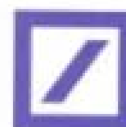
Deutsche Bank
Legal, Risk & Capital



February 9, 2012

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VIA ELECTRONIC MAIL (rule-comments@sec.gov)

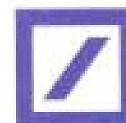
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File Number S7-38-11 – Request for Comments
Regarding Proposed Rule 127B

Ladies and Gentlemen:

Deutsche Bank AG is writing to provide certain comments, and to request certain clarifications, regarding Proposed Rule 127B (the "**Proposed Rule**"), as set out in the Commission's Release No. 34-65355 (the "**Release**"). While Deutsche Bank AG ("**we**", "**us**" or "**Deutsche Bank**") recognizes and strongly supports the Commission's efforts to ensure that parties do not structure securitization transactions that are designed to fail or otherwise profit from their failure, we also believe that the Proposed Rule, as drafted, as well as some of the interpretative positions taken by the Commission in the Release, will unnecessarily prohibit Deutsche Bank and other financial institutions from hedging balance sheet risk through synthetic securitization transactions. We believe that this has serious adverse implications for the safety and soundness of banking institutions and for the availability and cost of credit generally, neither of which were intended consequences of new Section 27B of the Securities Act of 1933 ("**Section 127B**").

Synthetic securitizations involving sophisticated parties serve valid risk mitigation and other structural purposes. Due to certain legal, operational and tax considerations, synthetic securitizations are also often the sole practical means to manage portfolio risk for large classes of assets owned by banking institutions. The inability to use synthetic securitizations as a risk management tool and the consequent inability to manage the risks associated with extending credit will necessarily result in an impairment to the safety and soundness of these institutions or a curtailment of lending activity generally, which will further restrict economic growth and the potential for economic recovery. Further, synthetic securitizations permit banking institutions to prudently take on and manage credit exposures efficiently and effectively; not only do synthetic securitizations result in credit being more readily available to bank customers, they allow credit to be made available at rates that reflect the ability to transfer risk to a broad and liquid market at a lower cost than would otherwise be achievable using conventional means. We believe all of these benefits are achieved without raising the type of conflicts of interest concerns that Section 27B was enacted to address.



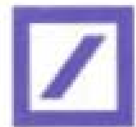
I. Background

Deutsche Bank is one of the world's largest financial institutions, with operations in the United States, Europe and elsewhere throughout the world. While it is active in essentially all financial markets, this letter is specifically concerned with the effect of the Proposed Rule on Deutsche Bank's ability to hedge its balance sheet risk through synthetic securitization transactions, and to engage in other synthetic transactions which would be permitted under the securities laws if structured as non-synthetic transactions, all as more fully described below. We note that several industry associations (including the International Association of Credit Managers, the Securities Industry and Financial Markets Association and the American Securitization Forum) have submitted or are proposing to submit comment letters to the Commission regarding the Proposed Rule. We share many of the concerns raised in those letters, but do not separately address all of them here.

In a typical synthetic securitization transaction (a "**Synthetic Securitization**"), a special purpose entity ("**SPE**") enters into a credit default swap ("**CDS**") with Deutsche Bank in respect of a reference portfolio ("**Reference Portfolio**") comprised of corporate loans, commercial mortgage loans, securities backed by such loans or other types of asset backed securities ("**Reference Obligations**"). Deutsche Bank acts as the credit protection buyer and the SPE acts as the credit protection seller on the CDS. Pursuant to the CDS, following the occurrence of a "credit event" (as defined in the CDS) with respect to one or more Reference Obligations, the SPE is required to pay a cash settlement amount to Deutsche Bank. The SPE issues notes to investors ("**SPE Notes**"), the proceeds of which are invested in securities issued by the U.S. or state governments or governmental agencies or other highly-rated securities, or in a bank deposit account pursuant to a deposit account agreement with Deutsche Bank or another eligible bank ("**Investment Securities**"). In the absence of credit events on the Reference Obligations, the interest rate borne by the Investment Securities is sufficient, together with the a portion of the cash flows paid by Deutsche Bank on the CDS, to make interest payments on the SPE Notes and, upon liquidation of the Investment Securities to also pay principal on the SPE Notes at maturity. In certain Synthetic Securitization transactions, Deutsche Bank also enters into a Total Return Swap ("**TRS**") with the Issuer, providing the Issuer with a fixed rate on the Investment Securities that, together with cash flows on the CDS, is structured to be sufficient to pay interest on the SPE Notes and principal on final maturity (to the extent there are no credit events on the CDS). To the extent that there are credit events resulting in losses on the Reference Portfolio, Investment Securities are liquidated by the transaction trustee in an amount sufficient to pay to Deutsche Bank the settlement amount payable by the SPE under the CDS, which will result in losses to the SPE Note investors.

