

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27644; 812-13212]

Deutsche Bank Trust Company Americas; Notice of Application

December 28, 2006

Agency: Securities and Exchange Commission (“Commission”)

Action: Notice of application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (the “Act”) granting an exemption to issuers of asset-backed securities from certain requirements of Rule 3a-7(a)(4)(i) under the Act to enable the Applicant to act as trustee to those issuers and the issuers to rely on Rule 3a-7.

Summary of Application: Applicant requests an order that would permit an issuer of asset-backed securities that is not registered as an investment company under the Act in reliance on Rule 3a-7 under the Act (an “Issuer”) to appoint Applicant to act as a trustee to the Issuer when Applicant is affiliated with an underwriter for the Issuer’s securities.

Applicant: Deutsche Bank Trust Company Americas.

Filing Dates: The application was filed on July 7, 2005, and amended on December 21, 2006.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 22, 2007, and should be accompanied by proof of service on Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer’s interest, the reason for the request, and the issues

contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, Securities and Exchange Commission, 100 F Street, NE,

Washington, DC 20549. Applicant: 60 Wall Street, New York, New York 10005.

For Further Information Contact: Susan I. Gault-Brown, Senior Counsel, at (202) 551-6869, or David W. Grim, Branch Chief, at (202) 551-6867 (Division of Investment Management, Office of Chief Counsel).

Supplementary Information: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, Room 1580, 100 F Street, NE, Washington, DC 20549 (tel. 202-551-5850).

Applicant's Representations:

1. Applicant is a subsidiary of Deutsche Bank AG.<sup>1</sup> Deutsche Bank AG is a global financial services organization that engages in consumer finance, worldwide corporate banking, investment banking, corporate trust services, and asset management. Applicant is frequently selected to act as trustee to Issuers.

2. An asset-backed securities transaction typically involves the transfer of assets by a seller, usually by a "sponsor," to a special purpose corporate or trust entity that is established for the sole purpose of acting as the Issuer and is structured to be bankruptcy remote and the subsequent issuance of asset-backed securities ("ABS") to investors by the Issuer (an "ABS Transaction").

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<sup>1</sup> Applicant also requests that the order apply to an Issuer's appointment, now or in the future, of any other entity controlling, controlled by, or under common control (as defined in section 2(a)(9) of the Act) with Applicant as a trustee for an Issuer. Applicant represents that any other entity relying on this relief now or in the future will comply with the terms and conditions of the application.

3. The parties to an ABS transaction enter into several transaction agreements that provide for the holding of the assets by the Issuer and define the rights and responsibilities of the parties to the transaction (“Transaction Documents”). The operative Transaction Document governing the trustee is referred to herein as the “Agreement.”

4. The sponsor of an ABS Transaction assembles the pool of assets by purchasing or funding them, describes them in the offering materials, and sells interests in the assets to investors. The sponsor determines the structure, drafts the documents, and prices the ABS Transaction. The sponsor selects the other parties to the ABS Transaction, including the underwriter, the servicer, and the trustee.

5. The servicer, either directly or through subservicers, manages the assets held by the Issuer. The servicer pays the income from the assets held by the Issuer over to the trustee, and the trustee uses the income, as instructed by the servicer and provided by the Agreement, to pay interest and principal on the ABS, to fund reserve accounts and purchases of additional assets, and to make other payments including fees owed to the trustee and other parties to the ABS Transaction.

6. The sponsor of an ABS Transaction selects the trustee. In selecting a trustee, the sponsor seeks to obtain customary trust administrative and related services for the Issuer at minimal cost. In some instances, other parties to an ABS Transaction may provide recommendations to a sponsor about potential trustees. Ratings agencies may influence the selection of a trustee. An underwriter for an ABS Transaction also may provide advice to the sponsor about trustee selection based on the underwriter’s

knowledge of the pricing and expertise offered by a particular trustee in light of the contemplated transaction.

7. If an underwriter affiliated with the Applicant recommends a trustee to a sponsor, both the underwriter's recommendation and any selection of the Applicant by the sponsor will be based upon customary market considerations of pricing and expertise, and the selection will result from an arms-length negotiation between the sponsor and the Applicant. Applicant will not price its services as trustee in a manner designed to facilitate its affiliate being named underwriter.

8. The trustee's role in an ABS Transaction is specifically defined by the Agreement, and under the Agreement the trustee is not expected or required to perform discretionary functions. The responsibilities of the trustee as set forth in the Agreement are narrowly circumscribed and limited to those expressly accepted by the trustee. The trustee negotiates the provisions applicable to it directly with the sponsor and is then appointed by and enters into the Agreement with the Issuer.

