit risk […] Nordea […] adopted the publicly available methodology from S&P."[17] Nordea has stated that it uses shadow ratings "merely as a common terminology with which to reference a certain credit quality as an input to [its] investment research."[18]

17. For an entity to be found to have committed an infringement of Article 14(1), each of the following elements must be satisfied: (i) the relevant entity must be a legal person established in the Union; (ii) the legal person must have issued credit ratings as defined by Article 3(1)(a) of the CRA Regulation; (iii) the occupation of the legal person must have included the issuing of credit ratings on a professional basis (the legal person will therefore be a CRA); (iv) the CRA must have issued credit ratings that were disclosed publicly or distributed by subscription; and (v) the CRA must not have applied for registration for the purposes of Article 2(1) of the CRA Regulation.

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[14] See Nordea's press release in this regard of 1 October 2018, https://www.nordea.com/en/press-and-news/news-and-press-releases/press-releases/2018/10-01-07h30-nordeas-re-domiciliation-is-completed.html.
[15] For examples of this description see respectively Exhibit 5 to the IIO's Statement of Findings, Letter dated 7 February 2017 from Nordea to the IIO, page 2; and Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 3, page 2.
[16] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 6, page 3. Exhibit 34 to the IIO's Statement of Findings, Nordea bond investment research reports June 2011 to 29 August 2016. The figure of 1,558 excludes Ratings in research reports produced by Nordea Bank Norge ASA.
[17] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 7, page 4.
[18] See Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 11.

18. In addition, further to the assessment of the elements above, the Board also considers below the application of Article 3(2) of the CRA Regulation in this case.

19. The findings of the Board are as follows.

*Legal person established in the Union*

20. The Board considers that during the relevant period, Nordea's predecessor, Nordea Bank AB, was a legal person established in the Union, specifically a public limited liability company with its registered office in Stockholm, Sweden.[19] The Board notes Nordea's statements that during the relevant period, the Nordea Group consisted of Nordea Bank AB as the parent entity, with Nordea Bank Danmark A/S, Nordea Bank Finland Plc and Nordea Bank Norge ASA as its direct subsidiaries.[20] From 2 January 2017, Nordea Bank AB was the "only Nordic banking entity of the group"[21], following the merger of the three subsidiaries into it. On the basis of this merger, the Board is of the view that Nordea was responsible for the issuing of the Ratings. In forming this view, the Board has followed the approach of the IIO and excluded from the Ratings any opinions in research reports produced by analysts that were employed by Nordea Bank Norge ASA.[22]

*Legal person issuing credit ratings within the meaning of Article 3(1)(a) of the CRA Regulation*

21. The Ratings can only constitute credit ratings if they were: (1) an opinion on the creditworthiness of one of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, which includes debt securities or an issuer of them; and (2) issued using an established and defined ranking system of rating categories.

22. The Board considers that the Ratings were opinions on the creditworthiness of one of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, specifically debt instruments and the issuers of such instruments. Nordea stated that one of the primary purposes of its credit research was to "provide investors with a thorough, comprehensible, independent and quantifiable assessment of the risks associated with investing in a security […] One way of summarizing our risk assessment is to provide a view on the creditworthiness of an issuer or a specific bond by applying tested and proven methodologies, established and published by the rating agencies."[23] The Board considered in particular the examples set out in paragraphs 137 and 138 of the IIO's statement of findings.

23. The Board also considers that these opinions were issued using an established and defined system of rating categories. Nordea stated that it had not elaborated its own

[19] See Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 5. Further to the cross-border reversed merger between Nordea Bank AB and Nordea completed on 1 October 2018, Nordea is now head-quartered in Finland.
[20] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 4, page 2.
[21] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 4, page 2.
[22] See the IIO's Statement of Findings at paragraph 56.
[23] Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 9.

