



BOARD OF GOVERNORS  
OF THE  
**FEDERAL RESERVE SYSTEM**  
WASHINGTON, D. C. 20551

ADDRESS OFFICIAL CORRESPONDENCE  
TO THE BOARD

March 31, 2009

Mark J. Welshimer, Esq.  
Sullivan & Cromwell LLP  
125 Broad Street  
New York, New York 10004-2498

Dear Mr. Welshimer:

This is in response to the request by ING Bank, fsb (“Bank” – assets of \$82 billion), Wilmington, Delaware, for an exemption from section 23A of the Federal Reserve Act and the Board’s Regulation W to allow Bank (i) to transfer to its affiliate, ING Support Holdings B.V. (“DutchCo”), an 80 percent participation interest in a pool of Alt-A residential mortgage-backed securities (“MBS”) and (ii) to receive from DutchCo, as consideration for the participation, an assignment by DutchCo of its right to certain payments by the Kingdom of the Netherlands (“State”).

Bank’s proposal arises out of the ongoing dislocations in the MBS market. Subsidiaries of ING Groep, N.V. (“ING Groep”), Amsterdam, the Netherlands (consolidated assets of \$1.4 trillion), including Bank, own Alt-A MBS that are not currently liquid. Because of the declining value of the MBS, Bank has had to take steep write-downs on the assets on a mark-to-market basis. These markdowns have resulted in accumulated other comprehensive loss (“AOCL”) in shareholders’ equity on Bank’s balance sheet.<sup>1</sup> Bank proposes to improve its total equity position by transferring to State the risk on 80 percent of a portfolio of Alt-A MBS (“Designated Securities Pool”) owned by Bank. Bank will retain the risk on the remaining 20 percent of the portfolio.

State has agreed to assume the risk on the Designated Securities Pool but does not want to take title to the assets. As a result, State and Bank have agreed to interpose DutchCo as an intermediary. Interposing DutchCo also allows Bank to sell a participation interest in the Designated Securities Pool to DutchCo in a transaction that Bank believes would qualify as a “true sale” for accounting purposes. If the transaction

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<sup>1</sup> AOCL does not reduce regulatory capital, and Bank is and would remain well capitalized under the Office of Thrift Supervision’s regulations.

is a “true sale,” Bank would exchange illiquid MBS for a AAA-rated obligation of State thereby reversing the unrealized losses associated with the transferred MBS, which would result in an increase in Bank’s equity capital.

To effect the risk transfer to State, State, ING Groep, and DutchCo propose to enter into an Illiquid Assets Back-Up Facility Agreement (“Facility Agreement”) under which State agrees to make a series of payments of predetermined amounts to DutchCo (“State Payments”). The State Payments would represent the net present value of a purchase price that is less than the par value of the Designated Securities Pool but above its fair market value. In exchange, DutchCo agrees to make payments to State in amounts essentially equal to the payments made by obligors on the securities in the Designated Securities Pool. Because the State Payments would be in predetermined amounts, the payments would not diminish if payments by DutchCo to State were reduced because of defaults by obligors on the securities in the Designated Securities Pool.

Under the participation agreement between Bank and DutchCo, Bank would make payments to DutchCo in the same amounts as the payments that DutchCo would be obligated to make to State under the Facility Agreement. DutchCo would pay for the participation by assigning its right to the State Payments to Bank.

Section 23A and Regulation W limit the amount of “covered transactions” between a bank and any single affiliate to 10 percent of the bank’s capital stock and surplus and limit the amount of covered transactions between a bank and all its affiliates to 20 percent of the bank’s capital stock and surplus.<sup>2</sup> Under section 23A and Regulation W, “covered transactions” include the purchase of assets by a bank from an affiliate, the extension of credit by a bank to an affiliate, the issuance of a guarantee by a bank on behalf of an affiliate, and certain other transactions.<sup>3</sup> The statute and regulation also require a bank to secure its extensions of credit to, and guarantees on behalf of, affiliates with prescribed amounts of collateral.<sup>4</sup> In addition, section 23A and Regulation W prohibit a bank from purchasing low-quality assets from an affiliate and require that all covered transactions between a bank and an affiliate be on terms that are consistent with safe and sound banking practices.

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<sup>2</sup> 12 U.S.C. § 371c(a)(1); 12 CFR 223.11 and 223.12.

<sup>3</sup> 12 U.S.C. § 371c(b)(7); 12 CFR 223.3(h).

<sup>4</sup> 12 U.S.C. § 371c(c); 12 CFR 223.14.

