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Board of Governors of the Federal Reserve System
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Washington, DC 20551
Attn: Jennifer J. Johnson, Secretary

VIA E-MAIL: Comments@FDIC.gov

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attn: Comments, Robert E. Feldman, Executive Secretary

VIA E-MAIL: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

VIA E-MAIL: RegComments@fhfa.gov

Federal Housing Finance Agency
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Washington, DC 20552
Attn: Alfred M. Pollard, General Counsel, Comments/RIN 2590-AA43

VIA WEB: www.regulations.gov

Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500
Attn: Regulations Division, Office of General Counsel

Re: OCC, Credit Risk Retention, Docket Number OCC-2010-0002; Docket No. R-1411; RIN 3064-AD74; Release No. 34-64148, File No. S7-14-11; RIN 2590-AA43

Ladies and Gentlemen:

Deutsche Bank AG ("**DBAG**" and, together with its affiliates, "**Deutsche Bank**") appreciates the opportunity to provide comments to the Securities and Exchange Commission and the regulators listed above (together, the "**Agencies**")[1] on Release No. 34-64148; File No. S7-14-11, dated March 30, 2011

[1] When used in this letter, the term "Agencies" refers to the appropriate Agencies that have rulemaking authority under Dodd-Frank with respect to the particular rule section discussed.

(the "**Proposed Rules**"),[2] which proposes to prescribe the credit risk retention requirements of Section 15G of the Securities Exchange Act of 1934 (the "**Exchange Act**") for sponsors of asset-backed securities. The Proposed Rules were issued under Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd-Frank**"). Section 15G requires the Agencies to jointly prescribe regulations to require securitizers of asset-backed securities to retain an economic interest in a portion of the credit risk on the underlying assets, and authorizes the Agencies to provide for exemptions and exceptions to such requirements.

Deutsche Bank AG is a multi-national commercial and investment bank organized under the laws of the Federal Republic of Germany, and has substantial and long-standing operations in the United States. Subsidiaries of Deutsche Bank in the United States and worldwide originate assets that are held on balance sheet or subsequently securitized, including commercial real estate loans originated through its U.S. subsidiary, German American Capital Corporation. Deutsche Bank's U.S. broker-dealer affiliate, Deutsche Bank Securities, Inc. ("**DBSI**") acts as an underwriter or in a similar capacity with respect to asset-backed securities transactions of a variety of asset classes, including commercial mortgage-backed securities ("**CMBS**") and residential mortgage-backed securities ("**RMBS**"), in both private-label securitization transactions and pass-through transactions sponsored by Freddie Mac and Fannie Mae (the "**GSEs**"). DBSI has acted as an underwriter, dealer or in a similar capacity for a number of asset-backed securities transactions in the first half of fiscal year 2011, including with respect to $3.34 billion in aggregate face amount of CMBS issued in the United States, and expects to continue to be an active participant in the U.S. securitization markets.

Deutsche Bank commends the Agencies for their considered efforts in undertaking the enormous responsibility of crafting rules that serve the purposes of Dodd-Frank while aiming to comply with a broad and challenging legislative mandate. We appreciate the effort and consideration of the Agencies in balancing the varying interests of market participants, legislators and consumers. We know that you understand that the rules implemented could significantly affect the availability and the cost of credit for numerous types of products, in addition to those which we refer to in this letter. Deutsche Bank agrees that properly and responsibly constructed forms of risk retention that discourage poor underwriting, yet maintain the flexibility to respond to investors and markets, will serve to improve the asset securitization markets as a valuable tool for credit formation. Stronger securitization markets will foster increased liquidity, expanded credit availability and reduced cost of credit to borrowers. As required under Dodd-Frank, exemptions should be available for certain asset classes and transaction types so long as appropriate controls are in place. Care must be taken to ensure that the Proposed Rules do not unintentionally impair the functioning of the securitization markets as viable funding and capital management tools, or result in requirements that are duplicative of, or in conflict with, the risk retention requirements in other jurisdictions. We encourage the Agencies to take into account the study and report issued under Section 941(c) of Dodd-Frank and the study conducted by the Chairman of the Financial

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[2] *See* http://www.sec.gov/rules/proposed/2011/34-64148.pdf.

Services Oversight Council under Section 946 of Dodd-Frank,[3] as well as the expressed views of legislators.[4]

I. EXECUTIVE SUMMARY

Our response focuses on the following key issues:

A. Deutsche Bank encourages recognition of the European Union risk retention regime.

B. The Agencies would exceed legislative intent by implementing certain of the proposed measures, in particular the premium capture cash reserve account requirement.

C. Premium capture would eliminate the economic incentives of securitization for originators and sponsors without providing meaningful benefits to borrowers and investors.

D. The informally expressed view that "par value" under the Proposed Rules for purposes of risk retention be interpreted to mean "market value" would require an excessively high level of risk retention.

We also make recommendations with respect to the following matters:

- The exemption for qualified residential mortgages should be more flexible.
- Sunset provisions on risk retention determined on the basis of historical peak asset default experience would free up capital for more efficient economic uses and increase flexibility without compromising the purposes of risk retention, and should be implemented.
- Multi-class resecuritization transactions should be exempted from the risk retention requirements.
- Restrictions on indirect transfer that may have the unintended effect of inhibiting legitimate business combination activity should be clarified.
- Various modifications and additions to the risk retention provisions specific to CMBS transactions would be desirable.

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[3] Macroeconomic Effects of Risk Retention Requirements, Chairman of the Financial Stability Oversight Counsel (January 2011), available at http://www.treasury.gov/initiatives/wsr/Documents/Section 946 Risk Retention Study (FINAL).pdf ("**Section 946 Study**").

[4] *See, e.g.,* Representatives John Campbell, Brad Sherman, et al., Letter to Agencies (May 31, 2011) and Senators Mary Landrieu, Kay Hagan, Johnny Isakson, et al., Letter to Agencies (May 26, 2011).

II. KEY ISSUES

A. Deutsche Bank encourages recognition of the European Union risk retention regime.

We have been following other commentaries on the Proposed Rules and note that regulatory duplication for entities subject to multiple risk retention regimes is a widespread concern, both in terms of increased operational costs, as well as the potential creation of an uneven playing field between U.S. and overseas institutions, and which could restrict cross border market access to what has historically been a global market. As a multi-national financial institution subject to the laws of numerous regulatory regimes, Deutsche Bank is uniquely positioned to reiterate, and wishes to stress, the importance of addressing risk retention as part of an internationally coordinated approach that properly reflects the global nature of the securitization market.[5]

As an EU credit institution (i.e. a bank), Deutsche Bank is required to comply with the risk retention rules that have been implemented within the European Union ("**EU**") under Article 122a of Directive 2006/48/EC (the "**Capital Requirements Directive**"). Article 122a includes, among other things, requirements on risk retention, due diligence and ongoing monitoring where a credit institution such as Deutsche Bank is an investor (including as an underwriter), or is otherwise exposed to credit risk under a securitization (e.g. as a liquidity provider or credit default protection provider). However, these requirements apply not only to Deutsche Bank AG, but to all consolidated affiliates in the Deutsche Bank group, wherever they are located. Deutsche Bank's branches and affiliates in the United States are subject to the risk retention requirements of Article 122a, which require that Deutsche Bank not invest in, or be exposed to, a securitization unless the originator, sponsor or original lender retains 5% of the credit exposure in the securitization.

Consequently, when Deutsche Bank is involved in securitizations in the U.S., it is likely to be subject both to Article 122a as well as the Proposed Rules. As discussed below, while there are similarities between the two regimes, the Proposed Rules and Article 122a differ markedly in a number of respects which, in certain circumstances, may make it impracticable for market participants to comply with both regimes. Examples of the circumstances in which this possibility arises include:

(i) a securitization of assets originated by Deutsche Bank Frankfurt, where the securitization notes are sold primarily in the EU but also into the U.S. through an SEC-registered offering. Deutsche Bank Frankfurt would have to retain 5% of the securitization under Article 122a given that the transaction is offered to EU investors. However, by virtue of the U.S. offering, Deutsche Bank Frankfurt would also have to comply with the 5% retention requirement under the Proposed Rules; and

(ii) a securitization of assets originated by Deutsche Bank New York with another Deutsche Bank U.S. affiliate, such as DBSI, as underwriter. Deutsche Bank New York, as a securitizer, would be subject to the 5% retention requirement under the Proposed Rules. However, Article 122a would also apply to the transaction by virtue of the U.S. underwriter

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[5] We note that a similar approach is also endorsed by the Financial Services Oversight Council in its Section 946 Study, which at page 30 states that "...risk retention must be considered in conjunction with other reforms in the Dodd-Frank Act as well as other reforms occurring both domestically and internationally."

(DBSI) being in an EU banking group; DBSI would not be able to act as underwriter unless Deutsche Bank New York retained 5% of the securitization under Article 122a. In this example, therefore, Deutsche Bank New York would be caught both by the Proposed Rules as well as Article 122a.

Deutsche Bank thus considers that coordination between, and a mutual recognition of, the U.S. and EU regimes is paramount to its continued ability to participate in the securitization markets. To that end, we would urge the Agencies to consider the express recognition of Article 122a in the final version of the Proposed Rules, by granting institutions (such as Deutsche Bank and other EU-headquartered banks) which comply with the risk retention requirements implemented under their respective home jurisdictions pursuant to the Capital Requirements Directive an exemption from the base risk retention requirements under the Proposed Rules.

