ING

VIA UPS

February 19, 2013

Ms. Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

COMMENT

Re: Capital Requirements of Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27,802, RIN 3038–AD54 (May 12, 2011)

Dear Ms. Jurgens:

ING Capital Markets LLC ("**INGCM**") appreciates this opportunity to comment on the above-captioned proposal (the "**Proposal**") by the Commodity Futures Trading Commission (the "**Commission**") regarding capital and margin requirements for non-bank swap dealers and major swap participants ("**MSPs**") pursuant to Section 4s(e) of the Commodity Exchange Act (the "**CEA**"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**"), in particular the Proposal's request for comment regarding whether it would be appropriate for swap dealers and MSPs to use internal models for computing market risk and counterparty credit risk charges for capital purposes if such models have been approved by a foreign regulatory authority and are subject to periodic assessment by such foreign regulatory authority. We also wish to comment regarding the timing for implementation of the Proposal's requirements.

I. Background on INGCM

INGCM provisionally registered as a swap dealer with the Commission and became a member of the National Futures Association (the "**NFA**") on December 31, 2012. INGCM is the U.S. swap dealer subsidiary of ING Bank N.V. ("**ING Bank**"), a Dutch bank with over €1.2 trillion in consolidated assets worldwide. In addition to direct supervision by the Commission and the NFA, INGCM is subject to consolidated supervision through its parent, ING Bank, by De Nederlandsche Bank (the "**DNB**"). In particular, the DNB supervises ING Bank's capital and risk management on a consolidated basis, including the use of internal models by ING Bank and its subsidiaries for regulatory capital purposes, in accordance with capital standards that are consistent with the Basel Accord. In this connection, the DNB approves and periodically assesses ING Bank's internal models, which are governed by global ING policies and procedures overseen by the DNB. The DNB has previously been determined by the Board of Governors of

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the Federal Reserve System (the "**Federal Reserve**") to administer a regime of comprehensive supervision and regulation on a consolidated basis.[1]

II. Use of Foreign-Approved Models

Recognizing that it did not currently have the resources to support the development of a program to conduct the initial review and ongoing assessment of internal models, the Commission proposed to permit a non-bank swap dealer that is a subsidiary of a U.S. bank holding company to utilize models that are approved and regularly assessed by the Federal Reserve.[2] It also proposed to allow a dually-registered swap dealer/security-based swap dealer to utilize models that are approved and regularly assessed by the Securities and Exchange Commission (the "**SEC**").[3] Other non-bank swap dealers, however, would be required to use a standardized, grid-based approach to computing market and credit risk requirements.[4] We understand that the Commission proposed this standardized approach primarily to accommodate the registration of swap dealer subsidiaries of commercial firms that are not otherwise subject to prudential regulation.

However, the grid-based approach generally requires, for a position to be offset, that it be hedged on a one-to-one basis. As a result, that approach does not effectively account for the market risk offsets associated with a market making business or with hedging using products other than swaps, e.g., delta hedging or hedging using futures.

As a result, the grid-based approach would make conducting a market making business in an entity subject to it prohibitively expensive and uncompetitive relative to the non-bank swap dealer subsidiaries of U.S. bank holding companies that would be permitted to use internal models. This result would be inconsistent with the principle of national treatment. Moreover, for a non-bank swap dealer that is part of a holding company group subject to consolidated supervision and risk management procedures and systems, the grid-based approach to capital would require the business to be managed in a way inconsistent with such supervision, procedures and systems. This result would be contrary to the safety and soundness objectives of Dodd-Frank.[5]

Additionally, to avoid these consequences, many foreign banks would be incentivized to conduct their activities from their parent entity abroad, rather than through a U.S. subsidiary. Although we recognize that the Commission is taking steps to establish a regime for effectively

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1 *See* 85 Federal Reserve Bulletin 448 (1999).

2 Proposal at 27808.

3 *Id.*

4 *Id.* at 27809.

5 *See* Section 4s(e) of the Commodity Exchange Act (providing that capital requirements for swap dealers shall help "ensure the safety and soundness" of swap dealers).

supervising foreign swap dealers,[6] we note that such a regime necessarily requires the Commission to address potential conflicts of law and to coordinate its supervision with home country regulators. Furthermore, under its proposed regime, the Commission envisions deferring to foreign entity-level requirements, including capital requirements, that it determines to be comparable to its own.[7] Presumably, then, if the Commission determines it to be appropriate to defer to a comparable entity-level regime in its entirety, then it would be appropriate to defer to internal model approval and assessment by a regulatory authority administering such a regime.