In other cases, Deutsche Bank may synthetically "sell" all or a portion of its exposure to one or more asset-backed securities ("**ABS**"), such as an unsold allotment of ABS retained by Deutsche Bank as underwriter of a conventional issuance of ABS, by entering into a CDS with an investor with the ABS as the Reference Obligation, rather than by effecting a physical sale of the ABS ("**Synthetic ABS**" and, together with SPE Notes, "**Synthetic Securities**"). In such cases, structuring the transaction as a the Synthetic ABS (as opposed to a conventional sale) is typically done at the specific request of the relevant investor(s) to satisfy tax, legal, accounting or other requirements of the investor(s).

Synthetic Securities are typically offered to a very limited number of prospective investors, which investors (or their investment advisors) are typically actively involved in selecting the specific Reference Obligations that will constitute the underlying Reference Portfolio. Prospective investors in a given Synthetic Securitization are afforded the opportunity to (and typically) perform thorough due diligence on the Reference Portfolio, including a full credit-by-credit analysis on each specific Reference Obligation.



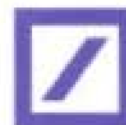
Investors typically approve such Reference Obligations at closing, with the exception of a limited number of credits as to which complete information cannot be provided due to confidentiality or other contractual restrictions. In cases where complete information cannot be provided, detailed credit information is provided to the investor without naming the specific obligor. Prospective investors in SPE Notes are provided with extensive disclosure with respect to the pertinent Synthetic Securitization, and are required to sign a subscription agreement which contains extensive disclosure about the risks of the transaction, and which also contains express acknowledgements and acceptance of such risks by the investor. Prospective investors are also provided with a summary of the terms of the CDS and (where applicable) TRS, the final forms of the actual swap confirmations, with all details (including the Reference Obligations and all financial terms) completed, and extensive disclosure of actual and potential conflicts of interest involving Deutsche Bank acting in its various capacities in respect of the CDS and otherwise in respect of the Synthetic Securitization. In those cases where the transaction is being utilized by Deutsche Bank in whole or in part as a portfolio hedge, such potential conflict of interest is also fully disclosed, acknowledged and consented to in writing by the investor. In certain Synthetic Securitizations, investors may also retain the right to accept or reject post-closing replacement of Reference Obligations (which in all cases much satisfy the specifically negotiated eligibility criteria determined at the time of closing). Aside from any such replacements, the Reference Portfolio is static, not managed.

Synthetic Securities are offered and sold only to investors that are either (i) either both "qualified institutional buyers" ("**QIBs**") under Rule 144A under the Securities Act of 1933, as amended (the "**Securities Act**") (and in certain limited instances, institutional accredited investors under Regulation D ("**IAIs**")) and "qualified purchasers" ("**Qualified Purchasers**") within the meaning of Section 2(a)(51) of the Investment Company Act of 1940 (the "**Investment Company Act**") in the case of U.S. persons, or (ii) non-U.S. persons pursuant to Regulation S under the Securities Act.

As a result of its underwriting and market making activities relating to SPE Notes and ABS, Deutsche Bank (or its affiliates) may retain or acquire ownership of a portion of the SPE Notes or ABS issued in a given transaction. When acting as an underwriter, the relevant Deutsche Bank entity may purchase SPE Notes or ABS for purposes of its sale to an ultimate investor or to satisfy certain contractual underwriting obligations. As a result of these underwriting activities, Deutsche Bank may end up owning SPE Notes or ABS subsequent to the expiration of the underwriting period, thus exposing Deutsche Bank to the economic risk of the SPE Notes (and to the underlying Reference Obligations) and ABS it owns. Furthermore, Deutsche Bank conducts market making activities in certain of the SPE Notes resulting in its acquisition and disposition of SPE Notes and ABS and accordingly either net long or short positions in such securities. As noted above, in certain cases sales of these positions may be effected synthetically as Synthetic ABS, typically at investor request. These transactions may raise the same issues as other Synthetic Securitizations under the Proposed Rules.