DutchCo is an affiliate of Bank for purposes of section 23A and Regulation W because DutchCo and Bank are controlled by ING Groep. Because Bank transfers the Designated Securities Pool to DutchCo up front but receives payment for the Designated Securities Pool over time, the transaction between Bank and DutchCo is tantamount to a loan by Bank to DutchCo in the amount of the purchase price of the Designated Securities Pool. As a result, the proposed transaction between Bank and DutchCo is treated as an extension of credit, which is a covered transaction under section 23A and Regulation W. The aggregate amount of the covered transaction would be approximately \$25.4 billion, which DutchCo will pay to Bank over time by assigning to Bank DutchCo's right to the State Payments. This amount would exceed the Bank's quantitative limit on covered transactions with a single affiliate, which is \$907 million.<sup>5</sup>

Accordingly, Bank seeks an exemption from section 23A and Regulation W to enable Bank to (i) transfer to DutchCo the participation interest in the Designated Securities Pool and (ii) receive from DutchCo an assignment of its right to the State Payments. Bank also requests an exemption from the collateral requirements of section 23A and Regulation W for Bank's extension of credit to DutchCo.

Section 23A and Regulation W specifically authorize the Board to exempt, in its discretion, transactions or relationships from the requirements of the statute and rule if the Board finds the exemption to be in the public interest and consistent with the purposes of section 23A.<sup>6</sup> The Board previously has indicated that the twin purposes of section 23A are (i) to protect against a depository institution suffering losses in transactions with affiliates; and (ii) to limit the ability of an institution to transfer to its affiliates the subsidy arising from the institution's access to the federal safety net.<sup>7</sup>

An exemption from section 23A and Regulation W for the covered transaction appears consistent with the purposes of the statute. In substance, the proposed transaction is a risk transfer between Bank and State through which Bank receives a AAA-rated obligation of State. DutchCo serves merely as a pass-through entity that helps State and Bank achieve their desired results. As a result of the transfer of the Designated Securities Pool, Bank would transfer 80 percent of the risk on the MBS it currently owns to State and thereby significantly improve its equity capital position. The interposition of an affiliate helps Bank achieve immediately the benefits to its equity capital because Bank believes that the transaction between Bank and DutchCo would qualify for "true sale" treatment. By selling the participation interest to DutchCo in a "true sale," Bank would reverse \$4.4 billion of AOCL, which would result in an increase in Bank's total equity capital from \$2.8 billion to \$7.2 billion.

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<sup>5</sup> As of December 31, 2008, Bank's capital stock and surplus was \$9 billion.

<sup>6</sup> 12 U.S.C. § 371c(f)(2); 12 CFR 223.43(a).

<sup>7</sup> 67 Federal Register 76560 (Dec. 12, 2002).

Although the addition of an intermediary to the transaction increases risk because of the intermediary's possible bankruptcy or insolvency, the parties have taken a number of steps to mitigate that risk. First, Bank selected DutchCo as an intermediary because it conducts minimal business, thereby reducing the likelihood of bankruptcy or insolvency.<sup>8</sup> In addition, DutchCo will indemnify Bank for State's failure to make any State Payment as a result of State's exercising any rights it might have under Dutch insolvency law. Finally, ING Groep will guarantee the amounts payable by DutchCo to Bank under the participation agreement, including the indemnity amounts.

The proposed transaction appears to pose little risk to Bank. The State Payments would not diminish if payments by DutchCo to State were reduced because of defaults by obligors on the securities in the Designated Securities Pool. Bank believes that granting the requested exemptions would have public benefits because the exemptions would facilitate State's efforts to provide Bank the potential to improve its equity capital position significantly.

In light of these considerations, the covered transaction between Bank and its affiliate appear to be in the public interest and consistent with the purposes of section 23A. The Board, after consultation with staff of the Federal Deposit Insurance Corporation and the OTS, hereby grants the requested exemptions.

This determination is specifically conditioned on compliance by Bank and ING Groep with all the commitments and representations made to the Board in connection with the exemption request. These commitments and representations are deemed to be conditions imposed in writing in connection with granting the exemptions and, as such, may be enforced in proceedings under applicable law. This determination is based on the specific facts and circumstances surrounding the proposed transaction and may be revoked in the event of any material change in those facts or circumstances or any failure by Bank or ING Groep to observe any of their commitments or representations.

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<sup>8</sup> In addition, DutchCo has established a bankruptcy-remote foundation ("Collection Foundation") to which it must immediately transfer the funds it receives from Bank and State. Bank has represented that foundations like the Collection Foundation are commonly used in the Netherlands to insulate counterparties from bankruptcy or insolvency risk.

Granting the exemption request does not represent a determination concerning the permissibility of any other transactions engaged in by Bank or ING Groep that are subject to section 23A and Regulation W. Please notify the Federal Reserve Bank of New York when this transaction is completed.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert deV. Frierson". The signature is fluid and cursive, with the first name "Robert" and last name "Frierson" being the most prominent parts.

Robert deV. Frierson  
Deputy Secretary of the Board

cc: Federal Reserve Bank of New York  
Federal Deposit Insurance Corporation  
The Office of Thrift Supervision