We consider an express exemption for Article 122a compliant transactions to be imperative in two particular circumstances: (i) where an offering by a U.S. sponsor is being sold solely outside of the U.S.; and (ii) where an EU securitizer is making a U.S. offering outside of the realms of the safe harbor in the Proposed Rules for foreign-related transactions. In this regard, we refer the Agencies to the suggestions made in the American Securitization Forum ("**ASF**") and Association for Financial Markets in Europe ("**AFME**") comment letters as to some of the ways in which recognition of the EU regime may be incorporated into the Proposed Rules.[6]

A comparison of the retention requirements under each of Article 122a and the Proposed Rules shows that there are sufficient parallels between the policy objectives and fundamental requirements of the two regimes to facilitate the exemption discussed above. In particular, like the Proposed Rules, Article 122a: (i) proposes to align the interests of securitizers and investors; (ii) provides for a base 5% risk retention requirement; (iii) requires that the 5% risk be retained by the originator or sponsor; (iv) permits risk retention through a vertical slice, seller's interest/pool exposure, random selection or a horizontal slice; and (v) prohibits certain types of hedging.

In some respects, Article 122a would appear to be more stringent than the Proposed Rules. By way of example:

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[6] The ASF proposes an extension of the current safe harbor for foreign transactions in Section __.22 of the Proposed Rules to include among other things (i) an exemption for Reg. S only offerings by U.S. sponsors where at least 10% of the offering is made to investors in a jurisdiction with substantially similar risk retention requirements ("**Qualified Non-U.S. Jurisdiction**"); and (ii) a safe harbor for non-U.S. securitizers that have already conducted risk retention in accordance with the requirements of a Qualified Non-U.S. Jurisdiction irrespective of the amount of their U.S. offering. If this is not a feasible option for the Agencies, as an alternative ASF has asked that the 10% dollar value limitation in the current Section __.22 be increased to 33% for securitizers otherwise compliant with a Qualified Non-U.S. Jurisdiction.

The AFME proposes that Section __.22 be amended so that it can be met in one of two ways: (i) by satisfaction of the selected dollar value limitation; or (ii) by confirmation by the non-U.S. sponsor of the commitment to retain a net economic interest in compliance with a Qualified Non-U.S. Jurisdiction.

(i) unlike the Proposed Rules, Article 122a has retrospective application, in that, Article 122a will apply to existing securitizations (i.e. pre-January 1, 2011), when new assets are added or substituted to the securitized portfolio after December 31, 2014;

(ii) Article 122a is potentially wider in terms of the types of transactions that will be affected. The definition of "securitization" in the Capital Requirements Directive places a particular emphasis on the 'tranching of credit risk'. Therefore, if the economic substance of a transaction is such that credit risk is tranched it can be captured by Article 122a, even if its legal construct does not explicitly indicate that it is a "securitization." Consequently, certain transactions that would not constitute securitizations under the Proposed Rules may nonetheless be caught by Article 122a. This would include synthetic ABS transactions and warehousing facilities;

(iii) Article 122a is more restrictive in terms of the permissible forms of risk retention in that Article 122a only provides for four risk retention options that apply to all asset classes, without specific exceptions or divergences for different asset classes as are available under the Proposed Rules; and

(iv) unlike the Proposed Rules, there is no carve-out under Article 122a for resecuritizations. An EU investing credit institution in a resecuritization would need to ensure that the retention requirement is being met at the resecuritization level irrespective of whether the underlying securitization features risk retention.

Deutsche Bank's primary concern in having to comply with the risk retention requirements both under Article 122a and the Proposed Rules is that conflicting differences between the two regimes would render compliance with both regimes impracticable. For purposes of illustration, we have highlighted in section III.E.4 below differences between the Proposed Rules and Article 122a within the context of multi-sponsor/originator retention requirements. Other differences include, among others, the following:

(i) variations exist between the entities retaining the credit risk in the transaction. Unlike the Proposed Rules, which generally place responsibility for satisfying the applicable risk retention requirements on the sponsor of a transaction, Article 122a permits the retention requirement to be satisfied by either the originator, sponsor or original lender. While there is some overlap between the definitions of "originator" and "sponsor" in the Capital Requirements Directive and the Proposed Rules, certain differences between the definitions may lead to conflicting requirements where there is no EU equivalent of a "sponsor"; and

(ii) variations exist in the manner in which the retained interest is to be measured and held, which in certain circumstances may give rise to potential compliance issues. For example, within the context of the horizontal risk retention option, Article 122a requires retention of the first loss tranche and, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors. The amount of such retention must be equal to no less than 5% of the nominal value of the securitized exposures, which is to be calculated independently of the acquisition

price of the exposures to be securitized.[7] If under the Proposed Rules, the horizontal risk retention is to be calculated by reference to the "market value" of the ABS interests and the restriction on satisfying the requirement by retention of multiple adjacent subordinate classes is preserved (as discussed in section II.D below), a securitizer may be prevented from electing the horizontal risk retention option because it may not be able satisfy the conflicting requirements of the Proposed Rules and Article 122a.

Deutsche Bank, therefore, urges an internationally coordinated approach to the risk retention requirement. While we recognize that the Proposed Rules may need to diverge from similar laws promulgated in other countries, including Article 122a of the Capital Requirements Directive, in order to address issues specific to the U.S. or expressly required by statute, we strongly encourage the Agencies to maintain an open dialogue with their counterparts in the EU and elsewhere, and actively work towards commonality. Ensuring that the rules are consistent wherever possible, and that participants have the ability to compete on a level playing field, will serve to both facilitate cross-border access to the securitization markets as well as the regulators' ability to effectively oversee it. To that end, Deutsche Bank will urge the German government to push for recognition of the U.S. risk retention rules at the EU-level. We note also that AFME has written a letter (dated July 19, 2011) to the European Banking Authority emphasizing the real need for mutual recognition with respect to retention as between the EU and U.S. authorities and we are fully supportive of that initiative.

B. The Agencies would exceed legislative intent by implementing certain of the proposed measures, in particular the premium capture cash reserve account requirement.

Deutsche Bank recognizes that the Agencies have broad statutory authority to implement base credit risk retention rules and, more broadly, to craft exemptions for particular asset classes (e.g., RMBS and CMBS). We believe, however, that this authority should be exercised in a way that balances a number of competing objectives, including those of ensuring safety and soundness, transparency and alignment of interest, while fostering competition, credit availability on reasonable terms and economic recovery. We further believe that the Agencies may have exceeded legislative intent with respect to certain of the measures proposed, in particular those relating to the premium capture cash reserve account ("**premium capture**"). Similarly, as discussed below, there is no basis in the statute for the informally-expressed view that "par value" for purposes of the rules governing premium capture and horizontal risk retention should be measured with reference to "market value." The result of these proposals, in our view, could increase the imbalance in the markets at a time when a balancing of competing objectives is critical to economic recovery. The ramifications of implementing a rule of questionable statutory basis on market stability could be severe. We urge the Agencies to reconsider the features of "base" risk retention that depart from this objective, and to re-propose risk retention rules as appropriate.

Premium capture essentially requires, independently of the "base" risk retention requirements under the Proposed Rules (e.g., horizontal (including for CMBS third-party purchases), vertical, L-shaped, revolving asset master trust, representative sample retention or ABCP), that the sponsor fund a first-loss absorbing cash reserve account with amounts representing monetized premium and excess spread on the "ABS interests" issued. The Proposed Rules require that the sponsor must fund in cash at

[7] See footnote 8 to paragraph 43 of the "Guidelines to Article 122a of the Capital Requirements Directive," published by the Committee of European Banking Supervisors on December 31, 2010.

closing a reserve account in an amount equal to the excess of (i) the gross proceeds received by the issuing entity from the sale of ABS interests to persons other than the sponsor (net of certain closing costs), over (ii) 95% (or 100% for the representative sample, ABCP or CMBS third-party purchaser options) of the "par value" of the related ABS interests in the issuing entity. Gross proceeds would be deemed to include the "par value" or "fair value" of ABS interests retained initially by the sponsor but that the sponsor expects to sell third parties after closing.