II. Issues Presented by the Proposed Rule

The Commission has promulgated the Proposed Rule under new Section 27B of the Securities Act, which was added thereto by Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**"). As several other commentators have pointed out, the intent of Section 621 is to prohibit securitization participants from intentionally designing asset-backed securities ("**ABS**") to fail or default while such participants benefit from the securities' failures. More specifically, Congressional intent was to provide the Commission with authority to remove conflicts of interest from such transactions, while also protecting the healthy functioning of the capital markets. Part III.v. of the Proposed Rule itself states that "[The Commission believes] that certain conflicts of interest are inherent in the securitization process, and accordingly that Section 27B and [the Proposed Rule] should be



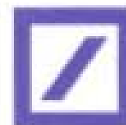
construed in a manner that does not unnecessarily prohibit or restrict the structuring and offering of an ABS."

Deutsche Bank has the following observations on the potential applicability of the Proposed Rule to the transactions described herein: (i) Synthetic Securitizations are commonplace in the capital markets and are marketed to and well understood by sophisticated market participants and (ii) the conflicts of interest presented by Synthetic Securitizations are inherently present in any transaction involving a transfer of an underlying pool of assets by a securitization participant to investors via an SPE. Furthermore, Synthetic Securitizations arranged by Deutsche Bank (i) are typically bespoke transactions in which investors are fully involved in selecting the Reference Portfolio, or are arranged at the request of one or more specific investors and (ii) contain full disclosure of the conflicts of interest presented by Synthetic Securitizations which are acknowledged and consented to in writing by, sophisticated investors.

Accordingly, Deutsche Bank believes that (i) these Synthetic Securitizations do not represent the type of transaction singled out by Congress as its primary focus of concern – namely where a financial institution structures a securitization to fail or otherwise bets against the securities sold to investors, often without adequate disclosure of that risk, (ii) drafting and interpreting the Proposed Rule so as to prohibit Synthetic Securitizations would have a significant adverse effect on the ability of financial institutions to manage their exposure to corporate credits, which will in turn have a significant adverse effect on liquidity in the credit markets and bank lending generally (including loans made to middle-market borrowers) and (iii) the Proposed Rule arbitrarily discriminates against synthetic transactions, as transactions offering comparable economic terms and risks to the parties could be structured using other methods (e.g., by direct sale, assignment or transfer of the underlying Reference Obligations, or through a bilateral collateralized CDS referencing the Reference Portfolio), but would impose significant additional costs and burdens on the parties that are avoided by means of a Synthetic Securitization.

We note that while the Proposed Rule does contain a narrowly-worded carveout for a limited range of hedging activities,[1] we do not believe that the carveout is extensive enough to cover scenarios where Deutsche Bank intends to exit a position resulting from an unsold allotment by effectuating a synthetic sale requested by an investor. Additionally, as discussed more fully below, (i) the Proposed Rule would in many circumstances prohibit a commonplace and effective form of hedging portfolio risk synthetically, while permitting the substantively identical hedging of portfolio risk through non-synthetic transactions (which may well be more costly, time-consuming or otherwise more problematic to execute in a non-synthetic fashion) and (ii) focuses solely on the form of the hedge transaction (synthetic sales generally prohibited while economically identical transactions generally permitted) without taking any account whatsoever of the primary intent underlying the Proposed Rule, which is to prevent securitization participants from designing and benefiting from securitizations that are designed to fail. We also note that (as discussed more fully in Part III below) the wording of the hedging exemption contained in the Proposed Rule is considerably narrower that the wording of the exemption for "risk-mitigating hedging activities" set out in Section 619 of the Dodd-Frank Act.

[1] Paragraph (b)(1) of the Proposed Rule permits "[r]isk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with such positions or holdings . . . ."