"system of categories/scales"[24] and used S&P's rating scale and ratings definitions "as a tool for communicating" its shadow ratings.[25]

24. In this regard, the Board also notes the examples of the use of an established and defined ranking system of rating categories set out in paragraph 146 of the IIO's statement of findings and included in the IIO's file. These rating symbols represent differing levels of risk in relation to the issuers or instruments being assessed.

25. In reaching its views, the Board notes that the definition of a credit rating provided by the CRA Regulation does not state that to be a credit rating, a credit rating must be produced in a particular way. Instead, the definition focusses on the product of a given process, on its qualities and characteristics. The Ratings possess those qualities and characteristics.

26. The Board also notes that the Ratings were not paid for by issuers, the creditworthiness of which, or the creditworthiness of whose instruments, was assessed. However, the Board notes that the definition of a credit rating does not require that a credit rating be produced at the instigation of a particular party to be a credit rating. Thus, this factor is irrelevant to the Board's decision-making in this regard.

27. Therefore, the Board finds that the Ratings meet the definition of a credit rating provided by Article 3(1)(a) of the CRA Regulation.

*Occupation including the issuing of credit ratings on a professional basis*

28. The Board finds that Nordea's occupation included the issuing of credit ratings on a professional basis. In this respect the Board has considered the findings of the IIO on the issue.[26] In particular, the Board notes that an earlier draft of the CRA Regulation[27] referred to the "principal occupation" of a CRA being the issuance of credit ratings, but that the final version refers simply to its "occupation". The Board therefore is of the view that the issuance of credit ratings does not have to be the *principal* occupation of a CRA.

29. The Board also has regard to the case law to which the IIO refers.[28] The Court of Justice of the European Union ('CJEU') found that "the words "on a professional basis" […] are not synonymous with the expressions "in the course of their business activity" or "as a part of their business activity"".[29] It held, regarding the activity in question in the case before it, that "on a professional basis" did not mean that the activity "must be the sole or even the principal activity of the undertakings concerned, it must be a normal and regular activity of those undertakings".[30]

[24] Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 13.
[25] Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 13.
[26] See paragraphs 121-131 of the IIO's Statement of Findings.
[27] Exhibit 19 to the IIO's Statement of Findings, Commission's proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, COM(2008) 704 final, 2008/0217 (COD), 12/11/2008.
[28] See paragraph 123 of the IIO's Statement of Findings.
[29] Case C-270/03, Commission v Italy, ECLI:EU:C:2005:371, paragraph 26.
[30] Case C-270/03, Commission v Italy, ECLI:EU:C:2005:371, paragraph 28.

30. Although this judgement does not relate directly to the CRA Regulation, the Board considers it relevant to the present case. Thus, the Board finds that the correct interpretation of acting "on a professional basis" involves conduct that is a "normal and regular activity" of the undertaking in question. The Board notes that this case law does not suggest that the undertaking should receive income directly as a result of the relevant activity.

31. In this case, the Board notes that Nordea had been issuing the Ratings for a number of years, and that credit research, which included the Ratings, was "produced by an independent team of credit analysts in the investment research unit the investment research unit that is part of the public side of Nordea Markets".[31] 23 people were employed in this team over the relevant period.[32] Nordea estimates that during the relevant period, approximately 9-11% of its investment research was credit research (as distinct from equity research), most of which contained a Rating.[33] On the basis of Nordea's own statements, 1,558 Ratings[34] were issued during the relevant period.

32. Nordea has stated that none of its turnover during this period can be assigned to the Ratings.[35] However, it also indicated that "the aim is for Nordea to indirectly generate revenues from its credit research activities"[36] by serving its customers' needs.

33. Taking this into account, the Board finds that Nordea's issuing of the Ratings was a normal and regular activity for it, and further that Nordea's occupation during the relevant period included the issuing of the Ratings on a professional basis.

*Credit ratings disclosed publicly or distributed by subscription*

34. Nordea has stated that its investment research, which contained the Ratings, was "available over the following channels: Email, Web (both open and closed) [and] third-party distributor (Bloomberg)."[37] [Redacted due to confidentiality].