Statutory authority under Section 941(b) of Dodd-Frank generally extends more clearly to constructing exemptions. For example, Section 15G(c)(1)(G)(i) of the Exchange Act states that the regulations may provide for "a total or partial exemption of any securitization, as may be appropriate in the public interest and for the protection of investors." Similarly, Section 15G(e)(1) of the Exchange Act permits the Agencies to issue an exemption to "(A) help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors." In addition, the Agencies have broad statutory authority to craft exemptions from the risk retention rules for CMBS transactions, and may choose from a menu of options provided for in the statute.[8]

Dodd-Frank neither mentions nor suggests the existence of premium capture, nor do the policy objectives underlying risk retention support premium capture. The Agencies have not expressly cited any specific statutory basis for premium capture in the Proposed Rules, nor has any empirical study or benefit/cost analysis specifically addressing the effects of a premium capture provision been presented. Dodd-Frank limits the Agencies' statutory authority to crafting rules and, more broadly, exemptions. We note that Section 15G(c)(1)(E) under the Exchange Act requires implementation of rules requiring retention of "not less than" 5% of the credit risk for any asset, which arguably could be interpreted to mean that regulators have some discretion to craft levels of risk retention above 5%. We do not believe that the language of the statute is intended to support this conclusion. Moreover, we believe the Agencies have correctly interpreted this section as simply expressing a regulatory minimum which would not prohibit the sponsor, originator or consolidated affiliate from holding additional exposure to the credit risk of the securitized assets. Under the Proposed Rules, the Agencies characterize premium capture as an amount "in addition to the five percent 'base' risk retention requirement of the proposed rules." However, the statute does not authorize stacking additional risk retention on top of the base risk retention, nor does it contemplate supplementing the retained interest with amounts representing proceeds on the sale of securities in excess of market value. The policy objectives of risk retention also do not contemplate eliminating legitimate economic incentives of securitization, which may lead to market stagnation.[9] Rather, Congress recognized the importance of securitization as a source of credit and liquidity to the markets and never intended to discourage its use. Premium capture appears to serve no purpose other than to eliminate economic incentives for sponsors, and limit the ability to structure transactions that are responsive to investor demand. Neither of these effects serve the statutory purposes

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[8] *See* 15 U.S.C. 78o-11(c)(1)(E).

[9] *See* Section 946 Study at 27 ("An excessive requirement could unduly limit credit availability and economic output to the point that these costs could outweigh the benefits of improved stability."), and at 28 ("...if regulators set risk retention requirements at an inappropriate level, or design them in an inappropriate manner, the costs in terms of lost long-term output could outweigh the benefits of the regulations.").

of aligning interests and encouraging sound underwriting, and may be harmful to the securitization markets and investors, which will reduce the availability of credit on reasonable terms. Similar regimes, including the EU risk retention requirements, do not take this approach, and we believe that the imposition of requirements of this nature could result in an economic disadvantage when compared to the EU markets, which would extend beyond the securitization market itself. We believe that premium capture should be eliminated on this basis, among other reasons.

The ramifications of a failure of the risk retention rules, including by adoption of rules that could be viewed as exceeding the legislative mandate, may be severe. First, new rules and regulations create compliance challenges in the short term that may result in market disruption. New rules and regulations of uncertain authority create additional challenges, and can result in immediate (and often lasting) uncertainty among market participants. This may slow credit formation, including securitization financing and other lending activity, which may further impact an already fragile credit market. The fact that any formal guidance from the Agencies would require joint agreement among the Agencies may further delay activity. Second, judicial challenge may result in a substantially protracted period of litigation, which could cause continued uncertainty in the rules and thereby contribute to market disruption. Third, the failure to properly implement rules may demand a legislative solution. Any extended period of legislative debate or other otherwise avoidable political process could further extend market instability. We urge the Agencies to reevaluate the statutory and policy basis for premium capture, and re-propose rules, subject to a meaningful comment period, that encourage sound lending within the limits of the statute.

C. Premium capture would eliminate the economic incentives of securitization for originators and sponsors without providing meaningful benefits to borrowers and investors.

Deutsche Bank urges the Agencies to eliminate premium capture. As discussed above, we believe that premium capture is inconsistent with legislative intent and (perhaps, counter to) the policy objectives for risk retention. In any case, Deutsche Bank believes that premium capture would end securitization of non-qualifying assets, including commercial real estate loans ("**non-qualifying CRE Loans**") that do not qualify under the commercial real estate loan exemption (a narrowly crafted exemption of limited, if any, utility). It not only would eliminate any economic incentives to securitize these types of assets, but may have the unintended effect of making such transactions wholly uneconomic. As discussed below, the CMBS market, as well as other securitization markets, would be severely negatively affected.

1. <u>Premium capture would make securitization unfeasible for originators and sponsors and should be eliminated</u>.

The Agencies' theory may be that by eliminating immediate receipt of income upon sale of senior interest-only or premium tranches, which in theory may be used to offset amounts required to be funded in compliance with the "base" risk retention requirement, sponsors' and investors' interests will be better aligned, which would encourage safe and sound underwriting. Instead, premium capture has the potential to end the securitization of non-qualifying assets. Operation of the premium capture provisions not only would eliminate the ability of sponsors to take any initial profits in a securitization, but would prevent or limit originators from recovering their cost basis of origination and sponsors from recovering any premium paid to originators for the assets. Forcing originators and sponsors to subordinate upfront

compensation to the most junior level of the capital structure, which in a best case scenario would result in a deferral of profit until expected maturity, would discourage or eliminate the use of securitization for the vast majority of originators. As a result, originators could be compelled to pass increased costs through to borrowers, which could substantially drive up the cost of credit, further inhibiting economic recovery. The availability of financing for assets bearing higher interest rates or that otherwise generate substantial amounts of excess spread, including financing for consumer assets purchased by lower-income borrowers, would suffer more severely relative to higher credit quality assets, particularly in a volatile interest rate environment.

2. Premium capture would negatively impact the commercial real estate market and CMBS transactions.

Although all asset classes will be affected by the imposition of a premium capture requirement, certain asset classes may be affected more than others, including commercial real estate, which depends principally on the securitization markets as a funding source. Deutsche Bank's businesses in the United States include origination and securitization of commercial real estate loans secured by properties located in the United States, and underwriting of CMBS backed by such loans. Vast numbers of commercial real estate loans are scheduled to mature in the next few years. The related borrowers of such commercial real estate loans will be considering various refinancing options. The amount of commercial real estate assets (in each case by outstanding current principal balance) held in currently outstanding CMBS transactions that are scheduled to mature in the next few years are approximately $97.16 billion in 2015, $131.32 billion in 2016 and $133.93 billion in 2017. This volume of maturities and demand for refinancing of assets, in the context of limited capacity of balance sheet lenders and increased capital requirements, will have a chilling effect on the commercial real estate securitization market. The imposition of a premium capture requirement could drive up lending costs significantly and restrict the availability of credit, potentially eliminating it for many borrowers. If the securitization markets were no longer functioning, only the most creditworthy borrowers would be able to refinance their loans or extend repayment schedules. This in turn could substantially increase defaults, further depress commercial real estate prices and destabilize the credit markets, all of which would further threaten an already tenuous economic recovery.

As described below under section III.E.4, the imposition of a premium capture requirement could also have a significant impact upon CMBS multiple sponsor (or "aggregator") transactions by requiring a single sponsor to satisfy not only the "base" risk retention requirement but also to satisfy the premium capture funding requirement. As described below, premium capture would further limit the incentives of non-retaining sponsors to employ prudent underwriting practices with respect to their respective assets contributed.

3. Premium capture would jeopardize off-balance sheet accounting treatment and legal true sale treatment.

Deutsche Bank is concerned that if a premium capture requirement is imposed, sponsors, particularly those complying with the horizontal risk retention requirement, may be required to consolidate the securitization vehicle for a transaction for accounting purposes, or will not able to treat certain asset securitizations as sales for accounting purposes. Any monetized premium or excess spread deposited to the premium capture reserve account, which in effect creates a form of horizontal risk

retention, may alone be viewed as a significant interest. When considered together with the horizontal, vertical or L-shaped retention, the requirement to fund a premium capture reserve would significantly increase the likelihood that the sponsor may be required to consolidate the securitization vehicle with the sponsor for accounting purposes. Even if the determination is made not to consolidate the securitization vehicle, sponsors would still need to consider whether legal isolation criteria have been satisfied to ensure accounting sale treatment. As a result, certain sponsors, including Deutsche Bank, may need to maintain higher risk-based capital reserves in addition to the risk retained interest, perhaps as high as the value of the transaction itself depending on the accounting treatment. This would significantly diminish the utility of securitization as a financing tool, adding to the deleterious effects on the financial markets discussed above.

Furthermore, the level of retained exposure to losses on assets transferred to a securitization vehicle may jeopardize the legal true sale treatment of the transfer. Retaining 5% of the credit risk of the assets in a transaction, in addition to any premium capture, may be viewed as recourse to the sponsor. Rating agencies typically would expect a true sale opinion from legal counsel. If a legal true sale opinion cannot be delivered, rating agencies may formulate credit ratings principally on the basis of the corporate ratings of the sponsor rather than on the credit risk of the assets. This would increase borrowing costs, and severely limit or potentially eliminate securitization as a viable financing alternative.

D. The informally expressed view that "par value" under the Proposed Rules for purposes of risk retention be interpreted to mean "market value" would require a level of risk retention greatly in excess of that intended by Congress.

Deutsche Bank understands that the Agencies intend that "par value" for purposes of calculating premium capture and the horizontal retained interest be interpreted to mean "market value." If this is indeed the Agencies' intention, then sponsors will be required to retain an excessively high level of credit risk relative to that required under Dodd-Frank or otherwise necessary to align interests and ensure sound underwriting practices. Deutsche Bank requests that the Agencies re-propose the sections of the Proposed Rules as necessary to clarify how the Agencies interpret the term "credit risk" under Dodd-Frank, including the definitions of "par value" and "ABS interest" (if such terms are to be retained), and to provide for a meaningful comment period.

1. Measuring risk retention based on the market value of the assets instead of the credit risk of the assets is inconsistent with the Agencies' legislative mandate.