III. Synthetic Securitizations Are Essential To Successful Portfolio Management

Synthetic Securitizations serve a bona fide business purpose in allowing for efficient risk transfer of credit exposure on a financial institution's balance sheet and are one of the most effective risk mitigation techniques for credit exposure available to financial institutions. Synthetic Securitizations are an essential prudential tool that Deutsche Bank (and other financial institutions) utilize to manage exposure in corporate credit portfolios and to satisfy regulatory capital requirements. Banking regulators, both in the United States and abroad, have long recognized Synthetic Securitizations as an effective risk transfer tool.[2]

Effective credit portfolio management is critically important to our prudential supervisors and to our management because of the vital role it plays in supporting Deutsche Bank's ability to lend. Properly structured Synthetic Securitizations that are recognized as risk mitigants for regulatory capital purposes which "free up" financial institutions' regulatory capital, enabling them to make more credit available to their customers. Inability to consummate Synthetic Securitizations would have a severe adverse effect on Deutsche Bank's (and other financial institutions') cost of capital, which will result in it making fewer loans at greater cost to its borrowers. Despite the continuing volatility in the financial markets, sophisticated investors have continued to seek out investments in Synthetic Securitizations since they afford the opportunity to invest in bespoke transactions with exposure to specific credits (which may not be attainable in a cash transaction due to administrative or legal transfer restrictions) and customized loss exposure parameters and negotiated leverage levels that may not otherwise be attainable in a cash transaction.

The Interpretation included in the Proposed Rule indicates that engaging in any transaction would involve or result in a material conflict of interest between the securitization participant and investors in the relevant ABS if a securitization participant has a "short position" and there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision. The Interpretation would define a "short position" as a transaction in which the securitization participant would benefit directly or indirectly from the actual, anticipated or potential (i) adverse performance supporting or referenced by the relevant ABS, (ii) loss of principal, monetary default or early amortization event on the ABS or (iii) decline in the market value of the relevant ABS. The Interpretation goes on to present four examples, of which Example 3 is of particular concern to us.

Example 3 sets out four variations of synthetic ABS transactions in which the securitization participant purchases credit protection from an SPE pursuant to a CDS. The examples lay out a spectrum of synthetic transactions ranging, in the Commission's view, from generally impermissible (Examples 3A and 3B) to generally permissible (Examples 3C and 3D). Deutsche Bank (as well as other industry commentators) does not believe that drawing the line between permissible and impermissible Synthetic Securitization transactions between Example 3B and Example 3C is required by regulatory policy or is the correct interpretation of the statutory mandate.

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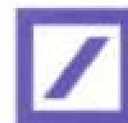
[2] The Board of Governors of the Federal Reserve System (the "**FRB**") and the Office of the Comptroller of the Currency (the "**OCC**") first formally addressed Synthetic Securitizations in a November 15, 1999 joint release entitled "*Capital Interpretations – Synthetic Collateralized Loan Obligations*". The FRB and OCC noted in the introduction to that release that Synthetic Securitizations "allow economic capital to be more efficiently allocated, resulting in, among other things, improved shareholders' returns". That release and a number of subsequent interpretive letters addressed the treatment of various Synthetic Securitization structures under the U.S. banking agencies' Basel I-based risk-based capital guidelines. The U.S. banking agencies' Basel II-based risk-based capital guidelines, like Basel II itself, have detailed provisions addressing Synthetic Securitizations and recognize them as an effective risk mitigant. Additionally, upon their effectiveness, the Basel III guidelines will also recognize the use of synthetic transactions for purposes of reducing potential capital charges related to counterparty risk.



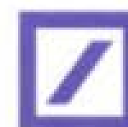
First, the statutory language does not prohibit transactions resembling Example 3B, and we do not believe policy or other considerations warrant an expansive reading that would encompass Example 3B. The statute's inclusion of an express exception for risk-mitigating hedging activities in connection with holdings arising out of the underwriting or sponsorship of an ABS does not imply that other hedging activities automatically involve a material conflict of interest. The approach taken in the Interpretation assumes that it does. The statute prohibits engaging in transactions that would result in or involve material conflicts of interest in connection with securitizations and then identifies certain classes of transactions that are not prohibited. It does not prohibit hedging activities in connection with securitizations other than as expressly permitted.

