

NBIM

Norges Bank Investment Management

David A. Stawick
Secretary to the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581
USA

Date: 18 February 2011
Your ref.:
Our ref.: 11/00363

Elizabeth M. Murphy
Secretary to the Commission
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
USA

Re: Protection of Collateral of Counterparties to Uncleared Swaps;
Treatment of Securities in a Portfolio Margining Account in a
Commodity Broker Bankruptcy – RIN 3038-AD28

Governance Requirements for Derivatives Clearing Organizations,
Designated Contract Markets, and Swap Execution Facilities; Additional
Requirements Regarding the Mitigation of Conflicts of Interest – RIN 3038-
AD01

Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major
Swap Participant," "Major Security-Based Swap Participant" and "Eligible
Contract Participant" – RIN 3235-AK65; File No. S7-39-10

End-User Exception to Mandatory Clearing of Swaps – RIN 3038-AD10

Advanced Notice of Proposed Rulemaking —Protection of Cleared Swaps
Customers Before and After Commodity Broker Bankruptcies – RIN 3038-
AD99

Extra-Territorial Reach of Dodd-Frank Requirements

Dear Ms Murphy and Mr. Stawick:

Norges Bank Investment Management welcomes the opportunity to comment on certain of the rules (the "Proposed Rules") proposed to date by the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC") (collectively, the "Commissions") implementing the requirements of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Norges Bank Investment Management ("NBIM") is a division of Norges Bank, the central bank of

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the Kingdom of Norway. NBIM conducts investment activities around the world, including in the United States.

NBIM supports many of the goals of the Dodd-Frank Act and the Commissions to reduce risk, increase transparency, and promote market integrity within the financial system. NBIM believes that the Proposed Rules may be enhanced significantly by providing greater assurances to customer, “buy-side” market participants in areas such as governance of designated contract markets (“DCMs”), swap execution facilities (“SEFs”), and derivatives clearing organizations (“DCOs”) and by providing greater assurance as to collateral protection in connection with over-the-counter swap transactions. In addition, NBIM respectfully urges the Commissions to provide greater clarity as to the extra-territorial reach of the Proposed Rules and of the requirements of Title VII of the Dodd-Frank Act generally.

Protection of customer assets. NBIM supports any steps the Commissions might take to enhance the protection of customer assets. This includes rule-making to limit the exposure of customer assets to losses due to the credit or financial standing of market intermediaries, such as DCOs, DCMs, futures commission merchants (“FCMs”), and “fellow customers” at any DCM or FCM. Accordingly, NBIM favors Model (1) “Full Physical Segregation,” described in *Advanced Notice of Proposed Rulemaking —Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies*, 75 Fed. Reg. 75162, 75164 (December 2, 2010). NBIM recognizes that, at present, considerations of cost and technological limitations may prevent full implementation of this Model. However, we urge that the CFTC’s final rule be designed to provide as close a result as possible to Model 1 under the current circumstances, and that the CFTC engage in future rulemaking over time to ensure that the requirements of the rule keep pace with technological developments.

On the basis of similar considerations, NBIM urges that the CFTC revise Proposed Regulation 23.602(a)(1) to provide non-dealer/MSP counterparties the option to require that initial margin for over-the-counter swaps be held with a custodian that is in fact independent of any affiliate of the swap dealer or MSP in question. Permitting, in effect, a swap dealer or MSP to dictate that one of its affiliates serve as the “independent” counterparty does not provide counterparties the protections envisioned by Congress. The financial conditions of corporate affiliates are not in fact independent of each other, and, as the world learned in the Lehman insolvency, the collapse of one member of a corporate group will very likely lead to the collapse of the entire group. In addition, we would urge that the CFTC amend its Proposed Rules to limit the ability of a swap dealer or MSP to impose undue costs or legal terms in connection with the use of an independent custodian. A dealer or MSP should not be in a position effectively to deny a counterparty the use of an independent custodian by imposing large costs in connection with transactions margined at such a custodian, or by refusing to agree to reasonable custodial terms consistent with those contemplated by the Proposed Rules.

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Governance; conflicts of interest. NBIM supports the CFTC's proposals to implement specific governance requirements for DCOs, DCMs, and SEFs as one means to limit the possible adverse effects of conflicts of interest. We respectfully submit, however, that the proposed governance requirements would be greatly strengthened by ensuring a greater presence of "buy-side" swap market participants in the governance structure.