Dodd-Frank requires credit risk retention, not market value retention. The notion of credit risk is the foundation of the risk retention rules. It also appears to be the source of fundamental confusion. The plain language of the base risk retention section of the statute requires the retained interest to equal at least 5% of "credit risk" of the assets.[10] The Proposed Rules depart from Section 941(b) and instead measure horizontal risk retention and premium capture with respect to the "par value" of the "ABS interests." Further, we understand that the Proposed Rules intend for horizontal risk retention and premium capture to be determined by reference to the *market value* of the assets. Simply put, we see no

[10] Section 15G(c)(1)(B)(i)(1) of the Exchange Act states that the regulations must "require a securitizer to retain…not less than 5 percent of the credit risk for any asset…that is not a qualified residential mortgage that is transferred, sold or conveyed through the issuance of an asset-backed security by the securitizer…"

evidence in Title IX of Dodd-Frank, or in the context in which the rules would apply, to support a definition of "credit risk" as "market value," or any other interpretation differing from the conventional meaning. Notably, the Section 946 Study interprets "credit risk" as independent of market risk.[11] We note that Article 122a of the Capital Requirements Directive takes a similar approach, as described above under section II.A.

The Agencies define "credit risk" under the Proposed Rules to mean:

> ...(1) The risk of loss that could result from the failure of the borrower in the case of a securitized asset, or the issuing entity in the case of an ABS interest in the issuing entity, to make required payments of principal or interest on the asset or ABS interest on a timely basis;...(2) The risk of loss that could result from bankruptcy, insolvency, or a similar proceeding with respect to the borrower or issuing entity, as appropriate; or...(3) The effect that significant changes in the underlying credit quality of the asset or ABS interest may have on the market value of the asset or ABS interest."

Clause (3) departs from the conventional meaning of "credit risk." Clause (3) of the definition appears to state that credit risk may be defined as the effect that changes in credit risk with respect to an asset may have on the market value of the asset. We doubt that Congress intended for credit risk to mean and include the *effects* of credit risk. In addition, the market value of assets and ABS interests for a securitization transaction will rise and fall over time depending on market conditions generally, liquidity of investment, rising and falling interest rates and other factors independent of the credit risk of the assets. As a result, market value, and, correspondingly, the value of the retained interest, could increase or decrease immediately (and perhaps substantially) following closing, which may compromise the alignment of interests between sponsor and investors. We believe that a simpler meaning of credit risk was intended. In any case, the definition of "credit risk" is overly broad and should be narrowed to more appropriately reflect its conventional meaning, which is consistent with the plain language of the statute and the context in which the term is used.

2. Measuring horizontal risk retention based on market value would require an excessively high level of risk retention in securitizations, including CMBS transactions.

If the Agencies intend for premium capture and horizontal risk retention (which requires retention of the most subordinate class in the capital structure) to be based on "market value," the sponsor would be required to purchase and retain securities having a principal amount substantially higher than that contemplated under Dodd-Frank and in place under other regulatory regimes, such as Article 122a of the Capital Requirements Directive.

The market value of subordinate classes of ABS interests in a securitization generally will be lower (and perhaps substantially lower) relative to similarly-sized classes of ABS interests more senior in the capital structure. Subordinate classes generally are allocated losses on the assets prior to more senior classes. This problem is particularly evident in "real estate mortgage investment conduit" or "REMIC"

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[11] *See* Section 946 Study, at 16 ("This definition of risk retention does not include ...interest rate risk, foreign exchange rate risk, or other types of market and macroeconomic risk that a securitizer might retain.").

transactions common to RMBS and CMBS securitizations of higher-quality assets.[12] In such transactions, the junior-most class of ABS interests would have a substantially lower market value than that of each senior class of ABS interests even though all classes of securities would generally be assigned principal balances based on the nominal value of the securitized assets. The subordinate classes would have an increasing market value at each step of seniority, and would generally have correspondingly increasing purchase prices (in each case as a percentage of par). In a REMIC structure the more subordinate classes of ABS interests would be purchased at a discount to par (rather than being issued with a higher interest rate) to reflect higher credit risk, and calculated primarily on the market value of the related class of securities. In a typical structure, pricing differences generally are not be reflected in the coupon assigned to the securities.

If a sponsor were to calculate the eligible horizontal residual interest at 5% of the market value (rather than the face value) of the ABS interests, based on currently expected rating agency subordination levels for a CMBS REMIC transaction, the eligible horizontal residual interest may include the triple-B rated class and all classes junior to such class. Certain CMBS transactions having higher quality collateral could include the single-A and double-A rated tranches. If the level of risk retention were to climb into the triple-B rated tranche (or the single-A and double-A rated tranche for deals having assets of higher credit quality), and the sponsor wished to satisfy the risk retention requirement by selling to a third-party purchaser,[13] under the Proposed Rules the junior tranches in the capital structure would need to be sold as a package to a single qualified third-party purchaser. As a result, a third-party purchaser would need to increase the size of its investment. However, under the Proposed Rules the horizontal eligible retained interest may consist only of a single tranche. The Proposed Rules do not permit horizontal risk retention through the holding of adjacent subordinate classes, as other regulatory regimes, such as the Capital Requirements Directive, would permit. Under current credit rating agency methodology, if a sponsor were to consolidate a group of classes having tiered ratings (e.g., three classes rated triple-B, double-B and single-B) into a single class, that single class would receive the lowest rating of the group (i.e., single-B, in this example). This result is uneconomic, and would lead to a contraction in securitization activity.

Even if the Agencies were to revise the Proposed Rules to permit retention of multiple adjacent subordinate classes by a third-party purchaser in satisfaction of the requirements, it is doubtful that a market would develop. Forcing third-party purchasers to buy higher rated securities would likely either: (i) dilute returns to the investors and thus drive away certain investors from the market; or (ii) prompt such buyers to demand higher returns on the retained investment grade securities than that historically desired (primarily because such securities have, in the past, been freely tradeable and liquid), which in either case may have the effect of driving up lending costs. Deutsche Bank estimates that the illiquidity

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[12] Generally speaking, a REMIC is a tax-advantaged investment vehicle common to securitizations of mortgage-related collateral. In a REMIC transaction, the cash flow from underlying mortgage-related collateral is directed to one or more classes of REMIC regular interests, which are pass-through certificates with varying coupons, durations and distribution and loss allocation priorities. A REMIC must also include a residual interest class.

[13] In addition to the "base" risk retention requirements, the Proposed Rules provide additional risk retention options unique to CMBS transactions. Under Section 15G(c)(1)(E) of the Exchange Act, one such option permits a sponsor to satisfy the risk retention requirement for a CMBS securitization transaction if a third-party purchaser purchases an eligible horizontal residual interest and satisfies certain other conditions, including the appointment of an independent "operating advisor" in certain circumstances.

premium required by buyers who, under the Proposed Rules, cannot trade their securities as a result of the hedging and transfer restrictions would result in higher average coupons to CMBS investors of roughly 15 basis points. The universe of third-party purchasers, which must make their purchase in cash under the Proposed Rules, and which has already diminished during the recent financial crisis, may further narrow.

III. OTHER RECOMMENDATIONS

In this section we make additional recommendations that we believe would be of value if implemented. These include considerations specific to RMBS and CMBS securitizations but which, in certain cases, apply to other asset classes. We believe the final rules should:

A. Allow for increased flexibility in the criteria governing the "qualified residential mortgages" ("**QRMs**") exemption.

B. Include sunset provisions on risk retention determined on the basis of historical peak default experience of different asset classes to free up capital for more efficient economic use without compromising the purposes of risk retention. Include a "qualified transferee" exception for CMBS transactions satisfying risk retention through purchase and retention by a third-party purchaser.

C. Broaden the exemption for resecuritization transactions to cover multi-class resecuritization transactions.

D. Include a technical correction to the hedging and transfer requirements to accommodate merger, consolidation and other business combination activity.

E. Contain various modifications and additions to the risk retention provisions specific to CMBS transactions.

We address each of the above recommendations in detail below.

A. The exemption for qualified residential mortgages should allow for increased flexibility.

Among the important policy goals underlying the exception for QRMs from the risk retention requirements is to provide for a regulatory regime that encourages the origination, sale and securitization of soundly underwritten mortgage loans of sufficiently high credit quality such that the policy reasons underlying the general retention requirements accordingly would not apply. In order to accomplish this task, policymakers rightly have sought to define QRMs in a transparent and practical way that provides adequate guidance for originators and other market participants. In constructing the Proposed Rules, the Agencies have elected to define a number of isolated criteria, each of which must be fully satisfied for the related residential mortgage loan to qualify as a QRM. This approach, perhaps unintentionally, overlooks the real possibility that weakness in one underwriting factor could be more than offset by strength in another. Credit quality more accurately reflects a balancing of many interrelated factors present in a mortgage lending transaction, and does not lend itself to a rigid prescriptive approach. For this and other reasons described below, Deutsche Bank urges the Agencies to refine the QRM definition to adopt a more

balanced approach that accounts for compensating underwriting factors.[14] Deutsche Bank believes that such an approach could be achieved without adding undue cost or complexity to the underwriting process, and would be more in line with the legislative mandate given to the Agencies to provide a meaningful exemption from risk retention.