Second, prohibiting Synthetic Securitizations that hedge balance sheet risk while permitting traditional securitizations that hedge balance sheet risk would result in treating economically identical transactions differently merely because of the means through which they are implemented. Neither Section 621 of the Dodd-Frank Act nor the Proposed Rule prohibits the traditional securitization of assets that are sold or participated to the SPE or the bilateral purchase of credit protection without an SPE – transactions that would have identical economic outcomes to the transactions that Example 3B identifies as involving a material conflict of interest. As in a Synthetic Securitization referencing the same assets, in each of these scenarios some or all of the risk of adverse performance of the assets, including the loss of principal or monetary default, is shifted from the lender to sophisticated counterparties. The apparent benefit that the securitization participant achieves from the "short transaction" represented by the CDS between the lender and the SPE – really the mitigation of a potential loss, designed to pursue the objective of a risk transfer that does not leave the institution short on the underlying exposure – is indistinguishable from the benefit it would have obtained in a permissible traditional securitization or bilateral transaction.

Finally, we note that Section 619(d)(1)(C) of the Dodd-Frank Act expressly permits banking entities to engage in "[r]isk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings." Prohibiting Synthetic Securitizations would (in addition to contravening the meaning of the statute) deprive Deutsche Bank (and other financial institutions) of an important risk management tool necessary to promote and sustain the primary loan origination market and to foster liquidity in the credit markets generally. This result satisfies no discernible policy objective, as evidenced by the fact that transactions having the same economic effect as our Synthetic Securitizations would not be prohibited if entered into directly and not by means of a synthetic structure. It is therefore imperative that neither the Proposed Rule, as finally adopted, nor the Commission's interpretations thereunder, unnecessarily interfere with the ability of financial institutions subject to the Proposed Rule to manage portfolio risk in a manner which is not adverse to the interests of investors.

IV. The Rule and Interpretation Are Excessively Broad and Unnecessarily Restrict Synthetic Transactions with a Valid Purpose

When Deutsche Bank implements a Synthetic Securitization, we are not, in economic substance, taking a "short position" on the Reference Portfolio. The Synthetic Securitization is a risk transfer transaction from Deutsche Bank to the investors in the Synthetic Securitization in the same manner that a traditional securitization or a direct sale of a loan or loan participation would be. In a conventional securitization, we would sell a portfolio of Reference Obligations (whether acquired specifically for purposes of the securitization or otherwise) to an SPE, which would fund its purchase by issuing ABS to investors. The risk of loss on the Reference Portfolio would, at closing, be transferred entirely to the ABS investors, who



will thereafter bear any losses resulting from a decline in value of, or in a payment default with respect to, the Reference Portfolio. Similarly, in a Synthetic Securitization, Deutsche Bank transfers at closing the risk of loss (typically the risk of bankruptcy or failure to pay by the obligors on the Reference Obligations) on the Reference Portfolio or underlying ABS through a CDS to the investors in the Synthetic Securitization. Where the economic effect to investors is substantively identical, there is a logical expectation that the form of the transaction should not give rise to radically different regulatory consequences.

Accordingly, we do not believe that drawing a hard and fast dividing line between the types of transactions referenced in Examples 3B and 3C[3] provides any additional protection to investors, while establishing such a dividing line would effectively preclude most Synthetic Securitizations. Deutsche Bank, in common with other large financial institutions, frequently (subject to market conditions) structures both synthetic and conventional ABS transactions. It also routinely originates, purchases and sells credits of the types that are frequently used for securitizations. With respect to a given origination or purchase of a given loan, neither the trader nor anyone else in our organization may definitively know at the time of origination or acquisition whether such loan will end up in a securitization or not. Limiting Synthetic Securitizations to entities that accumulate assets **solely** for inclusion in a securitization effectively penalizes all large financial institutions that routinely conduct transactions in such assets, and effectively limits Synthetic Securitizations to firms exclusively devoted to implementing such transactions. The Commission itself recognizes (see page 72 of the Proposed Rule) that as a practical matter it may not be possible to distinguish circumstances in which a securitization participant's long position in the underlying assets was originally acquired for investment purposes (i.e., Example 3B), from circumstances in which the securitization participant's long position was acquired for purposes of creating the ABS (i.e., Example 3C).