35. The Board, taking into account the IIO's findings, thus finds on the basis of this evidence that Nordea issued credit ratings that were disclosed publicly or distributed by subscription.

*Lack of application for registration as a CRA*

36. During the relevant period, it is uncontested and thus the Board finds that Nordea did not apply for registration for the purposes of Article 2(1) of the CRA Regulation. The evidence

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[31] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Questions 10 and 11, page 5.
[32] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 5, pages 2 and 3. Nordea clarified in this regard that one of the analysts was "part of the credit research team but whose role has been that of a strategist, and who to the best of our knowledge have not carried out [Ratings]"; he was thus excluded from the count.
[33] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Questions 8 and 9, pages 4 and 5.
[34] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 6, page 3. Exhibit 34 to the IIO's Statement of Findings, Nordea bond investment research reports June 2011 to 29 August 2016. The figure of 1558 excludes Ratings in research reports produced by Nordea Bank Norge ASA.
[35] Exhibit 7 to the IIO's Statement of Findings, Letter dated 27 March 2017 from Nordea to the IIO, Question 2, page 1.
[36] See Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, page 8.
[37] Exhibit 4 to the Supervisory Report, Letter dated 22 April 2016 from Nordea to ESMA, pages 19-20.

in the IIO's file is that ESMA did not receive such an application from Nordea, and Nordea has been consistent in maintaining that it did not need to make such an application.

*Article 3(2) of the CRA Regulation regarding investment research and recommendations*

37. Nordea has stated that as a MiFID regulated investment firm, its Ratings are investment recommendations or investment research, the provision of which is regulated by MiFID and MAD/MAR. Further, based on its own interpretation of the CRA Regulation, Nordea argued that investment recommendations or investment research are therefore excluded from the effect of the CRA Regulation by Article 3(2).[38] Specifically, Nordea's interpretation of the wording of Article 3(2) of the CRA Regulation, and in particular of the expression "for the purposes of paragraph 1(a), the following [i.e. recommendations and investment research] shall not be considered to be credit ratings", contends that while recommendations and investment research could include a credit rating, if they do they should not be considered to fall within the definition of "credit ratings" laid down by Article 3(1)(a) of the CRA Regulation.

38. With such a reading of Article 3(2) of the CRA Regulation, the Ratings included in Nordea's investment research would not be considered for the purposes of Article 3(1)(a) to be credit ratings, and thus Nordea would not be considered to be a CRA having failed to register under the CRA Regulation.

39. Therefore, according to Nordea, investment research is "explicitly exempt under Article 3(2)(b), also where the investment research material includes a conclusion of credit quality by reference to a scale."[39]

40. As noted by the Board above, the Ratings meet the conditions for being qualified as a credit rating within the meaning of Article 3(1)(a) of the CRA Regulation and they are also within the scope of the CRA Regulation as provided by its Article 2. Thus, the Board has to decide whether the application of Article 3(2) of the CRA Regulation would imply that the Ratings should not be considered to be credit ratings.

41. In reaching its view, the Board has kept in mind the principle that, when interpreting a provision of Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part.[40] Moreover, if Article 3(2) of the CRA Regulation were to be considered an exemption, it is settled case law that this exemption should be interpreted strictly as it would constitute an exception to general principles.[41] However, the CJEU also ruled that a "requirement of strict interpretation does

[38] See Exhibit 5 to the IIO's Statement of Findings, Letter dated 7 February 2017 from Nordea to the IIO, page 2, and pages 7-14 (Annex 1).
[39] See Exhibit 5 to the IIO's Statement of Findings, Letter dated 7 February 2017 from Nordea to the IIO, page 2.
[40] See for example Case C-33/11, A Oy, ECLI:EU:C:2012:482.
[41] See for example Case C-33/11, A Oy, ECLI:EU:C:2012:482.

not mean that the terms used to specify the exemptions should be construed in such a way as to deprive those exemptions of their intended effect."[42]

42. To come to a decision, the Board (in line with the Board of Appeal Decision) notes the importance of the legislative history of the provisions dealing with investment research and credit ratings with a view to assisting to establish the correct construction of Article 3(2).