The Proposed Rules cite evidence that less than 20% of all residential mortgage loans purchased or repackaged by the GSEs from 1997 through 2009 would have met the proposed standards for QRMs. It is clear that the proposed debt-to-income and loan-to-value ratio criteria, among other things, would in either case alone have disqualified a sizable proportion of residential mortgage loans, and unduly limited the universe of deserving borrowers. While the size of the QRM population is less important than the goal of encouraging soundly underwritten residential mortgage loans, the Proposed Rules could potentially limit the credit options of potential borrowers that are at least as, or more, creditworthy than certain borrowers that meet the QRM criteria by making those credit options more costly or otherwise limited. The Proposed Rules should recognize that a debt-to-income ratio that failed to meet QRM standards might be more than offset by a sufficiently low loan-to-value ratio.

1. The QRM criteria should permit exceptions for mortgage loans having compensating underwriting factors.

Mortgage originators have for many years widely employed the practice of applying compensating underwriting factors as an integral part of their respective underwriting guidelines. Statistical models that apply compensating underwriting factors are firmly embedded in the automated underwriting systems utilized by Fannie Mae, Freddie Mac, the Federal Housing Administration and many major banks. In the Proposed Rules, the Agencies have correctly identified the major factors that influence the risk of default in a mortgage loan, but the rules weigh those factors in an "all-or-none" fashion. Application of a model that permits strength of one factor to compensate for weakness on another thus would not create confusion or add complexity to existing market practices. Deutsche Bank urges the Agencies to refine the QRM definition to account for compensating underwriting factors, and similarly advises the Agencies to meet their practical goals by deploying this definition through automated underwriting. Such enhancements would make mortgage funds available to a broader universe of creditworthy borrowers without compromising the Agencies' goals of sound underwriting, transparency and practical application.

In light of the foregoing considerations, Deutsche Bank suggests that the Agencies formulate an approach that permits proper balancing of the various factors making up the credit quality of a borrower in a mortgage lending transaction. One such approach would be to formulate risk scoring of mortgage loans based on the vast historical underwriting and residential mortgage loan performance data available to market participants and utilized by the Agencies in fashioning the Proposed Rules. The GSEs have compiled an abundance of underwriting and residential mortgage loan performance data. Such information (and any other information the Agencies deem appropriate, including that used in formulating the QRM definition) may be used for the purpose of identifying and quantifying the characteristics of the population of previously originated residential mortgage loans that would have complied at origination

[14] We note that Dodd-Frank requires that the definition of QRM be no broader than the definition of "qualified mortgage" under the Truth in Lending Act, to be implemented by the Board of Governors of the Federal Reserve System under proposed Regulation Z.

with the QRM criteria had such criteria been in effect. Deutsche Bank urges the Agencies to re-evaluate the available data to determine which characteristics of mortgage loans correlate with others, and then to create a risk scoring system that incorporates compensating factors.

As an alternative, Deutsche Bank proposes that the Agencies engage, through a public solicitation process, one or more service providers that meet eligibility requirements specified by the Agencies for the purpose of constructing statistical models or other tools designed to evaluate the likelihood at origination that a residential mortgage loan would default. We believe that contracting with private entities to prepare models would potentially be a more cost-effective approach. The hired service providers would also be responsible for formulating a risk scoring system based on their evaluation. The risk scoring system would then be used to evaluate populations of previously originated residential mortgage loans that do not meet the QRM requirements under the Proposed Rules to determine how those residential mortgage loans compare with those meeting the QRM criteria. Certain mortgage loans in the non-QRM population undoubtedly will have lower risk scores and thereby evidence higher credit quality, and it will be important to determine which characteristics of those mortgage loans in particular contributed to overall higher credit quality. The Agencies may use a risk score based on some percentile of the mortgage loans in the QRM population as a measure of higher credit quality, and allow all residential mortgage loans in the non-QRM population that have an equal or lower risk score to qualify as a QRM. These models could then be incorporated in an automated underwriting system which would allow any originator to determine whether a proposed residential mortgage loan would qualify as a QRM. If the risk score generated by the automated underwriting system were equal to or lower than the middle score generated by the risk models, the loan would qualify as a QRM.

By applying a uniform system of risk scoring, mortgage lender discretion would be limited in making credit decisions based on compensating factors. All lenders, including smaller banks, would apply compensating factors using the same models and tools, thus adding some certainty and consistency to the lending process.

The development, deployment and maintenance of a risk scoring approach could be funded through fees paid by originators using the automated underwriting system to determine whether a proposed loan would qualify as a QRM. Any ongoing cost burden resulting from the employment of the automated underwriting system thus would be borne by private entities. The approach would also need to be systematically evaluated on a periodic basis by an oversight committee established by the Agencies, which would be responsible for the design and conduct of regular audits and tests of the models and any related automated underwriting systems, the storage and safekeeping of related data, upgrades of models and underwriting systems and the periodic evaluation of service providers, including rebidding of contracts, if necessary or appropriate. The oversight committee also would be tasked with measuring the effectiveness of the automated underwriting system and making recommendations for revisions, if necessary, to the regulators.

Deutsche Bank believes that this approach, if carefully implemented, would increase the availability of safe, soundly underwritten financing in a cost-effective manner at minimal or no cost to the taxpayer, and without adding undue complexity. Moreover, by increasing flexibility in the RMBS rules the Agencies would narrow the otherwise broad regulatory disparity between GSEs and RMBS private-label markets, thereby reducing lenders' dependency for liquidity on the GSEs (and, in turn, the U.S. government) and help to ensure more affordable credit for consumers. Increased parity between GSEs

and the RMBS private-label markets will limit any potential market disruption as the private markets begin to replace the GSEs as the primary source of liquidity in the residential mortgage markets.

2. Deutsche Bank Supports ASF's "QRM Blend" and "Modified QRM" exceptions to risk retention.

In addition to the Deutsche Bank proposal outlined above, Deutsche Bank also supports the "QRM blend" and "modified QRM" alternatives proposed by the American Securitization Forum ("**ASF**") in its comment letter (the "**ASF Letter**") to the Agencies, dated June 10, 2011.[15] The "QRM blend" exception permits asset pools composed of a blend of QRMs and residential mortgage loans that do not satisfy the QRM definition. Under the "QRM blend" exception, the sponsor would be permitted to ratably reduce its base risk retention to an amount less than 5% based on the weighted average of the concentration of QRMs in the related asset pool. The "modified QRM" definition similarly permits risk retention in an amount between 0-5% depending on the level of compliance with a sliding scale of criteria. Like the Deutsche Bank proposal above regarding consideration of compensating underwriting factors, the "modified QRM" exception allows for higher debt-to-income ratios and loan-to-value ratios, and lower credit scores. A borrower that failed to satisfy any of the debt-to-income ratio, loan-to-value ratio or credit history (or credit score) requirement under the QRM definition could still satisfy the "modified QRM" definition through the application of specific, objective and quantifiable compensating underwriting factors.

B. Sunset provisions on risk retention determined on the basis of historical peak asset default experience would free up capital for more efficient economic uses and increase flexibility without compromising the purposes of risk retention.

1. A sunset provision targeted on historical peak default experience appropriately reflects the approximate time in the life of a securitization when risk retention no longer serves any purpose relating to asset performance.

Deutsche Bank recognizes the important effect of risk retention on an originator's or sponsor's attention to asset quality. Deutsche Bank fully endorses this approach as an effective way of aligning interests among originators, sponsors and investors and restoring discipline to the origination and securitization process, and commends the Agencies for permitting consolidated affiliates to hold the retained interest. However, Deutsche Bank believes it is equally important to recognize that the impact of origination standards on asset performance diminishes over time. After some point in the life of a securitization, asset performance is determined by factors not relevant or discernible at origination, and risk retention no longer serves any purpose relating to asset performance. At that point, if not sooner, originators and sponsors should be permitted to sell or hedge the retained risk position in order to free up capital or other resources for more efficient economic uses, including the origination of new assets. This will not increase overall risk exposure, but should substantially increase the availability of capital for other financings, the lack of which has contributed significantly to the recent financial crisis.

Dodd-Frank requires that the Agencies "specify... the minimum duration of the risk retention required" under the related section, a requirement which the Agencies have not expressly addressed in the

[15] *See* paragraphs (VIII)(A)(xiii)(a) and (b) of the ASF Letter.

Proposed Rules.[16] Deutsche Bank believes that a risk retention sunset determined on the basis of historical peak asset default experience would serve the goal of aligning sponsor and investor interests while, at the same time, removing an unnecessary capital burden and freeing up critical risk absorbing capital for new lending.

Requiring that risk be retained for longer than the period during which origination standards have an effect on asset performance may further constrain an already fragile credit market. Efficient use of balance sheet capital benefits the overall health of the institution, the economy and the financial system. Retained interests which no longer serve their intended purpose should not be held on an institution's balance sheet if they could be deployed more effectively for other financial purposes, such as asset origination. Without a sunset provision, origination volume of assets having longer stated maturities, such as non-QRMs or non-qualifying commercial real estate loans, would be negatively affected. By creating a sunset on risk retention, regulators will not compromise the alignment of interests among originators, sponsors and investors, and will free up capital to maintain a broad spectrum of financial institutions willing to originate assets and otherwise participate in the securitization markets. This will result in a more efficient use of capital, which will contribute to the overall recovery of the economy.