As discussed more fully in Part V below, Deutsche Bank's Synthetic Securitizations, if structured as non-synthetic transactions, would present exactly the same conflicts of interest and economic consequences to investors as Synthetic Securitizations, but would not be prohibited by the Proposed Rule. However, these alternative structures would result in significant delays in execution of the transaction, and in significant additional costs which would ultimately be borne by investors. It bears repeating that in many instances synthetic structures are specifically requested by investors in order to meet certain objectives that they may have. Accordingly, Deutsche Bank strongly believes that a Synthetic Securitization, which presents no greater conflict of interest or potential for abuse than a non-synthetic transaction, and which presents the same economic and risk characteristics, should not be precluded by the Proposed Rule. We do not see that any benefit would be provided to investors by such prohibition, particularly where all investors are highly sophisticated, full disclosure is made of potential conflicts, the transaction structure and the Reference Portfolio, and the investors (or their investment advisors) are actively involved in selecting the Reference Obligations or actually request a synthetic transaction. On the contrary, permitting Synthetic Securitizations of the types herein described would facilitate Deutsche Bank (and other financial institutions) in making more credit available to our clients, while helping us to maintain the safety and soundness of our own portfolio. It should also be noted that precluding Synthetic Securitizations would significantly adversely impact our ability to provide financing to our clients, including mid-cap companies in the United States and Europe.

In the course of its underwriting and/or market making activities, Deutsche Bank or one or more of its affiliates may either retain (as a portion of an unsold allotment) or acquire a portion of the SPE Notes

[3] In example 3C, the securitization participant accumulates "a long cash or derivatives position in the underlying assets solely in anticipation of creating and selling a synthetic ABS – and not with a view to taking an investment position in those underlying assets."

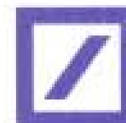
issued in a given Synthetic Securitization, or ABS issued in a conventional securitization. Underwriting, placing and market making with respect to ABS are traditional activities that have conducted by originators of ABS and their affiliates since the inception of the ABS market. It is not unusual that a portion of ABS being offered in a securitization be retained by the underwriter / initial purchaser due to market conditions and / or contractual obligations. Section 219(d)(1)(B) of the Dodd-Frank Act expressly permits the purchase, sale, acquisition or disposition of securities and other investments that would otherwise be prohibited under the proprietary trading rules in connection with underwriting or market-making-related activities, to the extent that any such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties. While generally not required by the transaction documents, market making by Deutsche Bank or its affiliates in some or all of the issued SPE Note / ABS tranches provides a valuable source of liquidity to ABS investors. When Deutsche Bank retains or acquires SPE Notes / ABS in the course of its underwriting and/or market making activities, Deutsche Bank is not taking a position in such securities in the conventional sense. Rather, Deutsche Bank is taking a risk to the securities retained or acquired that directly arises from its customary roles in connection with an ABS securitization. To the extent that Deutsche Bank hedges its position with respect to the SPE Notes / ABS so retained or acquired, it is essentially not taking a short position as to the SPE Notes in conflict with the interest of investors. It is merely hedging its risk position in the securities so retained or acquired, which securities may well be resold to investors (at which point Deutsche Bank would unwind its hedge). We believe that these activities do not pose a direct conflict to the interests of investors, and that Deutsche Bank should be permitted to retain a portion of the SPE Notes / ABS being issued and sold, to acquire such SPE Notes / ABS in the course of its market-making activities, to be able to freely hedge its position in such SPE Notes / ABS during the period retained by Deutsche Bank, and to sell such SPE Notes / ABS (subject to all applicable requirements of the securities laws) at any time. The securities laws already contain restrictions on market misconduct in connection with the foregoing activities, whether carried out synthetically or otherwise. To the extent the Commission believes that further protection is necessary in a given area, any such protection should be carefully tailored to the misconduct to be precluded, not a blanket prohibition on any form of transaction that may potentially give rise to abuse.

Finally, we note that if the intent of the Proposed Rule is to prevent a securitization participant from structuring an ABS transaction that is "designed to fail", it is no more difficult for a securitization participant to acquire underlying assets of dubious credit quality in the marketplace expressly for the intent of creating and selling an ABS, synthetically or otherwise, than it is to select questionable assets from its own portfolio.

V. The Rule Arbitrarily Discriminates Against Synthetic Transactions

As discussed above, Synthetic Securitizations may, or may not, be precluded by the Proposed Rule depending on Deutsche Bank's subjective intent (whether we are buying the asset for our own portfolio solely with the intent of doing a securitization, or otherwise) at the time of purchase of the underlying asset. Synthetic Securitizations may thus be prohibited under the Proposed Rule due to the inherent conflict of interest between the seller and the buyer of credit protection on the Reference Obligations if effected through a CDS, but not if effected in another manner, even though the economic substance of both transactions is identical.

