Deutsche Bank

September 20, 2010

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

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

Re: File Number S7-16-10

Dear Ms. Murphy and Mr. Stawick:

Deutsche Bank AG ("DBAG" and, together with its affiliates, "Deutsche Bank") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") with our views and suggestions regarding certain key definitions and the regulation of mixed swaps under the derivatives title ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). In particular, this letter emphasizes the need, in order to promote efficient and well-functioning markets, for legal certainty with respect to whether certain transactions will be categorized as "swaps," "security-based swaps" or "mixed swaps" and for regulatory consistency in the treatment across these types of transactions.

Scope of Swap Definition

The expansive definition of "swap" introduces considerable legal uncertainty with respect to a range of products that are not derivatives and were not intended by Congress to be regulated as swaps. These include, among others, the following:

- *Insurance products, including financial guarantees, subject to state regulation*. While Chairman Gensler has recently stated that he does not believe that traditional insurance products such as life and property and casualty insurance should be subject to the Dodd-Frank Act, he has said he is reserving judgment on financial guarantees, indicating that he views them as similar to credit derivatives. To the contrary, unlike financial guarantees, credit derivatives do not require the incurrence of loss for payment. We believe that nowhere in the Dodd-Frank Act did Congress evidence an intention to alter state regulation of insurance products.

- *Non-derivative financial transactions*. The breadth of clause (iii) of the definition of "swap" could be read to include obligations that pay interest on a variable basis, loans with embedded terms such as interest rate caps, loan participations and commercial loans by non-bank entities, none of which should be included in the definition of "swap." We believe that nowhere in the Dodd-Frank Act did Congress evidence an intention to regulate under Title VII transactions that are not derivatives.

These products are not enumerated as examples in the definition of "swap" in Title VII, and, to achieve legal certainty, we propose that they be expressly excluded through rulemaking or regulatory guidance.

Regulatory Consistency with respect to CDSs

Because of a distinction in Title VII between swaps and security-based swaps based on whether a transaction is linked to a broad-based index of securities, on the one hand, or a narrow-based index of securities or a single security or loan, on the other hand, certain credit default swap ("CDS") transactions[1] that are economically identical will be subject to different regulators and potentially differing regulations.

[1] There are three main types of CDS. First, "single-name CDS" contracts typically offer credit protection with respect to a single corporate or sovereign reference entity. In exchange for a premium paid by the protection buyer, the protection seller makes a payment if a credit event occurs with respect to the reference entity. These transactions may be physically or cash settled. Second, "basket CDSs" are instruments referencing portfolios of reference entities, which can comprise any number of names. Essentially, a basket CDS is a pool of single-name CDS contracts. To achieve documentation, processing and other operational efficiencies, basket CDSs generally are documented pursuant to a master confirmation agreement or standard terms supplement, rather than individual stand-alone agreements for each of the underlying single-name CDS contracts. Notwithstanding this form of documentation, each of the underlying single-name CDSs constitutes a separate and independent transaction, with each of the underlying single-name CDSs operating independently of the others in the basket in all material respects. The occurrence of a credit event relating to a single reference entity in the basket does not give rise to a payment or delivery obligation with respect to any other underlying single-name CDS. Third, "index CDSs" are similar to basket CDSs, but reference a market standard pool of single-name CDS contracts. Operating in a manner substantially identical to basket CDSs, if an individual name in the index CDS experiences a credit event, there is a settlement of a pro-rata portion of the index CDS with respect to that name, it is removed from the index, and the index continues on the reduced notional. Index CDSs are similarly documented pursuant to a master confirmation agreement or a standard terms supplement.

The definition of "swap," as it relates to CDSs expressly excludes any CDSs that would fit within the category of "security-based swap", other than a "mixed swap." The definition of "security-based swap," as it relates to CDSs, includes "swaps" based on:

> the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

In other words, (a) CDSs on narrow-based indices ("basket CDSs") or single names are security-based swaps and (b) CDSs that are not security-based swaps ("index CDSs") are swaps.

Because basket CDSs and index CDSs are economically identical to pools of single-name CDSs, such transactions are typically executed by the same desks, often with the same counterparties, and potentially cleared by the same clearinghouses. It is therefore essential that any regulations applicable to these transactions, whether written by the SEC, the CFTC or the Commissions together, be substantially identical.

Mixed Swaps

Section 712(a)(6) of the Dodd-Frank Act makes mixed swaps subject to regulations to be jointly prescribed by the CFTC and the SEC. We believe that to the extent possible the Commissions should strive, in the interest of regulatory certainty and efficiency, to subject such mixed swaps not to dual regulation by each Commission, but rather to regulation by a single regulator under a jointly defined single rule set.

There is also ambiguity as to whether a mixed swap results when one leg of a transaction represents a payment based on an interest rate, such as LIBOR. It is possible to read the definition as saying that such a leg would convert a security-based swap into a "mixed swap," which could subject that security-based swap to joint CFTC and SEC jurisdiction and rulemaking. Many security-based swaps transfer the market risk of an underlying security between counterparties by providing that the party that is "synthetically short" the underlying security will make payments based on the value of that security to the party that is "synthetically long." The synthetically long party, on the other hand, pays to the synthetically short party an amount that may be based on LIBOR or another interest rate, generally to compensate the synthetically short party for financing costs incurred in establishing or maintaining the transaction or its hedge.

We suggest that the Commissions clarify that a security-based swap will not be treated as a mixed swap as a consequence of the fact that one leg of the transaction is calculated based on an interest rate measurement. If such a payment obligation were to cause a transaction to be a mixed swap, the distinction between swaps and security-based swaps would become meaningless. Instead, we believe the mixed swap category, and the resulting joint rulemaking, should be reserved for those transactions that meaningfully expose both counterparties to the risks of those underlying instruments whose transactions are regulated by both Commissions, such as, for example, a "best-of" transaction that requires a payment based on the higher of the performances of a commodity and a security.

Forwards on Commodities with Cash Settlement Options

The definition of "swap" explicitly excludes the "sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled." Title VII does not further define "intended to be physically settled." In particular, it is unclear whether, simply by virtue of containing an option for cash settlement, a forward on a commodity that otherwise would be "intended to be physically settled" is transformed from a non-swap to a swap.

We suggest that the Commissions clarify that a forward can be "intended to be physically settled" even if it contains an option for cash settlement, whether or not the option for cash settlement is exercised at maturity. We believe such treatment is consistent with the fact that physically-settled commodity forwards businesses may use cash-settleable instruments as part of their normal business. Bifurcating the regulation of such business based on the fact that a specific instrument does or does not have such a clause does not appear to comport with commercial realities of this market. In addition, the majority of the Title VII regulatory regime involves requirements that attach prior to the maturity of an instrument, such as clearing, exchange trading, margin, capital, business conduct and position limits. As a result, market participants must know whether an instrument is a "swap," "security-based swap" or neither upon entering into the instrument. Therefore, a regime in which the determination is made based on whether a cash settlement option is exercised at maturity is not feasible.

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We thank the Commissions for the opportunity to comment on the definitions of "swap" and "security-based swap" and the regulation of "mixed swaps." We would be happy to provide the Commissions any additional information, on any of the subjects discussed in this letter or any other issues, that would be useful to the Commissions in implementing Title VII.

Please feel free to call either of the undersigned with any question or request for additional information that you may have.

Sincerely,

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