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November 13, 2018

Mr. Michael Coco  
Chief, Office of International Corporate Finance  
Division of Corporation Finance  
US Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Transferable Custody Receipts (TraCRs)

Dear Mr. Coco:

Deutsche Access Investments Limited, a wholly-owned Australian subsidiary of Deutsche Bank AG (DAIL), intends to issue a financial product known as TraCRs (Transferable Custody Receipts). Each TraCR would give investors a beneficial interest in a share of common equity securities issued by a US company that is listed on the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (Nasdaq). TraCRs will be listed and traded on Chi-X, a regulated stock exchange in Australia.

We are writing to request that the Staff of the Division of Corporation Finance confirm that it will not recommend enforcement action to the Commission if DAIL offers and sells TraCRs to US broker-dealers who serve as market makers for TraCRs on Chi-X as part of an offering outside the United States as described under the heading "Basis for Relief" below.

Description of TraCRs

DAIL has developed TraCRs in order to enable Australian investors to acquire a beneficial interest in shares (Underlying Shares) issued by US companies that are listed on the NYSE or Nasdaq. Each TraCR will give holders a beneficial interest in a share issued by a US-listed company and exposure to the financial performance of that share, without the holder having to acquire that share directly. TraCRs are issued in series, with each series related to a specific class of shares issued by a US-listed company. The US companies which are the issuers of Underlying Shares are not involved in the issuance of TraCRs and may not be aware of the existence of TraCRs relating to their shares.

In some respects, TraCRs are equivalent to unsponsored American depository receipts (ADRs) which trade in the United States and which are registered with the Commission under

the Securities Act of 1933 (Securities Act) on Form F-6. While the securities regulatory regime in Australia recognizes TraCRs as a distinct financial product, there is no registration scheme in Australia that is analogous to the registration arrangements under Form F-6.

TraCRs trade on Chi-X in Australia in Australian dollars during normal Australian market trading hours. Investors will be able to purchase and sell TraCRs on Chi-X through Australian broker-dealers in the same way as investors purchase and sell shares issued by Australian-listed companies. In accordance with the Australian Corporations Act, DAIL has prepared a product disclosure statement and financial services guide (PDS) relating to TraCRs.

There is no constituent agreement, such as a deposit agreement or indenture or agency agreement, that defines the rights of holders of TraCRs. Rather, the rights of holders will be as described in the PDS. In this respect, TraCRs are similar in approach to unsponsored ADRs that are registered on Form F-6 under the Securities Act, under which the ADR certificate (which is a negotiable instrument under the Uniform Commercial Code) which is filed as an exhibit to the Form F-6 registration statement serves also as the prospectus under the Securities Act providing disclosure to investors and as the terms of deposit defining the rights of holders of ADRs.

TraCRs will be issued by DAIL upon delivery of Underlying Shares to DAIL's custodian in the United States (Custodian). The Custodian will hold Underlying Shares in a segregated sub-account within its participant account at the Depository Trust Company (DTC). Under the Australian regulatory regime, DAIL is deemed to be holding the underlying shares on trust for the benefit of each TraCR owner. DAIL must ensure that the number of Underlying Shares held in its segregated sub-account at the Custodian is always equal to the number of TraCRs on issue.

Holders of TraCRS can elect to cancel TraCRs at any time and have the Underlying Shares transferred to them. Underlying Shares would be transferred from the account of the Custodian at DTC to an account at DTC as directed by the cancelling holder. Those underlying shares would be freely transferrable through the US stock exchange on which the shares are listed or other US trading venue on which the shares are traded. In this respect, cancellation of TraCRs and delivery of Underlying Shares through DTC is similar to cancellation of an ADR and delivery of the underlying securities in the home market. With TraCRs, as with ADRs, the cancelling holder must make appropriate arrangements to hold the securities that underlie the receipt instrument.

Underlying Shares must be in the S&P 500 index or the Dow Jones Industrial Average index and must have been traded on either the NYSE or Nasdaq for at least 12 months. Although the PDS provides that Chi-X and DAIL may agree that other securities may serve as Underlying Shares, the Underlying Shares which are covered by this letter will be issued by US issuers that are listed on the NYSE or Nasdaq. The Underlying Securities will be of a class of equity securities that is registered under Section 12(b) of the Securities Exchange Act of 1934. As inferred under the "Basis for Relief" below, the Underlying Shares will be freely tradeable under the Securities Act and will be acquired in ordinary secondary market transactions in transactions not involving the issuer of the Underlying Shares or an affiliate.

DAIL believes that there is very little likelihood that TraCRs would “flowback” to the United States. TraCRs are designed for trading in the Australian market: they will clear and settle through Australian clearance and settlement systems, they will trade in Australian dollars, and they will pay dividends in Australian dollars, after the deduction of fees and expenses for the currency conversion. A US investor seeking to own shares of a US issuer would incur extra costs and expenses by holding TraCRs instead of owning US shares directly.