43. In particular, as established by the Board of Appeal, Article 3(2) of the Commission's original proposal of 12 November 2008[43] "was different and had the opposite purpose of the current text of Article 3(2) [of the adopted CRA Regulation]. In the Commission's proposal, paragraph 2 was as follows: "For the purposes of point (a) of paragraph 1, credit ratings shall not be considered recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC".[44]

44. The Board of Appeal thus considered that "The intended purpose was to specify that a credit rating, albeit being an opinion regarding the creditworthiness of an issuer or of a debt security, was not to be confused with an investment recommendation within the market abuse framework. [It] was clearly intended […] as a clarification for the benefit of credit rating agencies. The original proposal did not address the question whether the provision of (regulated or unregulated) investment services, in the form specifically of investment recommendations, investment research and other opinions by entities which were not credit rating agencies, could be considered a credit rating activity."[45]

45. On 23 April 2009, the European Parliament adopted its position on first reading.[46] This text contained both recital (20) and Article 3(2) as they currently stand in the adopted CRA Regulation, despite no such proposals having been tabled by the ECON Committee Report[47] of 1 April 2009 or by the ECB in its Opinion[48] of 21 April 2009.[49]

46. It is unclear at which stage and for which reasons the drafting of Article 3(2) of the CRA Regulation was modified between the version in the Commission's proposal and the final version.[50] As the Board of Appeal pointed out, "A provision originally directed at credit rating agencies became a provision directed at entities issuing recommendations under MAD or engaging in investment research and other forms of general recommendations under MiFID or otherwise providing "opinions about a value of a financial instrument or a

[42] Case C-33/11, A Oy, ECLI:EU:C:2012:482, paragraph 49.
[43] Exhibit 19 to the IIO's Statement of Findings, Commission's proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, COM(2008) 704 final, 2008/0217 (COD), 12/11/2008.
[44] Board of Appeal Decision, paragraph 238.
[45] Board of Appeal Decision, paragraph 239.
[46] See Position of the European Parliament adopted at first reading on 23 April 2009 with a view to the adoption of Regulation (EC) No .../2009 of the European Parliament and of the Council on Credit Rating Agencies (EP-PE_TC1-COD(2008)0217), 23 April 2009.
[47] Report on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies (COM(2008)0704 – C6-0397/2008 – 2008/0217(COD)), Rapporteur MEP Jean-Paul Gauzès (A6-0191/2009).
[48] Opinion of the European Central Bank of 21 April 2009 on a proposal for a regulation of the European Parliament and of the Council on credit rating agencies (CON/2009/38), OJ 2009/C 115/01.
[49] See Board of Appeal Decision, paragraphs 240-242.
[50] See also paragraph 203 of the IIO's Statement of Findings.

financial obligation"."[51] The Board of Appeal also noted that the "negotiations between the co-legislators led to the result that the original Article 3(2) of the Commission's proposal was fundamentally transformed."[52]

47. Yet, as the Board of Appeal Decision set out in its analysis of the legislative history, the opening sentence "For the purposes of paragraph (1)(a)…" "remained, just in a slightly different form from the original "for the purposes of point (a) of paragraph 1", but in a completely different context: one in which, as noted, the original purpose of paragraph (2) was reversed, it not being specified that the rating that was not a recommendation for the purposes of MAD, but that recommendations under MAD and MIFID were not ratings, to the effect that those providing such recommendations should be deemed outside the scope of [the CRA Regulation]."[53]

48. The Board of Appeal also voiced some doubts on the real intention of the co-legislators, due to "the circumstance that Article 3(2), as it stands now, was not entirely drafted from scratch in its current version but was amended during the legislative process, and that its [opening sentence] was already there in the Commission's proposal with the purpose of defining what credit rating is." [54]