The identical economic effects and transfer of credit risk effected synthetically under both Transaction Types could be effected by other means, without being subject to the restrictions of the Proposed Rule. For example, the Reference Obligations could be sold directly to the SPEs or to end investors. Other than not involving a CDS, the transactions would otherwise appear to be identical – in both cases; the credit



risk of the Reference Obligations has been passed to the investors in securities issued by the SPE (or directly to the investors). As in a Synthetic Securitization referencing the same assets, in each case some or all of the risk of adverse performance of the assets, including the loss of principal or monetary default, would be shifted from Deutsche Bank to investors in the SPE or directly to investors. The apparent benefit that we would achieve from the "short transaction" represented by the CDS between Deutsche Bank and the SPE – really the mitigation of a loss – is essentially indistinguishable from the benefit we would have received from a conventional securitization or a direct sale involving the sale, participation, assignment or transfer of the underlying assets. There is no sound policy reason to treat these transactions differently, particularly when the Synthetic Securitization serves the bona fide business purpose of mitigating the risk we have to loans and assets on our balance sheet.

It should, however, be noted that a sale, participation, assignment or transfer of the Reference Obligations to the SPE will more likely include significant additional costs and other difficulties in effecting the transaction than would a synthetic structure, which additional costs would ultimately be borne by investors in the securities issued by the SPE. Such costs would include any costs associated with transferring the Reference Obligations to the SPE, such as consent fees, mortgage recordation fees, costs of counsel documenting each individual transfer in accordance with the provisions specified in the underlying documentation, etc. Sales and participations typically require borrower consent, while CDS transactions which transfer economic risks in those same assets do not. Synthetic Securitizations originated or underwritten by Deutsche Bank typically involve corporate credits. Whereas consumer credits are typically easy to transfer and thus amenable to conventional securitizations, corporate credits are generally difficult and time consuming to transfer, and in some cases can be securitized only in synthetic transactions. Many corporate borrowers may be unwilling to consent to the transfer of a loan to an SPE because of the difficulties they may face dealing with an SPE if they need to modify or restructure the loan at a future date.

In addition, and as discussed more fully in Parts III and IV above, Deutsche Bank believes that the Proposed Rule and Interpretation, as currently drafted, will preclude its ability to engage in Synthetic Securitizations, while permitting these activities to be conducted through conventional sales. One of the effects we see in such a blanket prohibition is to increase costs to our institution, to borrowers and to investors, and to severely limit a valuable source of market liquidity, while providing no additional protection to investors.

Deutsche Bank further believes that both the retention by it or an affiliate of a portion of the SPE Notes / ABS during the initial offering of a Synthetic Securitization or other offering, and the acquisition of any such SPE Notes / ABS through its market-making activities, serve a valuable liquidity function for issuers and investors, and should not be regarded as Deutsche Bank accumulating a proprietary position in such SPE Notes / ABS (or in the underlying Reference Obligations) in the conventional trading sense. Accordingly, we believe that we should be able effectuate the sale of unsold allotments of these securities so retained and/or acquired by means of synthetic sales. In so doing, we are not "shorting" the SPE Notes / ABS we have sold. Rather, we are merely disposing of assets that were retained as a result of our market making and underwriting activities.

VI. Any Conflict Presented by the Transaction Types can be Addressed Through Disclosure

Under existing securities laws, investors in securitizations are entitled to the same disclosures about actual or potential conflicts of interest regardless of whether the SPE owns the underlying assets or has sold credit protection on them. Deutsche Bank does not believe that prohibiting Synthetic Securitizations for purposes of the Proposed Rule while permitting economically indistinguishable transactions (to

substantively identical clients and typically with less disclosure or involvement in the structuring of the securitization) would promote investor protection. Further, Deutsche Bank's Synthetic Securitizations are marketed only to QIBs (or in certain limited instances, IAIs) or to non-US persons. These sophisticated investors are familiar with the origination policies and practices of the financial institutions whose securitization transactions they invest in. As noted above, in the case of each Synthetic Securitization originated or underwritten by Deutsche Bank, investors are provided with extensive disclosure, including copies of the actual and final CDS confirmation applicable to that transaction, specifying all Reference Obligations and economic and other terms.