Accordingly, we respectfully request that the Commission modify the Proposal to permit a non-bank swap dealer whose internal models are approved and regularly assessed by a qualifying foreign regulatory authority to utilize those models to calculate its market risk exposure and OTC derivatives credit risk requirement. In particular, we suggest that the Commission adopt the following clear, objective and uniform criteria for assessing whether to approve or to accept a model approved by a foreign regulatory authority:

- The relevant foreign regulatory authority is determined to be qualified based on whether it has been determined by the Federal Reserve to administer a regime of comprehensive consolidated supervision and is a member of the Basel Committee on Banking Supervision.

- The swap dealer subsidiary's use of internal models is subject to policies and procedures and governance requirements that are applied uniformly across its holding company group and subject to the oversight of the foreign regulatory authority.

- The swap dealer's internal models are subject to: (i) prior approval by the foreign regulatory authority of any new models or material changes to existing models, (ii) notification to the foreign regulatory authority of any non-material changes to existing models, (iii) periodic assessment by the foreign regulatory authority and (iv) remediation of any material weaknesses identified by the foreign regulatory authority (e.g., through the application of multipliers to the capital requirements generated by models that the foreign regulatory authority determines to exhibit excessive backtesting exceptions).

- The swap dealer makes available to the Commission, upon request, copies of its internal capital computations and any correspondence with the foreign regulatory authority regarding its internal models.

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6 *See* 77 Fed. Reg. 41213 (July 12, 2012) (proposed cross-border guidance); 78 Fed. Reg. 858 (Jan. 7, 2013) (interim exemptive order).

7 77 Fed. Reg. at 41227.

- The swap dealer's use of internal models is otherwise subject to the same Commission approval and disapproval conditions as the Commission has proposed to apply to models that are subject to approval and assessment by the Federal Reserve and the SEC.

In our view, modifying the Proposal to adopt the framework described immediately above would be fully consistent with Dodd-Frank and principles of national treatment and international comity, while also facilitating an efficient use of Commission and NFA resources.

III. Implementation of Capital Requirements

As with other aspects of Dodd-Frank, it is critical that capital requirements for swap dealers be phased-in over a period sufficient to prevent significant market disruption. This is particularly important because firms, such as INGCM, have already registered as swap dealers without knowing the capital rules that will apply to them. This situation has created significant uncertainty, as firms do now know how to price transactions into which they are entering prior to adoption of final capital rules, nor whether those final capital rules would make their currently legal entity structure uneconomic and thereby require significant business restructuring. Without an appropriate phase-in period to prepare for the application of capital requirements to existing positions, the market would be disrupted significantly as a large number of firms seek to amend, terminate or novate positions at the same time so that they may come into compliance with those requirements.[8]

In addition, many of the non-bank entities that will register with the Commission as swap dealers have not previously been subject to entity-level capital requirements. As a result, depending on the terms of the Commission's final capital requirements, a significant number of entities may be required to raise additional capital at the same time. This would exacerbate already difficult market conditions for financial institutions seeking to raise additional capital, making it more likely that firms will instead seek to amend, terminate or novate positions, as noted above.

To address these issues, we respectfully request that the Commission provide a period of at least two years before its capital requirements for nonbank swap dealers fully take effect. This period should provide sufficient time for existing positions to run off or be novated or terminated, as well as for swap dealers to raise additional capital, if necessary. It also would make the timeframe for implementation of the Commission's capital requirements more consistent with the implementation timeframe for Basel III, which is anticipated to be phased in over the next two to six years. This consistency is important for firms, such as INGCM, that are subject to consolidated capital requirements consistent with the Basel Accord because it will

[8] This is particularly the case with respect to positions subject to credit concentration charges, since the charges proposed by the Commission are based on charges specified in SEC rules that are not commonly applicable under the Basel Accord, and so have not been taken into account by firms subject to consolidated capital requirements consistent with the Basel Accord.

allow them to come into compliance with all of the relevant changes to their capital requirements in an orderly manner.

INGCM appreciates the opportunity to submit these comments in connection with the Proposal. Please do not hesitate to contact the undersigned at 646-424-6159 with any questions or if we can be of assistance to the Commission.

Sincerely,

Marcy S. Cohen
General Counsel and
Managing Director

cc: Gary Gensler, Chairman
Bart Chilton, Commissioner
Scott O'Malia, Commissioner
Mark Wetjen, Commissioner

Gary Barnett, Director
Thomas Smith, Deputy Director
Division of Swap Dealer and Intermediary Oversight