49. Thus, the Board finds that, as acknowledged by the Board of Appeal, "there is a significant ambiguity in the wording of Article 3(2) and in the combined reading of Article 3(1)(a) and Article 3(2) and that this ambiguity cannot be resolved with certainty by looking at the legislative history of the provision." [55]

50. Moreover, (as already set out in the Board of Appeal Decision[56]), the Board's view is that the legislative history does not support the assertion that the provisions should be considered as clear and unambiguous so as to be decisive on the question of interpretation.

51. In such cases, the case law of the CJEU provides that in interpreting a provision of European Union law, it is necessary to consider also the context and the objectives pursued by the rules of which is it part, i.e. in the case of Article 3(2), the context and the objectives pursued by the CRA Regulation.

52. As the Board of Appeal, the Board "agrees with the conclusion of the IIO that it is also necessary to consider whether the literal interpretation as advocated by [Nordea] would make [the CRA Regulation] devoid of at least some of its purposes and would, to some extent, contradict the scope of [the CRA Regulation], as defined in Article 2, opening an unreasonable loophole in the system (subject to Article 4, Use of credit ratings)."[57]

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[51] Board of Appeal Decision, paragraph 244.
[52] Board of Appeal Decision, paragraph 244.
[53] Board of Appeal Decision, paragraph 245.
[54] Board of Appeal Decision, paragraph 247.
[55] Board of Appeal Decision, paragraph 249.
[56] Board of Appeal Decision, paragraph 261.
[57] Board of Appeal Decision, paragraph 249.

53. First, the CRA Regulation establishes a specific regulatory framework (separate from the MAR/MiFID framework) with distinct objectives for the issuing of credit ratings.[58] This ensures for example that credit ratings are of adequate quality.

54. As noted by the Board of Appeal, "As opposed to investment recommendations/research governed by the MAR/MIFID frameworks, credit rating activities are reserved activities, i.e. they may be conducted only by entities that are registered in accordance with Article 14(1) [of the CRA Regulation] (or otherwise recognised under [the CRA Regulation]).

    Credit ratings are subject to specific requirements that do not have any equivalent in the MAR/MIFID frameworks and aim at addressing specific risks that these ratings may present to the financial system, including provisions (i) limiting the use of credit ratings by market participants (Article 4 [of the CRA Regulation]), (ii) imposing certain requirements on the credit rating process and methodology (Article 8 [of the CRA Regulation]) and (iii) imposing requirements in terms of presentation and disclosure of credit ratings including discontinuance of ratings and unsolicited ratings (Article 10 […] and Section D of Annex I [of the CRA Regulation])."[59]

55. The Board of Appeal further noted that, "whereas investment recommendations/research activities remain supervised principally by national market or banking authorities, credit rating activities are supervised exclusively by a single EU authority (ESMA) and are outside the scope of competence of national market or banking authorities."[60]

56. Second, in this context, the Board also notes the objectives pursued by the rules of which Article 3(2) of the CRA Regulation is part. According to Recital 7, "The principal aim of this Regulation is to protect the stability of financial markets and investors". Recital 75 also states: "the objective of this Regulation, namely to ensure a high level of consumer and investor protection by laying down a common framework with regard to the quality of credit ratings". In particular, according to Recital 43, the registration requirement aims at ensuring "a high level of investor and consumer confidence".