### Application of Regulation S

The Commission has noted that the registration requirements under Section 5 of the Securities Act may be interpreted broadly. As stated in the Adopting Release for Regulation S:

The registration requirements of the Securities Act literally apply to any offer or sale of a security involving interstate commerce or use of the mails, unless an exemption is available. The term “interstate commerce” includes “trade or commerce in securities or any transaction or communication relating thereto . . . between any foreign country and any State, Territory, or the District of Columbia . . .” The Commission, however, historically has recognized that registration of offerings with only incidental jurisdictional contacts should not be required. Securities Act Release No. 6863 (April 24, 1990)(footnotes omitted)(Regulation S Adopting Release).

The Commission adopted Regulation S to clarify the extraterritorial application of the registration provisions of the Securities Act. Regulation S consists of a general statement of applicability of the registration provisions of the Securities Act and two safe harbors, one of which applies to offers and sales by issuers, securities professionals involved in the distribution of securities, their affiliates and persons acting on their behalf (the issuer safe harbor) and the other of which applies to certain resales. The issuer safe harbor distinguishes three categories of securities offerings, based upon factors such as the nationality and reporting status of the issuer, the type of security that is the subject of the transaction, and other factors. The issuer safe harbor requires implementation of various procedural safeguards, which differ for each of the categories.

DAIL is offering and selling TraCRs in accordance with the following procedures: there are no directed selling efforts in the United States relating to the TraCRs, and issuances of TraCRs are effected as offshore transactions in that DAIL (and any person acting on its behalf) will not make offers in the United States relating to the TraCRs. Except for US broker-dealers who are serving as market makers as described under “Basis for Relief” below, DAIL will only issue TraCRs to persons as to which at the time a buy order is originated (meaning when an order is placed for the issuance of TraCRs), DAIL reasonably believes that the buyer is outside the United States.

### Proposed Role of US Broker-Dealers to Act as Market Makers for TraCRs

A number of US broker-dealers propose to serve as market makers for TraCRs on Chi-X. Under the Operating Rules: Procedures of Chi-X, a participant of Chi-X that wants to serve as a market maker for a particular security must apply to Chi-X for consideration to so serve and provide a market maker undertaking to Chi-X.<sup>1</sup> The undertaking requires such participants to make markets in the specified securities, i.e., to engage in a minimum level of trading activity and maintain bid prices within certain parameters.<sup>2</sup> Market makers must provide at least four weeks notices of their intention to withdraw from serving as a market maker.

As currently structured, US broker-dealers will not be able to create TraCRs through the deposit of Underlying Shares with the Custodian and the issuance of TraCRs to them because such broker-dealers will not be outside the United States at the time the deposit is made.<sup>3</sup> We are seeking the Staff's views that US broker-dealers may deposit Underlying Shares and create and be issued TraCRs subject to the conditions described below. Allowing US broker-dealers to create TraCRs will enhance liquidity of TraCRs on Chi-X and will provide such broker-dealers with another method in which they can reduce risks that may be associated with holding Underlying Shares by providing a further avenue for secondary market transactions through the creation and resale of TraCRs. US brokers that serve as market makers on Chi-X are fulfilling their responsibilities in accordance with their undertakings relating to the TraCRs. They can be viewed as securities intermediaries that are involved in the distribution of TraCRs through their market making role. Such intermediaries should have the benefit of the Commission's approach that does not place US intermediaries at a disadvantage to non-US intermediaries for purposes of

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<sup>1</sup> Specifically, under Paragraph 1.1 of Section 4.9 of the Chi-X Operating Procedures, the process for registration as a market maker involves: (a) the participant must provide Chi-X with a completed market maker undertaking; (b) Chi-X will consider each market making undertaking that it receives and then decide whether to exercise its discretion to register the participant as a market maker; (c) the obligation to comply with the undertaking commences no later than the first day of the month following the participant's registration as a market maker; (d) Chi-X will continuously monitor compliance with the undertaking and request information relating to a participant's market making activities; and (e) Chi-X may deregister a participant as a market maker at any time.

<sup>2</sup> Specifically, under Paragraph 2.1 of Section 4.9 of the Chi-X Operating Procedures, under the market making undertaking a participant must: (a) act in good faith with respect to price and volume of reasonable bids in the products in which it makes a market; (b) enter and maintain orders that are in compliance with market making arrangements; (c) comply on a daily basis with specified requirements for the quoting obligation ratio of active continuous trading; and (d) notify Chi-X immediately if it becomes aware of failing to comply with the undertaking and a complete explanation for the failure to comply.

<sup>3</sup> It is theoretically possible that a US broker-dealer could create TraCRs through the use of an office location outside the United States. However, very few US broker-dealers have directly established offices outside the United States, opting instead for corporate structures with non-US subsidiaries and affiliates for their operations outside the United States.

Regulation S. As noted under “Basis for Relief” below, US brokers will resell TraCRs on Chi-X, thus supporting their role as an intermediary involved in a foreign sale of a security under Regulation S.

As noted above, Regulation S requires that certain transactional restrictions be put in place in order for offers and sales of securities to comply with the issuer safe harbor. One of these restrictions is that at the time the buy order is originated, the buyer must be outside the United States, or the seller and any person acting on its behalf reasonably believes that the buyer is outside the United States. Although this requirement would appear to preclude the involvement of US broker-dealers in offerings under Regulation S, the Commission expressly contemplated that US broker-dealers and other US financial institutions could fully participate in Regulation S offerings.

