

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 8767 / January 9, 2007**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12526**

**In the Matter of**

**DEUTSCHE BANK TRUST  
COMPANY AMERICAS,  
THE BANK OF NEW YORK,  
and WILMINGTON TRUST  
COMPANY,**

**Respondents.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS, MAKING  
FINDINGS, AND IMPOSING A CEASE-  
AND-DESIST ORDER PURSUANT TO  
SECTION 8A OF THE SECURITIES ACT  
OF 1933**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) against Deutsche Bank Trust Company Americas, The Bank of New York, and Wilmington Trust Company (collectively “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (“Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds that:<sup>1</sup>

#### A. RESPONDENTS

Respondent **Deutsche Bank Trust Company Americas ("DBTCA")**, headquartered in New York, New York, is a New York State-chartered bank that is a member of the Federal Reserve System ("Federal Reserve") and, as such, is regulated by the Federal Reserve and the New York State Banking Department. DBTCA provides banking and bank-eligible securities services.

Respondent **The Bank of New York ("BNY")**, headquartered in New York, New York, is a New York State-chartered bank that is a member of the Federal Reserve and, as such, is regulated by the Federal Reserve and the New York State Banking Department. BNY provides banking and bank-eligible securities services.

Respondent **Wilmington Trust Company ("WTC")**, headquartered in Wilmington, Delaware, is a Delaware State-chartered bank that is a member of the Federal Deposit Insurance Corporation ("FDIC") and, as such, is regulated by the FDIC and the Delaware State Banking Department. WTC provides banking and bank-eligible services.

#### B. SUMMARY

As part of their businesses, Respondents act as auction agents in the auctioning of auction rate securities. From at least January 1, 2003 through June 30, 2004, in connection with certain auctions, each Respondent accepted initial or revised bids after submission deadlines and allowed broker-dealers to intervene in auctions. In certain instances, this conduct also affected the rate paid on the auction rate securities. As a result of this conduct, each Respondent caused violations of Section 17(a)(2) of the Securities Act.

#### C. FACTS

##### 1. The Auction Rate Securities Market

Auction rate securities are municipal bonds, corporate bonds, and preferred stocks with interest rates or dividend yields that are periodically re-set through auctions, typically every 7, 14, 28, or 35 days. Auction rate bonds are usually issued with maturities of 30 years, but the maturities can range from 5 years to perpetuity. Broker-dealers often market auction rate securities to issuers as an alternative variable rate financing vehicle, and to investors as an alternative to

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<sup>1</sup> The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

money market funds. Auction rate securities were first developed in 1984, and the auction rate securities market has grown to more than \$200 billion.

a. Auction Mechanics. Auction rate securities are auctioned at par so the return on the investment to the investor and the cost of financing to the issuer between auction dates is determined by the interest rate or dividend yield set through the auctions.<sup>2</sup> According to the disclosure documents (the prospectus or official statement) for each security, the interest rate or dividend yield is set through an auction (commonly referred to as a “Dutch” auction) in which bids with successively higher rates are accepted until all of the securities in the auction are sold. Investors can only submit the following types of orders: 1) a “hold” order, which is the default order for current investors (i.e., the order that is entered for a current holder if the holder takes no action), where a current investor will keep the securities at the rate at which the auction clears; 2) a “hold-at-rate” bid, where a current investor will keep all or a pro-rated amount of the securities if the clearing rate is at, or all of the securities if the clearing rate is above, the specified rate; 3) a “sell” order, where a current investor will sell the securities regardless of the clearing rate; or 4) a “buy” bid, where a prospective investor, or a current investor who wants more securities, will buy securities if the clearing rate is at or above the specified rate. Disclosure documents often state that an investor’s order is an irrevocable offer.