57. Thus, as set out by the Board of Appeal, "There is certainly no indication that it was intended to open a major exception to the operation of [the CRA Regulation. …] The effect of [Nordea's] interpretation would be that market participants (including those not subject to the MiFID framework because general investment recommendations/research is not a reserved activity, and also because Article 3(2)(c) also includes a potentially very wide class of "opinions about the value of a financial instrument or a financial obligation" which are not recommendations or investment research as defined in letters (a) and (b)), and even (potentially) registered CRAs, would be able to avoid the application of [the CRA Regulation] simply by including credit ratings in documents containing recommendations or investment research or even "opinions about the value of a financial instrument". In other

[58] See Board of Appeal Decision, paragraphs 208, which held that "credit rating activities are subject to a specific regulatory framework, which is distinct from the MAR/MIFID frameworks".
[59] Board of Appeal Decision, paragraph 208.
[60] Board of Appeal Decision, paragraph 208.

words, subject to the market abuse framework, anyone could at least in theory issue credit ratings so long as the ratings were included in a document that fell within the Article 3(2) definitions. […] These ratings could not have the regulatory use set out in Article 4 (this Article expressly requiring that for regulatory purposes credit ratings can be used only if they are official and issued by registered credit rating agencies), but would nonetheless be (and present themselves as) credit ratings."[61]

58. Thus, as pointed out by the Board of Appeal Decision[62] and the IIO[63], having in mind the objectives pursued by the CRA Regulation, the Board finds that it is very unlikely that the legislator would have intended to leave completely open the possibility for non-registered companies to issue ratings without any other conditions than just inserting them in a recommendation or an investment research.

59. Moreover, considering another point highlighted by the IIO, the Board considers that this would allow unfair competition from these companies compared to CRAs registered under the CRA Regulation and subject to strict rules regarding the issuing of ratings. This would also lead to the issuing of credit ratings on another legal basis than the CRA Regulation, thus undermining *de facto* the scope of the CRA Regulation.[64]

60. Third, as remarked by the Board of Appeal, such a reading of Article 3(2) "does not necessarily deprive Article 3(2) of effect, the purpose of which may simply be one of clarifying the general position of investment recommendation or investment research which is consistent with its treatment in earlier legislation. Alternatively, […] a product may be developed which does fall into both categories, which is not an impossible outcome given the propensity of the financial markets to change over time. The fact that [there are no current] examples is of limited significance."[65]

61. Fourth, the same document may be treated as having different components for regulatory purposes. For example, a document could contain both a recommendation and a credit rating: there could be a recommendation described at the top of the document as "overweight" (i.e. a recommendation to buy), and at the bottom of the document a credit rating explaining that the issuer is considered to be "an investment grade issuer in the BBB+ range".[66] The Board's reading, in line with the Board of Appeal Decision, of such a document is that the "BBB+" content is a credit rating, whereas the content "overweight" is investment advice.

62. In addition, as held by the Board of Appeal Decision, "if the recommendation "overweight" was accompanied by an official credit rating issued by a registered rating agency […], the presence in the same document of such a credit rating would not make the whole document a credit rating (Article 3(2) clarifies that such a transmutation is prevented); both the

[61] Board of Appeal Decision, paragraph 262.
[62] See Board of Appeal Decision, paragraph 263.
[63] See paragraph 206 of the IIO's Statement of Findings.
[64] See paragraph 207 of the IIO's Statement of Findings.
[65] Board of Appeal Decision, paragraph 264.
[66] Board of Appeal Decision, paragraph 266.

recommendation content and the rating content would remain what they are, but in such a case the coexistence of these two components in the same document prepared by [Nordea] would be fully lawful, because the official credit rating is not issued by [Nordea] but by a registered rating agency."[67]

63. The Board considers, following the Board of Appeal Decision, that the same document "may have content which consists of recommendations or investment research within the Article 3(2) exclusion, and content which consists of "credit ratings" within the meaning of the definitions of "credit rating" in Article 3(1)(a) and (h) of [the CRA Regulation]. If so, and if the other requirements of [the CRA Regulation] are satisfied, the communication, for its rating component, will fall within [the CRA Regulation], and the issuer will require to be registered."[68]

*Conclusion*

64. In conclusion, based on the above reasons, the material in the IIO's file and the Board of Appeal Decision, the Board finds that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that Nordea issued credit ratings during the relevant period.