In discussing the transactional restrictions in Regulation S in the Regulation S Adopting Release, the Commission emphasized that “Offers and sales of securities to US persons who are distributors are permitted; it is not the Commission’s intent to prevent US persons from participating in an offshore offering as distributors.” See footnote 111 of the Regulation S Adopting Release. This is consistent with Commission statements in the initial proposing release and subsequent reproposing release relating to Regulation S.<sup>4</sup> Indeed, the Commission’s initial statement addressing the circumstances under which US issuers could offer and sell securities outside the United States without registration under Section 5 of the Securities Act notes that “it is immaterial whether the offering originates from within or outside the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States.”<sup>5</sup>

As is the case with unsponsored ADRs in the United States, DAIL will issue TraCRs against the deposit of Underlying Shares with the Custodian on an ongoing basis. There are no contractual arrangements between DAIL and brokers providing an undertaking to create TraCRs.

In the case of TraCRs, in order to act as a market maker on Chi-X, US brokers will provide a market maker undertaking to Chi-X as described above. For purposes of applying the Commission’s approach to allowing US financial intermediaries to participate in offerings outside the United States, the market maker undertaking to Chi-X, under which brokers are obligated to effect transactions in TraCRs, would come within the scope of that approach. The undertaking evidences that US brokers have a commitment relating to maintaining liquidity of TraCRs on Chi-X, and that commitment will involve such brokers creating TraCRs on a continuous basis in transactions with DAIL. Clearly, the role of US brokers in the distribution of

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<sup>4</sup> Initial proposing release: “There is no prohibition on the offer or sale of securities to US persons who are distributors; it is not the Commission’s intent to prevent US underwriters or broker-dealers from participating in an offshore offering.” Securities Act Release No. 6779 (June 10, 1988), at footnote 111; reproposing release: “... reference to the prohibition on sales in the United States or to US persons was not intended to preclude US persons from participating as underwriters or selling dealers.” Securities Act Release No. 6838 (July 11, 1989), at footnote 47.

<sup>5</sup> Securities Act Release No. 4708 (July 9, 1964).

TraCRs is in many ways the same as in a classic distribution of securities under Regulation S under which a US broker undertakes to sell securities outside the United States.

Regulation S does not address how its requirements would apply to receipts relating to US issuers that are issued outside the United States. However, it is clear from the Regulation S Adopting Release that it is appropriate to make a distinction between receipts and underlying securities. The Adopting Release indicates that the focus should be on the sale by a depository of ADRs representing securities of the class distributed. The issuance of ADRs in exchange for freely tradeable underlying securities and the withdrawal of deposited securities is not precluded by Regulation S. In the case of TraCRs, all of the underlying securities will be freely tradeable. As indicated under “Basis for Relief” below, DAIL will not accept for deposit either restricted securities or securities that are subject to a trading restriction (such as so-called “control securities” held by affiliates subject to restrictions under Rule 144).

#### Basis for Relief

As a basis for the relief requested in this letter, DAIL proposes that US broker-dealers would make the following representations in connection with the issuance of TraCRs to them:

- Such firm is registered as a broker-dealer under Section 15 of the Securities Exchange Act of 1934
- Such firm has registered with Chi-X as a market maker for TraCRs and has not given notice that they intend to withdraw as a market maker
- The Underlying Shares to be deposited for the issuance of TraCRs were not acquired from the issuer of the Underlying Shares
- The Underlying Shares to be deposited for the issuance of TraCRs were not acquired from an affiliate of the issuer (as defined under Securities Act Rule 405) of the Underlying Shares except in non-pre-arranged transactions on a US trading venue
- The TraCRs will be resold on Chi-X, either directly or through an affiliate of such firm

We note that the Securities Act will not restrict US broker-dealers from purchasing and selling TraCRs in ordinary secondary market transactions on Chi-X, and likewise will not restrict US broker-dealers from tendering TraCRs for cancellation and receiving Underlying Shares for resale in the United States. Further, the Securities Act does not restrict US broker-dealers from effecting ordinary secondary market transactions in Underlying Shares in non-US markets. It is the inability to clear and settle Underlying Shares through the standard clearance and settlement procedures in Australia that results in the need to create a financial instrument like TraCRs. Clarifying that US broker-dealers are permitted to create TraCRs under the conditions described above is consistent with the Commission’s expressed intentions that US brokers and dealers should be able to be full participants in offshore offerings of securities and that such participation is consistent with Regulation S.

Requested Confirmation

On behalf of DAIL, we respectfully request that the staff of the Division of Corporation Finance confirm that it will not recommend enforcement action to the Commission if DAIL offers and sells TraCRs to US broker-dealers who serve as market makers for TraCRs on Chi-X as part of an offering outside the United States as described under the heading "Basis for Relief" above.

If you have questions or comments relating to this request, please feel free to contact me at 202-637-2377, [paul.dudek@lw.com](mailto:paul.dudek@lw.com).

Respectfully submitted,



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cc: Jeff Margolick, Deutsche Bank  
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