The final rate at which all of the securities are sold is the “clearing rate,” which applies to all of the securities in the auction until the next auction. Bids with the lowest rate and then successively higher rates are accepted until all of the sell orders are filled. The clearing rate is the lowest rate bid sufficient to cover all of the securities for sale in the auction.<sup>3</sup> If there are not enough bids to cover the securities for sale, then the auction fails, the issuer pays an above-market rate set by a pre-determined formula described in the disclosure documents, and all of the current holders continue to hold the securities, with minor exceptions. If all of the current holders of the security elect to hold their positions without bidding a particular rate, then the clearing rate is the all-hold rate, a below-market rate set by a formula described in the disclosure documents.

b. Broker-Dealers’ Role in Auctions. The issuer of each security selects one or more broker-dealers to underwrite the offering and/or manage the auction process. Investors can only submit orders through the selected broker-dealers. The issuer pays an annualized fee to each broker-dealer engaged to manage an auction (typically 25 basis points for the par value of the securities that it manages). The issuer also selects an auction agent to receive the orders from the broker-dealers and calculate the clearing rate for the auction.

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<sup>2</sup> Between auctions, investors might be able to buy or sell auction rate securities in the secondary market at prices greater than, equal to, or less than par.

<sup>3</sup> For example, suppose \$100,000 of securities were for sale and the auction received four buy bids. Bid A was for \$50,000 at 1.10%, Bid B was for \$50,000 at 1.15%, Bid C was for \$50,000 at 1.15%, and Bid D was for \$25,000 at 1.20%. Under these circumstances, the “clearing rate” would be 1.15%, meaning all of the securities in the auction would pay interest at a rate of 1.15% until the next auction. Bid A would be allocated \$50,000, Bids B and C would receive pro-rata allocations (\$25,000 each), and Bid D would receive no allocation.

Auction agency agreements, the material terms of which are described in the disclosure documents, generally specify a time when orders must be provided to the auction agent (the “submission deadline”). Some broker-dealers allow investors to submit orders to the broker-dealers up until the submission deadline. Many broker-dealers, however, have an internal deadline by which investors must submit their orders to the broker-dealer. This internal deadline allows the broker-dealer sufficient time to process and submit the orders to the auction agent by the submission deadline set forth in the auction agency agreements. Regardless of the deadlines they use, the broker-dealers must submit the orders to the auction agent by the submission deadline.

c. Auction Agents’ Role in Auctions. The issuer pays the auction agent a fee (typically 1 basis point for the principal outstanding amount of securities on an annualized basis) to administer auctions in accordance with the auction agency agreements. After receiving the orders from the broker-dealers, the auction agent calculates the clearing rate that will apply until the next auction.

The auction agent allocates the securities to the broker-dealers based on the orders they submitted. The auction procedures generally state that orders are filled in the following order: hold orders, hold-at-rate and buy bids with a rate below the clearing rate, hold-at-rate orders with a rate at the clearing rate, and buy bids with a rate at the clearing rate. When there are more bids for securities at the clearing rate than securities remaining for sale, the securities are allocated on a pro rata basis first to the hold-at-rate bidders and then to the buy bidders.

## 2. Respondents’ Conduct

Respondents engaged in the following conduct in connection with certain auctions:

a. Accepting Bids After the Submission Deadline. Auction agency agreements set a formal submission deadline by which broker-dealers had to submit all bids to the auction agent. In certain instances, each Respondent accepted initial and/or revised bids after this submission deadline. In certain instances, this conduct, except when solely done to correct clerical errors, advantaged investors or broker-dealers that bid after a deadline by displacing other investors’ bids and affected the clearing rate.<sup>4</sup> This conduct did not conform to disclosed procedures; and

b. Allowing Broker-Dealers To Intervene in Auctions. Each Respondent allowed broker-dealers improperly to intervene in auctions to affect the clearing rate.

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<sup>4</sup> The clearing rate determines the interest rate or yield the issuer must pay to investors until the next auction. In those instances when this practice or any of the practices described in this Order lowered the clearing rate, investors received a lower rate of return on their investments. Conversely, in those instances when the practices raised the clearing rate, issuers had to pay a higher interest rate or yield. To the extent that certain practices affected the clearing rate, investors may not have been aware of the liquidity and credit risks associated with certain securities.