65. In addition, the Board holds that Nordea cannot benefit from the application of Article 3(2) of the CRA Regulation to argue that the Ratings do not fall within the definition of credit ratings within the meaning of the CRA Regulation.

66. Thus, the Board notes that during the relevant period, Nordea, a legal person established in the Union, was a CRA and did not apply for registration for the purposes of Article 2(1) of the CRA Regulation. The Board thus finds that Nordea committed the Infringement set out at Point 54 of Section I of Annex III of the CRA Regulation during the relevant period (i.e. 1 June 2011 to 29 August 2016).

## B. Findings of the Board with regard to the negligent or intentional commission of the Infringement

67. The Board has previously set out its views in relation to the negligent commission of an infringement.[69] These views have been confirmed by the Board of Appeal Decision.[70] Negligence is established for a CRA where, as a professional firm in the financial services sector subject to stringent regulatory requirements, it is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care. Further,

[67] Board of Appeal Decision, paragraph 268.
[68] Board of Appeal Decision, paragraph 269.
[69] See for example DBRS Ratings Limited: Board of Supervisors Decision of 24 June 2015, ESMA 2015/1048; Fitch Ratings Limited: Board of Supervisors Decision of 21 July 2016, ESMA/2016/1131; and Moody's Deutschland GmbH and Moody's Investors Service Ltd: Board of Supervisors Decision dated 23 May 2017, ESMA41-137-1005.
[70] See in particular Board of Appeal Decision, paragraph 283. See also paragraphs 277-282.

as a result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly its infringement of the CRA Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.[71]

68. Negligence is a Union law concept in the context of the CRA Regulation, albeit one which is familiar to, and an inherent part of, all Member States' legal systems, and must be given an autonomous, uniform interpretation. From the provisions of Articles 24 and 36a of the CRA Regulation, the term "negligence" in the context of that Regulation requires more than a determination that an infringement has been committed. It is clear from the second subparagraph of Article 36a(1) of the CRA Regulation that a negligent infringement is not one that was committed deliberately or intentionally. This position is further supported by case law of the CJEU, which ruled that negligence may be understood as entailing an unintentional act or omission.[72]

69. Having regard to the CJEU jurisprudence, the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a CRA when it fails to comply with the CRA Regulation.

70. The Board notes the position taken by the General Court in the Telefonica case, where the General Court spoke of persons "carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such activity entails".[73] Similarly the Board considers that in circumstances where, operating within the framework of a regulated industry, an entity which holds itself out as a professional entity and carries out regulated activities is expected to exercise special care in assessing the risks that its acts and omissions may entail. The Board is of the view that a high standard of care is to be expected of a CRA.[74]

71. The nature and extent of the requirements imposed on CRAs by Annex I of the CRA Regulation, and of the corresponding infringement provisions under its Annex III, reflect the weight given to these considerations by the legislator. The Board considers that to ensure a high standard of care by CRAs, the acts and omissions of a CRA should be judged with these considerations in mind.

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[71] The Board has considered the Opinion of Advocate-General Mayras in Case C-26/75, General Motors Continental NV v. Commission, ECLI:EU:C:1975:141, where it is stated that "the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them." The Board has also considered Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport ECLI:EU:C:2008:312, paragraph 77 where the CJEU states that negligence should be understood as "entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation".

[72] See for instance Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport ECLI:EU:C:2008:312, where the CJEU noted at paragraph 75 of its judgment that all of the Member States' legal systems "have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care".

[73] Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, ECLI:EU:T:2012:172, paragraph 323.

[74] See e.g. Case C-48/98, Firma Söhl & Söhlke v Hauptzollamt Bremen ECLI:EU:C:1999:548, paragraph 58.

72. Applying the test described above to the facts of this case, the Board notes the IIO's file, the Board of Appeal Decision and, in particular, the reference by the Board of Appeal Decision to the "very unusual"[75] circumstances of the case.