Even if the assets do not perform perfectly in line with historical performance, permitting a sunset will not compromise the purposes of risk retention. First, delinquencies which occur later in the life of an asset are unlikely to be related to origination issues or weaknesses and are more likely to be associated with factors not predictable at origination. Second, even if losses are not fully realized within the applicable period of retention, the market will have extracted a significant discount from the retained interest to the extent assets have performed poorly. A sunset provision therefore would not detract from the primary objectives of risk retention by requiring originators and sponsors (and, for certain CMBS transactions, certain subordinate investors) to bear, directly, the bulk of credit losses on the assets during the period of ownership, and to bear, economically, the market's view of any unrealized losses that remain upon sale of the formerly retained securities.

2. A "qualified transferee" exception in CMBS transactions will mitigate the illiquidity of investment with respect to subordinate tranches retained by third-party purchasers.

Section 15G(c)(1)(E) of the Exchange Act permits, but does not require, the Agencies to formulate an exemption for third-party purchasers of CMBS that, among other things, carry out "due diligence on all individual assets in the pool before the issuance of the asset-backed securities." One potential solution to address the price-depressing effects of the illiquidity of the retained interest caused by the proposed requirement that risk retention be held to maturity is for the Agencies to permit the transfer or sharing of credit risk among junior classes (e.g., those classes rated triple-B and lower) by permitting the transfer of such junior classes to qualifying third-party purchasers. Deutsche Bank believes that the Agencies may, consistent with the statute and the policy goals of encouraging sound underwriting, provide for the transfer by a third-party purchaser satisfying the requirements for risk retention to a qualified transferee. Qualification would entail satisfaction of the same conditions for

[16] 15 U.S.C. 78o-11(a)(1)(A). The Agencies have, notwithstanding their legislative mandate to specify minimum duration for risk retention, made the unusual request for comment on whether a sponsor should be permitted to freely transfer or hedge its retained exposure after a specified period of time and, if so, whether a different period of time should be established for different securitizations.

purchase as those required of the initial third-party purchaser of the horizontal residual retained interest under the Proposed Rules (other than the restrictions on transfer), including compliance with relevant securities laws transfer restrictions. Qualification would therefore require granting such third-party purchasers full access to asset-level information (including updated financial information from the underlying borrowers) identical to that provided to the initial third-party purchaser to enable the purchaser to conduct a review of the underwriting standards, collateral and expected cash flows of each commercial real estate loan that is collateral for the asset-backed securities. This feature would better satisfy the policy goals underlying Section 15G and the Proposed Rules by having an additional third-party with an economic and control interest conduct a comprehensive review of asset-level information at a time subsequent to closing.

The disclosure requirements under the Proposed Rules, including the price to be paid, could be satisfied prior to purchase and disclosed for the benefit of existing and subsequent investors. Such buyers would in effect become "qualified" in the same way as the third-party purchaser initially retaining the eligible horizontal residual interest. This solution has the benefit of allowing for capital structures that are responsive to investor demands while also complying with the goals of the risk retention requirements. We are further of the view that third-party purchasers of CMBS should also have the benefit of the sunset provision described above independent of the qualified transferee exception, in which case the qualified transferee exception would only apply during the period between closing and the expiration of the sunset.

C. Multi-class resecuritization transactions should be exempted from the risk retention requirements.

1. The resecuritization exemption as currently drafted is too narrowly constructed to be meaningful.

The resecuritization exemption under the Proposed Rules applies only to single-class pass-through transactions, which constitute a subset of resecuritization transactions too narrow to be a meaningful exemption. The vast majority of private-label resecuritization transactions re-tranche prepayment risk and/or credit risk on the underlying asset-backed securities (and the receivables underlying such securities) across multiple time-based and/or credit classes as desired to suit investor interest. As a result, the Proposed Rules will likely lead to a substantial decrease in resecuritization transaction volume, thus severely limiting the investment options available to potential investors. More importantly, the lack of a meaningful exemption would restrict access of consumers and businesses to credit on reasonable terms by making more conventional multi-class resecuritization transactions economically unfeasible.

2. The resecuritization exemption would have little bearing on underwriting standards and origination practices because the underlying exposures will have been originated months or years prior to resecuritization.

We believe that requiring risk retention in resecuritization transactions does not serve the purposes of ensuring high quality underwriting standards and encouraging appropriate risk management

practices.[17] A resecuritization transaction is a subsequent issuance of securities backed by previously issued asset-backed securities collateralized by financial assets which may have been originated months or years prior to the resecuritization transaction, and in some cases may consist of high credit quality assets for which no risk retention is necessary, such as QRMs. Unlike in a conventional securitization transaction, the originators of the underlying assets would not be directly compensated for the sale of the assets in connection with the transaction nor would lending be directly dependent on liquidity generated through securitization. The benefits of resecuritization that are realized by originators are too tangential to lending operations to have a meaningful effect on origination practices, including the application of underwriting standards. Requiring risk retention would do little to align interests of originators, sponsors and investors to promote the sound underwriting of high quality assets, yet could significantly diminish the continued viability of a valuable risk management tool.

For the reasons stated above, Deutsche Bank supports a full exemption for resecuritization transactions, regardless of whether the underlying asset-backed securities have been issued in transactions complying with the risk retention requirements, or for which an exemption were otherwise available. Assuming the Agencies agree that a sunset provision with respect to risk retention would be desirable for different asset classes, Deutsche Bank would not object if the sunset provision did not apply to transfers of securities formerly held for risk retention compliance purposes to be made for the purpose of immediate resecuritization. Nor would Deutsche Bank object to a resecuritization exemption that does not apply to or limits structured collateralized debt obligation transactions having managed pools of assets, so long as such exclusion or limitation is carefully constructed to avoid inadvertently restricting other resecuritizations.

3. <u>The Agencies should add flexibility to the resecuritization exemption to permit transactions collateralized by pools composed of combinations of private-label asset-backed securities and federally supported obligations.</u>

Deutsche Bank from time to time sponsors issuances of securities collateralized by a pool composed of one or more types of the following assets: (i) GSE-sponsored pass-through securities, (ii) private-label asset-backed securities, (iii) direct obligations of the United States and (iv) U.S. government-guaranteed or -insured obligations. Deutsche Bank requests that the Agencies formulate an exemption from risk retention for securitization transactions collateralized by pools containing one or more of the foregoing asset types for the reasons stated below.

The general exemptions under the Proposed Rules also allows an exemption for transactions collateralized either "solely" by U.S. direct obligations or "solely" by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States. A securitization transaction collateralized by a pool of assets containing some combination of (i) U.S. direct obligations and (ii) obligations insured or guaranteed by the United States should be exempt from the risk retention requirements articulated under the Proposed Rules. In either case the United States or an agency thereof

[17] The Agencies cite as authority Section 15G(e)(1) of the Exchange Act, which permits the Agencies to issue an exemption to "(A) help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors."

would fully back the underlying collateral, thus an exemption would be appropriate. Deutsche Bank requests that the Agencies make this technical clarification. In addition, to the extent the assets of such pools include GSE-sponsored pass-through securities, which have the benefit of a GSE guarantee and themselves would currently be exempt from the risk retention requirements, an exemption from risk retention should apply.

The remaining question is whether a securitization transaction collateralized by a mixture of agency pass-through securities, private-label asset-backed securities and U.S. government-guaranteed or -insured obligations and direct obligations of the United States should be subject to risk retention. As noted above, resecuritizations, regardless of whether the securities in such resecuritizations are tranched, should have the benefit of a full exemption from risk retention. Assuming that the Agencies are amenable to clarifying the exemption for securitizations of combinations of agency pass-through securities and U.S. obligations or U.S. government-guaranteed or -insured obligations, combining such assets with private-label securities in a securitization should not change the underlying reasons for an exemption for this type of transaction.

D. Restrictions on indirect transfer may have the unintended effect of inhibiting legitimate business combination activity.

Deutsche Bank requests that the Agencies craft an exemption to the transfer restrictions under the Proposed Rules to accommodate corporate merger, consolidation and other business combination activity conducted for legitimate business reasons. Dodd-Frank requires that the Agencies formulate rules prohibiting "a securitizer from directly or indirectly hedging or otherwise transferring the credit risk."[18] The Agencies have crafted rules permitting transfer to consolidated affiliates because "the required risk exposure would remain within the consolidated organization and, thus, would not reduce the organization's financial exposure to the credit risk of the securitized assets."[19]

The transfer by a parent company to an unaffiliated entity of the equity interest in a subsidiary holding the risk retention pursuant to the rules may be in technical violation of the rules. Clearly the intent of Section 15G of the Exchange Act is not to create an obstacle to legitimate business combination activity. Otherwise, if the risk retention must be maintained until stated maturity, restrictions on transfer and hedging under the Proposed Rules may limit merger, consolidation and other corporate combination activity in the absence of an exemption. Sponsors and consolidated affiliates contemplating corporate combination activity would need to consider how risk retention would be maintained post-combination. Structuring business combinations around risk retention clearly would limit the range of options available to sponsors and their affiliates. The proposal should clarify that a parent company is permitted to transfer, to a non-affiliate, the consolidated group of subsidiaries that holds all the interests or assets that the sponsor is required to retain pursuant to the rule. This clarification would be consistent with the purposes of Dodd-Frank because the required risk exposure would remain within the consolidated group as transferred to the non-affiliate.