*b.1 Bids To Prevent Failed Auctions.* Failed auctions occur when there are more securities for sale than there are bids for securities and result in an above-market rate described in the disclosure documents. In certain instances, each Respondent informed broker-dealers that auctions might fail without additional bids, allowed bids to be submitted or revised after the auction deadline to prevent failed auctions, and/or thereafter re-ran auctions that otherwise would have been reported as failed auctions. In certain instances, this conduct affected the clearing rate; and

*b.2 Bids To Prevent All-Hold Auctions.* All-hold auctions occur when all current holders want to hold their positions so that there are no securities for sale in the auction and result in a below-market rate described in the disclosure documents. In certain instances, DBTCA and BNY informed broker-dealers that auctions might be all-hold auctions, allowed bids to be submitted or revised after the auction deadline to prevent all-hold auctions, and/or thereafter re-ran auctions that otherwise would have been reported as all-hold auctions. In certain instances, this conduct affected the clearing rate.

#### **D. LEGAL SECTION**

Section 17(a)(2) of the Securities Act prohibits material misstatements and omissions in the offer or sale of securities. Negligent conduct can violate Section 17(a)(2). See, e.g., SEC v. Hughes Capital Corp., 124 F.3d 449, 453 (3d Cir. 1997); In the Matter of Raymond James Financial Services, Inc., Exchange Act Release No. 49234 (Feb. 12, 2004). By engaging in the practices described in Section III.C.2 above, each Respondent caused violations of Section 17(a)(2).

#### **E. STRUCTURE OF THE SETTLEMENT**

In determining the structure of the settlement and the size of the payments that the Respondents undertake to make, the Commission considered the amount of investor harm and the Respondents' conduct in the investigation to be factors that mitigated the serious and widespread nature of the violative conduct. The Commission also considered the Respondents' role and conduct in the auction process relative to the broker-dealers' role and conduct. In addition, the Commission considered the importance of deterring future violations of the securities laws. Finally, the Commission considered the Respondents' respective market share during the relevant period. DBTCA and BNY, which were auction agents for a relatively large share of the auction rate securities market, each will pay \$750,000, and WTC, which was the auction agent for a relatively small share of the auction rate securities market, will pay \$100,000.

#### **F. RESPONDENTS' COOPERATION**

In determining to accept the Offers, the Commission considered the cooperation the Respondents afforded the Commission staff.

## **G. UNDERTAKING**

DBTCA, BNY, and WTC undertake to pay \$750,000, \$750,000, and \$100,000, respectively, to the United States Treasury within fifteen (15) days of the entry of this Order. This payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies the particular Respondent as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Kenneth R. Lench, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549. By making this payment, Respondent relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Respondent. In determining whether to accept the Offers, the Commission has considered this undertaking.

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

- A. Respondents DBTCA, BNY, and WTC shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act;
- B. Not later than 3 months after the entry of this Order, each Respondent shall provide each broker-dealer that has previously submitted bids for auction rate securities and the issuers of such securities with a written description of the Respondent's material practices and procedures for auctions in which it serves as auction agent. Thereafter, each Respondent shall supply a written description of the Respondent's current material practices and procedures for auctions to broker-dealers and issuers of each offering of auction rate securities for which it serves as auction agent to whom such written description has not previously been provided prior to the issuance of such securities. Whenever such policies and procedures are materially changed, a written statement describing such change shall be provided to each broker-dealer and issuer of auction rate securities for which the Respondent is then serving as auction agent within 60 days of the effective date of such change. A Respondent may fulfill the foregoing requirements to provide such written description by sending it to the dealer's general counsel and to the issuer's senior financial official or to the official of the issuer who executed or will execute the auction agent agreement with such Respondent.

As used in this Section, “auction rate securities” means, with respect to a Respondent, auction rate securities sold in auctions for which Respondent serves as the auction agent; and

- C. Not later than 6 months after the date of this Order, unless otherwise extended by the staff of the Commission for good cause shown, each Respondent’s chief executive officer or general counsel shall certify in writing to the staff of the Commission that Respondent has implemented procedures that are reasonably designed to prevent and detect failures by Respondent to conduct the auction process in accordance with the auction procedures described in the disclosure documents and any supplemental disclosures and that the Respondent is in compliance with Section IV.B of this Order.

By the Commission.

Nancy M. Morris  
Secretary