73. Overall, with particular regard to and in line with the Board of Appeal Decision, the Board concludes that Nordea did not commit the Infringement negligently.

74. In addition, the Board does not find that the Infringement was committed intentionally as the material before the Board does not support such a finding.

## C. Supervisory measure to be adopted

75. Article 24(1) of the CRA Regulation provides that where one of the infringements listed in Annex III of the CRA Regulation is found, the Board must adopt one or more of the supervisory measures listed in that Article.

76. In accordance with Article 24(2) of the CRA Regulation[76], the Board considers that it is appropriate to issue a public notice in respect of the infringement found in the present case. The Appendix to this Statement of Findings of the Board contains a draft of the public notice.

[75] Notably, Board of Appeal Decision, paragraph 311.
[76] Article 24(2) of Regulation (EC) No 1060/2009 states: "When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement; (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently".

## APPENDIX TO THE STATEMENT OF FINDINGS OF THE BOARD

## [DRAFT] PUBLIC NOTICE

Nordea Bank Abp ('Nordea') is a credit institution established in the European Union that is authorised to carry out banking activities.

Regulation (EC) No 1060/2009 on credit rating agencies ('the CRA Regulation') lays down obligations for a credit rating agency ('CRA') in the conduct of its activities. In conjunction with its role as supervisor of CRAs under the CRA Regulation, the European Securities and Markets Authority ('ESMA') has functions and powers to take enforcement action in relation to infringements of the CRA Regulation by CRAs. A firm that is a CRA must apply to be registered to issue credit ratings publicly or by subscription. Nordea is not a registered CRA and has not applied to be registered.

In December 2016, the supervisors of CRAs within ESMA formed the view that there were serious indications of possible infringements of the CRA Regulation by Nordea. It appeared that Nordea had issued credit ratings although it had not applied to be registered.

The matter was then referred to an independent investigating officer ('IIO') who, having conducted an investigation, submitted her findings to ESMA's Board of Supervisors ('the Board').

Having considered in particular the evidence and the decision of 27 February 2019 of the Board of Appeal of the European Supervisory Authorities, the Board has found that Nordea committed without intent or negligence an infringement of the CRA Regulation as follows.

### Infringement

#### A) Relevant legislation

Article 14(1) of the CRA Regulation obliges a CRA, in given circumstances, to apply for registration.

A failure by a CRA to apply for registration where required to do so is an infringement of the CRA Regulation – as provided by point 54 of Section I of Annex III of the CRA Regulation ('the Infringement').

A credit rating is defined by Article 3(1)(a) of the CRA Regulation.

Article 3(1)(b) of the CRA Regulation defines a CRA as firm whose occupation includes the issuing of credit ratings on a professional basis.

In considering whether Nordea had committed an infringement of the CRA Regulation, ESMA reviewed Nordea's conduct in appearing to issue credit ratings. In particular ESMA considered whether Nordea was issuing credit ratings as they are defined by the CRA Regulation. ESMA also considered the application of Article 3(2) of the CRA Regulation to Nordea's case.

**B) Factual findings and analysis of the Board**

Between 1 June 2011 and 29 August 2016, Nordea issued credit research reports as part of its investment research activities. These reports related to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included opinions that were variously described as a "Corporate rating", a "Company Rating", a "Bond rating" or a "shadow rating" ('the Ratings'). Approximately 1,558 of the Ratings were issued by Nordea during this period.

The Board found that the Ratings met the definition of a credit rating provided by the CRA Regulation.

**C) Finding of infringement**

The Board therefore found that Nordea had committed the Infringement as a consequence of issuing the Ratings.

However, the Board did not find intent or negligence to be established. In accordance with the relevant provisions of the CRA Regulation, no fine is imposed for the Infringement.

**Supervisory measure**

**Public notice**

Pursuant to Article 24 of the CRA Regulation, the Board decided that the Infringement warranted a supervisory measure in the form of the publication of this public notice.