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[18] 15 U.S.C. 78o-11(a)(1)(A).
[19] Proposed Rules, at 58.

E. Certain recommendations with respect to risk retention in commercial mortgage-backed securities transactions.

In addition to the key issues and other recommendations discussed in this letter, Deutsche Bank makes the suggestions below which relate principally to the CMBS-related sections of the Proposed Rules. The Agencies should exercise their broad statutory authority to formulate exemptions for CMBS transactions from the risk retention rules, and may choose from a menu of options provided for in the statute.

We have addressed above in section III.B.2 the "qualified transferee" provision allowing for transfer of the retained CMBS tranche held by a third-party purchaser to subsequent third-party purchasers that perform due diligence and satisfy other conditions. We have also addressed above in section II.C.2 the negative impact premium capture would have on multi-sponsor CMBS transactions under the current Proposed Rules.

We encourage the Agencies to consider the recommendations below for increasing the number and flexibility of risk retention options available for CMBS transactions.

1. CMBS issued in transactions collateralized by a prescribed number of commercial mortgage assets for which investors are permitted to exercise comprehensive due diligence should be exempt from risk retention.

Deutsche Bank favors a disclosure-based exemption that focuses on investor access to information on a prescribed number of mortgage assets (no more than 20 exposures) to enable investors to scrutinize each individual exposure. Investors would be entitled to receive information consistent with that provided for large loan floating-rate CMBS transactions (which generally have performed better historically than other asset and transaction types), including asset summaries, electronic underwriting files and third party reports (e.g., appraisal, structural, environmental and seismic reports), as well as a detailed collateral tape. Transparency would allow experienced investors to more thoroughly and effectively evaluate origination practices, and to eliminate exposures that are not soundly underwritten, which would ensure sound origination standards. Better access to information about commercial mortgage loans and borrowers will lead to greater influence over underwriting standards.

CMBS transactions, particularly "large-loan" securitizations in which a sponsor securitizes a limited number of assets for which investors are given comprehensive asset information, did not experience the same levels of delinquency as fixed-rate conduit CMBS transactions or securitization of other asset classes. Structured collateralized debt obligations ("**CDOs**"), including CDOs of RMBS, and particularly those with exposure to subprime, negative amortization, "Alt-A" or reduced documentation, "option ARMS" or other lower credit quality residential mortgage loans, accounted for a substantial portion of losses relative to other asset classes. Fixed-rate conduit CMBS transactions, which have accounted for a larger proportion of CMBS transactions than large-loan floating-rate deals, although performing better than CDOs generally have performed worse than large-loan transactions.[20] For

[20] The commercial real estate loans underlying fixed-rate conduit CMBS transactions generally have smaller balances, bear interest at a fixed rate and are originated in higher volume. For a lender, the loan documents

example, cumulative delinquency rates for fixed-rate conduit CMBS transactions that closed in calendar years 2006, 2007 and 2008, are approximately 10.77%, 12.66% and 9.91%, respectively. Cumulative delinquency rates for large-loan floating rate CMBS transactions, although higher for 2006 vintages (16.45%), are approximately 4.79% and 4.86% for 2007 and 2008, respectively. Similarly, cumulative realized loss rates for fixed-rate conduit CMBS transactions that closed in calendar years 2006, 2007 and 2008, are approximately 1.34%, 1.00% and 1.87%, respectively, and for large-loan floating rate CMBS transactions, just 0.01%, 0.42% and 0.01%, respectively. With the possible exception of 2006, large-loan floating rate CMBS transactions have performed significantly better than conduit transactions. In addition, cumulative loss rates on large floating-rate commercial real estate loans securitized between 1995 and 2010 have been 17.5% of the cumulative loss rates for fixed-rate loans securitized in conduit CMBS transactions. We believe that enhanced disclosure for these types of transactions, which have allowed investors to thoroughly and effectively scrutinize credit quality of the assets, contributed markedly to their relative success. An exemption for these types of transactions would be desirable.

Section 15G(c)(1)(E) of the Exchange Act grants the Agencies broad authority to specify the types, forms and amounts of risk retention with respect to commercial mortgages, including "a determination by the Federal banking agencies and the Commission that the underwriting standards and controls for the asset are adequate." Providing sophisticated investors with comprehensive asset-level information operates as a control mechanism with respect to underwriting practices. Moreover, Dodd-Frank generally supports the proposition that increased disclosure will contribute to better underwriting and risk management practices. A total exemption that focuses on providing comprehensive access to information regarding a prescribed number of commercial mortgage assets will allow an experienced investor to review and understand each of the exposures in a transaction prior to making an investment decision. Each such investor may elect to invest or not to invest on the basis of such review. The need for risk retention or rigid underwriting criteria diminishes because of the control mechanism in place.

In addition, Section 15G(c)(1)(G)(i) of the Exchange Act allows the Agencies to specify "a total or partial exemption of any securitization, as may be appropriate in the public interest and for the protection of investors."[21] It is clearly in the public interest to have a liquid credit market for commercial mortgages. Access to credit reduces borrowing costs generally for commercial borrowers, which in turn reduces the cost of commercial space to lessors of commercial property, which will benefit the overall economy. Increased disclosure would undoubtedly contribute to the protection of investors.

A disclosure-based approach reflects the practice in the CMBS market, particularly large loan CMBS transactions. A large loan CMBS transaction generally involves a relatively smaller number of assets and permits more transparency with respect to asset-level information, including information on both the senior loan in the securitization and any secondary financing. Deutsche Bank urges the Agencies to adopt an exemption for CMBS transactions having no more than 20 mortgage assets that permit comprehensive investor due diligence of asset-level information.

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governing conduit commercial real estate loans are fairly standardized and not subject to high levels of negotiation as would floating rate, higher balance commercial real estate loans.

[21] *See* 15 U.S.C. 78o-11(c)(1)(G)(i). Deutsche Bank does not interpret Section 15G(c)(1)(G)(i) of the Exchange Act to require the Agencies only to periodically apply special exemptions to isolated transactions, but rather believe that the plain language of the statute authorizes the Agencies to define additional exemptions.

2. Loss-absorbing subordinate financing with respect to commercial mortgage assets should count towards calculation of the eligible horizontal residual interest.

The Proposed Rules require that the eligible horizontal residual interest receive payments of principal only after all other classes of ABS interests have been paid in full. The eligible horizontal residual interest requirement therefore fails to take into account that certain securitized commercial mortgage assets may be secured by a mortgaged property for which the related borrower has obtained a loss-absorbing subordinate loan or companion loan secured by the same mortgaged property. The terms of the related asset-level documents typically would prohibit any payment on the subordinate interest prior to payment in full on the senior interest corresponding to the same mortgaged property. The definition of qualifying CRE Loan excludes loans from senior/subordinate structures or other forms of secondary financing on qualifying CRE Loans, notwithstanding the risk absorbing features of the subordinate or secondary financings (as these instruments are provided by third parties, the diligence and related requirements of the financing should ensure sound origination practices, the primary goal of the statutorily mandated risk retention requirement). Nor do the risk retention requirements address so-called "rake" structures common in certain CMBS transactions (such as where the senior component of a large loan contributed to the transaction is investment grade on a stand-alone basis).[22] "Rake" and subordinate loan structures actually encourage sponsors to transfer higher quality assets to securitizations because each of the contributed loans or components would typically have an investment grade rating from one or more rating agencies. The senior/subordinate loan structure would not be a securitization transaction within the meaning of Section 15G of the Exchange Act, but nonetheless the junior loan holder would in effect hold the "first-loss" on a mortgage asset. Failing to treat these structures favorably may actually encourage sponsors to include higher leverage (and weaker credit quality) assets in CMBS transactions, which, contrary to the statutory purpose under Dodd-Frank, may actually increase credit risk in CMBS securitizations.

Deutsche Bank believes that the Agencies have broad statutory authority to formulate risk retention rules with respect to commercial mortgages. Section 15G(c)(1)(E) of the Exchange Act grants the Agencies broad authority to specify the types, forms and amounts of risk retention with respect to commercial mortgages, including "retention of a specified amount or percentage of the total credit risk of the asset." The "total credit risk" of a commercial mortgage asset depends on the existence of subordinate financing, regardless of whether the subordinate loan is held outside the securitization vehicle or, like in the case of a "rake" bond, within the securitization vehicle. Moreover, the Proposed Rules clearly permit satisfaction of the risk retention requirements by retention of assets not held by the securitization vehicle, such as in the case of the representative sample form of risk retention. Under the representative sample option, the assets retained would ideally show equivalent credit risk to those assets securitized. As described above, subordinate exposures on a mortgage property securing a senior commercial mortgage asset held by the securitization vehicle would absorb losses prior to the senior commercial mortgage asset, and therefore show higher credit risk.

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[22] In a "rake" structure, a single commercial mortgage loan is transferred to the securitization trust and then tranched into a senior portion and junior "rake" bonds. The senior portion would typically be pooled with the commercial mortgage loans, and the junior portion relating to the commercial mortgage loan would be certificated and held by one or more holders. In a senior/subordinate loan structure, the subject mortgaged property would be subject to a senior and subordinate lien. The senior loan would be transferred to the securitization vehicle and the subordinate loan held outside the securitization.