The Proposed Rules would require SEFs, DCMs, and DCOs to include "public directors" and customers of members, in various combinations, on their boards of directors, regulatory oversight committees (in the case of SEFs and DCMs), and risk management committees (in the case of DCOs). A public director is, very generally, a person without a financial interest in the registered entity in question or a member of the registered entity. There is no requirement that the director does not have current or previous experience or financial interests that might align his or her interests or views with those of the owners of the registered entity. In fact, the proposing release states that, in determining whether a director has a "material relationship" with a registered entity, the board "need not consider previous service as a director of the registered entity to constitute a 'material relationship.'" The Proposed Rules do not require customer representation on a DCO's board of directors, or on boards or committees of SEFs or DCMs; the CFTC's position in this regard is based generally on the view that, as long as a committee or the corporate body overseeing the committee has adequate customer representation, it is not necessary that both bodies include customers among their members.

We encourage the CFTC to revise the Proposed Rules to require greater customer, and specifically buy-side, participation in the governance process. In our experience, the dealer community is well organized and actively involved, through ownership and participation, in the affairs of swap trading and clearing facilities. We believe that the active participation of buy-side customers will be an important element of any program to limit the effects of conflicts of interest. We also believe that that, in light of the importance of DCOs in the derivatives markets, and the key role we expect their risk management committees to play in limiting the effects of conflicts of interest, significant buy-side representation will be essential on both the risk committees and boards of directors of DCOs. Customer representation on a risk management committee is not a substitute for representation on the board of directors of a DCO, and there will almost surely be matters to come before the full board of directors where customers have important interests that are not also brought before a risk management committee. We do not believe that the proposed mechanism requiring DCOs to report to the CFTC instances where the board of directors overrides a determination of a risk management committee is a fair substitute for customer representation on the board (although it is an important complement to customer representation), in light of the uncertainty as to the timing and detail of the regulatory review and the likely deference the regulator will give to the board's determinations.

In light of these considerations, we would urge the CFTC to require (i) significant customer representation on the boards of directors, risk management committees, and regulatory oversight committees of all registered entities, (ii) that customers who serve on those bodies

be fairly representative of the “buy” side of the market generally, and (iii) that registered entities develop and implement protocols for the identification and nomination of customers and public directors for service on those bodies by representatives of the buy-side of the market.

End-user exception. Proposed Section 39.6 of the Commodities Exchange Act would provide an exception from applicable clearing requirements if a swap is used by certain non-financial entities “to hedge or mitigate commercial risk.” Many of NBIM’s derivatives activities involve hedges against its ordinary course exposures and obligations, including non-speculative financial assets and positions. NBIM urges the CFTC to confirm in its final rules or in its commentary to the final rules that use of the word “commercial” would not be deemed to preclude reliance by foreign central banks and other sovereign entities on the exception where it would otherwise be available.

Extra-territorial reach of the Proposed Rules. NBIM strongly urges the Commissions to clarify the jurisdictional scope of the Proposed Rules, and to provide, to the extent possible, bright-line tests making clear where the Proposed Rules apply. We share the concerns expressed by both the Commissions and various commentators involving international comity, the interests of foreign regulators in the regulation of their home markets, and practical limitations on the ability of the Commissions to monitor activity and enforce U.S. laws and standards outside the United States.

Specifically, we believe that non-U.S. swap market participants who engage in swap transactions outside the United States in jurisdictions, including many European countries, with their own derivatives regulatory schemes should be able to do so without concern that they or their trading activities will be governed by the U.S. regulatory regime. We strongly prefer that transactions effected by non-U.S. swap market participants with branches and affiliates of U.S. banks and dealers be subject to the local laws of the jurisdictions where the transactions are effected, including laws as to execution, margining and clearing. Certainly, we recognize the need on the part of U.S. regulators to impose financial, reporting, and other requirements on entities that may be swap dealers or major swap participants under U.S. law. However, we urge the Commissions to design those regulatory regimes to minimize the effect on the non-U.S. counterparties of those entities and on their dealings with those entities, where those dealings occur outside the U.S. To do otherwise has the potential, among other things, to create competing and potentially contradictory schemes regulating derivatives trading in non-U.S. markets and confusion among market participants, and to place branches and affiliates of U.S. banks and dealers at a competitive disadvantage in those markets.

Major swap participant status. We believe strongly that it would be unnecessary and inappropriate to subject foreign governments or their agencies or instrumentalities to regulation as swap dealers or major swap participants, and we do not read the Dodd-Frank Act or the Proposed Rules to require that result. NBIM, for its part, operates in over 55 markets, and in each of those markets we comply with local market regulations. Regulators

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in those markets do not attempt to impose substantive registration or supervisory requirements on NBIM, notwithstanding its large size. The same considerations should preclude substantive regulation of foreign governments and their agencies and instrumentalities as swap dealers or major swap participants.

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We hope that you will find these thoughts helpful in your deliberations.

Yours sincerely



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