As noted above, SPE Notes are typically offered to a very limited number of prospective investors, which investors (or their investment advisors) are often actively involved in selecting the specific Reference Obligations that will constitute the SPE's Reference Portfolio. Investors are afforded the opportunity to perform thorough due diligence on the Reference Portfolio, and generally perform a full credit-by-credit analysis on each specific Reference Obligation and approve such Reference Obligations at closing, with the exception of a limited number of credits as to which complete information cannot be provided due to confidentiality or other contractual restrictions. In such cases, detailed credit information is provided to the investor in a manner mutually agreed which does not involve a breach of those restrictions. Prospective investors are provided with extensive disclosure with respect to the pertinent Synthetic Securitization, and are required to sign a subscription agreement which contains extensive disclosure about the risks of the transaction, and which also contains express acknowledgements and acceptance of such risks by the investor. Prospective investors are provided with a summary of the terms of the CDS and (where applicable) TRS, the final forms of the actual swap confirmations, with all details (including the Reference Obligations and all financial terms) completed, and extensive disclosure of actual and potential conflicts of interest involving Deutsche Bank acting in its various capacities in respect of the CDS and otherwise in respect of the Synthetic Securitization. In those cases where the transaction is being utilized by Deutsche Bank in whole or in part as a portfolio hedge, such potential conflict of interest is also fully disclosed, acknowledged and consented to in writing by the investor.

Accordingly, our sophisticated investors are fully aware of the risks involved in Synthetic Securitizations, are provided with all legally-required disclosure, both with respect to the transaction structure and the underlying Reference Obligations, and have the capacity to (and do) evaluate such information and conduct any further investigation of the Reference Obligations that they believe necessary. The fact that Deutsche Bank is acting as the credit protection buyer under the relevant CDS, and that investors will suffer losses in the event of credit events in respect of the underlying Reference Portfolio, are well known in the context at issue, particularly when the relevant investors are involved in the selection of the Reference Obligations and structuring of the transaction. The features described above actually provide our investors with more protection than are typically provided in a conventional securitization. Prohibition of Synthetic Securitizations would thus appear to create a perverse incentive toward structuring transactions with less investor protection.

VII. Conclusion

For the reasons set forth above, Deutsche Bank strongly believes that the Commission should revise the final Interpretation and Rule 127B to affirmatively state that Synthetic Securitizations of the type undertaken by Deutsche Bank are not precluded by Rule 127B, irrespective of whether the underlying assets are selected from a financial institution's investment portfolio, acquired for purposes of effecting the Synthetic Securitization, or any combination of both. Alternatively, if the Commission believes that the express provisions of Section 621 require it to conclude that Synthetic Securitizations would result in Deutsche Bank having a material conflict of interest with investors, we believe that the Commission

should rely on its general exemptive authority under Section 28 of the Securities Act to adopt a disclosure-based exemption for Synthetic Securitizations of the type undertaken by Deutsche Bank that are marketed exclusively to investors that are either (i) both QIBs (or IAIs) and Qualified Purchasers, or (ii) non-U.S. persons under Regulation S.

Deutsche Bank believes that the carveout provided by the Proposed Rule for risk-mitigating hedging activities is too narrow, is not warranted by the statutory language, and would materially impair the ability of Deutsche Bank (and other financial institutions) to effectively manage risk in their portfolios. We further believe that the Proposed Rule should be revised to be consistent with the wording of Section 619, and to not preclude synthetic transactions that are economically equivalent to otherwise permitted ABS transactions. Finally, Deutsche Bank should be permitted to retain or acquire positions in securities issued in a Synthetic Securitization in connection with its bona fide underwriting and market-making activities, respectively, and then to sell such positions either synthetically or by a traditional sale at any time, as such positions are retained or acquired in connection with Deutsche Bank's underwriting and market-making activities and are not proprietary positions in the conventional sense. As these positions are not proprietary positions in the conventional sense, Deutsche Bank further believes that it should have the ability to hedge (including synthetically) any such retained positions pending their disposition.

Deutsche Bank appreciates your attention to our thoughts and concerns. I would welcome the opportunity to discuss these issues with the Staff of the Commission.

Sincerely,