For the reasons stated above, subordinate loans, rake bonds and other secondary financing with respect to commercial mortgage assets should count towards the 5% eligible horizontal residual interest. If the aggregate subordinate exposure held outside the securitization vehicle with respect to mortgage properties that also secure senior interests held by the securitization vehicle equals at least 5% of the par value of the ABS interests issued by the securitization vehicle, then the transaction should have the benefit of a full exemption from risk retention.

3. The definition of qualifying CRE Loan does not provide a meaningful exemption.

Deutsche Bank believes that certain of the criteria for qualifying CRE Loans are overly restrictive, narrow the universe of credit available to the commercial mortgage market and fail to reflect the unique features of CMBS transactions. Less than 1% of the commercial mortgages currently held in existing securitization trusts could be characterized as qualifying CRE Loans. Certain of the 33 separate criteria for qualifying CRE Loans, including (i) a minimum debt service coverage ratio of at least 1.7x (or 1.5x for certain qualifying leased CRE loans and multi-family loans), (ii) a maximum loan-to-value ratio of no greater than 65% (or 60% in certain circumstances) and (iii) a 20-year maximum amortization period, taken together, are satisfied by very few commercial mortgage loans included in existing CMBS transactions or historically. Because virtually no commercial mortgage loan is underwritten to this standard, and revising origination criteria to meet this standard would make lending economically prohibitive, the exemption does not provide meaningful relief.

If the Agencies decide to utilize the concept of a qualifying CRE Loan as set forth under the Proposed Rules, there are a few areas where Deutsche Bank believes the definition could be improved. First, requiring a minimum and maximum initial loan term of ten and twenty years, respectively, would have little impact on the quality of the commercial mortgage loan if there is no change to the minimum debt service coverage ratio and maximum loan-to-value ratio criteria. Deutsche Bank urges the Agencies to eliminate this requirement. Second, no market currently exists for commercial mortgage loans having 20-year amortization periods. Shorter amortization periods would result in an increase in monthly payments that many borrowers will not be willing to take on. Thirty-year amortization periods are the current market standard for commercial mortgages and should be reflected in the rules implemented. Third, the Proposed Rules prohibit any qualifying CRE Loan from having secondary financing despite the fact that such commercial mortgage loans by nature may be of higher credit quality than loans with higher leverage. As further described under section III.E.2 above, the Proposed Rules create an incentive to include higher leverage loans in CMBS transactions, which may compromise performance while depriving borrowers of a useful form of financing. Finally, we believe the definition of CRE Loans should permit consideration of compensating underwriting factors for many of the reasons described above for QRMs. An approach that permits proper balancing of the various factors making up the credit quality of a borrower in a mortgage lending transaction will provide necessary flexibility to the CRE Loan definition without detracting from underwriting quality.

4. Multiple sponsors in a single CMBS transaction should share responsibility for risk retention proportionally.

The Proposed Rules generally place responsibility for satisfying the applicable risk retention requirements on the sponsor of a transaction. For transactions having multiple sponsors, the Proposed Rules require that all sponsors ensure that "at least one" of the sponsors of the securitization satisfy the

risk retention requirements, including premium capture. However, the text of the proposing release and the applicable request for comment each suggest that only a single sponsor may retain the economic interest in the credit risk. CMBS securitizations of non-qualifying CRE Loans, including transactions sponsored by Deutsche Bank, often feature multiple sponsors. If the Agencies indeed intend to permit retention by more than one sponsor, any risk retention should be shared on a pro rata basis among those sponsors in proportion to the assets contributed by each sponsor, particularly in the case of horizontal risk retention.

Deutsche Bank often partners with other financial institutions that contribute assets to a single CMBS or other securitization (sometimes called an "aggregator" transaction). In a CMBS "aggregator" transaction structured as a REMIC, a Deutsche Bank entity, along with unaffiliated sponsoring lending institutions, contribute commercial real estate assets to a securitization depositor which in turn transfers those assets to a securitization trust that issues CMBS. Such a transaction would therefore have multiple sponsors. Under the Proposed Rules, if there are multiple sponsors in a transaction, those sponsors must ensure that at lease one sponsor satisfies the "base" risk retention requirement, in addition to funding premium capture. If a single sponsor in an "aggregator" transaction were required to satisfy the risk retention requirement, sponsors not required to retain credit risk may not have as strong an incentive to prudently underwrite the commercial mortgages sold into the securitization transaction, which may affect credit quality. Moreover, a single sponsor would normally be very unwilling to retain sole risk on assets it did not originate, particularly first-loss risk in the case of a transaction utilizing horizontal risk retention. The risk for the sponsor is magnified when premium capture is factored in, which the sponsor also would have sole responsibility for funding, and which also would absorb losses on the assets (a portion of which were originated by other financial institutions) in highly subordinated position. This additional layer of risk would require the sponsor solely to assume the risk of assets originated by other financial institutions in the transaction. Penalizing one party for poor underwriting by unaffiliated parties is a less effective way to encourage sound underwriting of high credit quality assets than would to make each party proportionally responsible for what it contributes.

If the Proposed Rules do not change, there may be a chilling effect on multiple sponsor deals, which otherwise provide a cost-effective way for originators to realize the benefits of securitization without incurring significant transaction costs. If the final rules discourage multiple sponsor transactions, the time period between CMBS transactions will be delayed as individual sponsors aggregate commercial mortgage loans of size and diversity sufficiently desirable to undertake incurring securitization transaction costs. Individual sponsors will need to put more capital at risk for longer periods of time. Originators also will be increasingly at risk for interest rate swings during the period of aggregation. Some market players, including smaller, thinly-capitalized lenders that do not have the resources to solely sponsor a CMBS transaction, may exit the CMBS market.

In addition, the Proposed Rules only permit an originator to retain the economic interest in the credit risk if it has contributed 20% or more of a given CMBS transaction. Smaller commercial lenders that do not have the resources to sponsor CMBS transactions individually typically will access the securitization markets through "aggregator" transactions under which such lenders pool assets with large banks. To the extent sponsors are less willing to assume credit risk on assets originated by third parties, this requirement will have the effect of "boxing out" smaller lenders from contributing to CMBS transactions, and could ultimately drive smaller lenders out of the CMBS market. Deutsche Bank requests that the Agencies permit sponsors of any size that contribute assets in a given transaction to

assume a portion of the required risk retention on a pro rata basis with other sponsors. To exclude smaller lenders and force other deal participants to assume this risk may force smaller players out the CMBS market, thereby reducing financing options for borrowers, driving up the cost of credit generally and potentially reducing commercial real estate prices.

We note that the risk retention rules that have been implemented within the EU under Article 122a of the Capital Requirements Directive follow a similar approach to one we propose above. It may, therefore, be a helpful reference for the Agencies when considering alternative options. In this regard, note that Article 122a requires the retention requirement to be satisfied by the originator, sponsor or original lender. If the securitized exposures are those of multiple originators or original lenders (who are not part of the same corporate group), the retention requirement must be fulfilled by each originator or original lender by reference to the proportion of total securitized exposures in the securitization for which it is the originator or original lender. This is to ensure that each originator retains "skin in the game." Alternatively, this condition can be satisfied by the sponsor of the securitization into which such securitized exposures of multiple originators or multiple original lenders have been sold or otherwise pooled. Should there be multiple sponsors to the securitization and the retention requirement were to be satisfied by the sponsor(s) (as opposed to the originator(s) or original lender(s)), then similar requirements on satisfaction of the retention requirement on an individual basis by such sponsors would apply.[23]

5. Requiring sponsors to monitor and ensure compliance by third-party purchasers with risk retention requirements will be extremely difficult.

If the sponsor satisfies the risk retention requirement through horizontal risk retention by a third-party purchaser, under the Proposed Rules the sponsor is responsible for, among other things, ensuring the third-party purchaser's compliance. Practically speaking, this would be difficult to satisfy. The sponsor would need adequate comfort from the third-party purchaser under the legal documentation for the transaction both initially and on an ongoing basis. It is highly doubtful that any third-party purchaser would be willing and able to make the desired representations and warranties, and to give the covenants, certifications and indemnities necessary to give the sponsor adequate comfort. For these reasons, third-party purchasers should have primary responsibility for ongoing compliance with the risk retention requirements. Deutsche Bank proposes that the rules state that the sponsor's duty to comply be satisfied by (i) the third-party purchaser's periodic delivery of a certification to the effect that such third-party purchaser is currently in compliance with (and has not previously been out of compliance with) the applicable risk retention requirements under the Proposed Rules and (ii) such certification being made available to investors.

IV. CONCLUSION

Deutsche Bank believes that sensible adjustments to the Proposed Rules would improve the securitization process and facilitate economic growth without undermining the purposes of risk retention contemplated by Dodd-Frank. We encourage the Agencies to consider our general concerns, as well as the several specific options proposed in this letter, each of which we believe provide flexibility to market participants without undermining the primary goals of risk retention.

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[23] *See* paragraph 29 of the "Guidelines to Article 122a of the Capital Requirements Directive," published by the Committee of European Banking Supervisors on December 31, 2010 for details.

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We appreciate the opportunity to comment on the topics discussed above and for the consideration of Deutsche Bank's views. We would be happy to provide any additional information on any of the subjects discussed in this letter and would also be happy to meet with the Agencies to discuss the same.

Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at (212) 250-3003 or at salvatore.p.palazzolo@db.com.

Sincerely,

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