9. The trustee usually becomes involved in an ABS Transaction after the substantive economic terms have been negotiated between the sponsor and the underwriters. The trustee does not monitor any service performed by, or obligation of, an underwriter, whether or not the underwriter is affiliated with the trustee. In the unlikely event that the Applicant, in acting as trustee to an Issuer for which an affiliate acts as underwriter, becomes obligated to enforce any of the affiliated underwriter's obligations to the Issuer, the Applicant will resign as trustee for the Issuer consistent with the requirements of Rule 3a-7(a)(4)(i). In such an event, the Applicant will incur the costs associated with the Issuer's procurement of a successor trustee.

10. The sponsor selects one or more underwriters to purchase the Issuer's securities and resell them or to privately place them with buyers obtained by the underwriter. The sponsor enters into an underwriting agreement with the underwriter that sets forth the responsibilities of the underwriter with respect to the distribution of the ABS and includes representations and warranties regarding, among other things, the underwriter and the quality of the Issuer's assets. The obligations of the underwriter under the underwriting agreement are enforceable against the underwriter only by the sponsor.

11. The underwriter may assist the sponsor in the organization of an Issuer by providing advice, based on its expertise in ABS Transactions, on the structuring and marketing of the ABS. This advice may relate to the risk tolerance of investors, the type of collateral, the predictability of the payment stream, the process by which payments are allocated and down-streamed to investors, the way that credit losses may affect the trust and the return to investors, whether the collateral represents a fixed set of specific assets or accounts, and the use of forms of credit enhancements to transform the risk-return profile of the underlying collateral. Any involvement of an underwriter in the organization of an Issuer that occurs is limited to helping determine the assets to be pooled, helping establish the terms of the ABS to be underwritten, and providing the sponsor with a warehouse line of credit with which to purchase the pool assets.

12. As noted above, an underwriter may provide advice to a sponsor regarding the sponsor's selection of a trustee for the Issuer; however, an underwriter's role in structuring a transaction would not extend to determining the obligations of a trustee, and the underwriter is not a party to the Agreement.

13. The underwriter is not a party to any of the Transaction Documents and, except for arrangements involving credit or credit enhancement for an Issuer or remarketing agent activities, typically has no role in the operation of the Issuer after its issuance of securities. The Applicant represents that although an underwriter typically may provide credit or credit enhancement for an Issuer or engage in remarketing agent activities, an underwriter affiliated with the Applicant will not so provide or so engage.

Applicant's Legal Analysis:

1. Applicant requests an order under Section 6(c) of the Act granting an exemption from certain requirements of Rule 3a-7 under the Act.
2. Section 6(c) of the Act gives the Commission the authority to exempt any person or transaction or any class of persons or transactions from any provision of the Act, or from any rule thereunder, if and to the extent such exemption is necessary or appropriate in the public interest; is consistent with the protection of investors; and the purposes fairly intended by the policy and provisions of the Act.
3. Rule 3a-7 provides Issuers that would otherwise fall within the definition of investment company under Section 3(a) of the Act with an exclusion from the definition of investment company. In adopting Rule 3a-7, the Commission stated that it intended to “remove an unnecessary barrier to the use and development of structured financings.”<sup>2</sup>
4. Under Rule 3a-7, an Issuer that meets certain conditions is deemed not to be an investment company under Section 3(a) of the Act. One of Rule 3a-7's conditions, set forth in paragraph (a)(4)(i), requires, among other things, that the Issuer appoint a

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<sup>2</sup> Exclusion from the Definition of Investment Company for Structured Financings, Investment Company Act Release No. 19105, 52 SEC Docket 2573 (November 19, 1992) (the “Adopting Release”) at 2573.

trustee that is not affiliated with the Issuer or with any person involved in the organization or operation of the Issuer (the “Independent Trustee Requirement”).

Applicant states that the phrase “person involved in the organization or operation of the Issuer” includes an underwriter, and Rule 3a-7(a)(4)(i) therefore prohibits an Issuer from appointing a trustee that is affiliated with an underwriter.

5. Applicant requests exemptive relief from Rule 3a-7(a)(4)(i) to the extent necessary to permit an Issuer to appoint the Applicant as a trustee to the Issuer when the Applicant is affiliated with an underwriter involved in the organization of the Issuer.

6. Applicant submits that the requested exemptive relief from the Independent Trustee Requirement is necessary and appropriate in the public interest; is consistent with the protection of investors; and the purposes fairly intended by the policy and provisions of the Act for the following three reasons: (1) due to changes in the banking industry; (2) due to the timing and nature of the roles of the trustee and the underwriter; and (3) because the requested relief is consistent with the policies and purposes underlying the Independent Trustee Requirement and Rule 3a-7.

#### Changes in the Banking Industry

7. Applicant states that consolidation within the financial industry that occurred throughout the 1990’s as a result of bank mergers and sales and related acquisitions of trustee servicing businesses by banks has resulted in a significant decrease in recent years in the number of bank trustees providing services to Issuers. Applicant states that economic and other business factors have also contributed to the trend toward fewer banks offering corporate trust services. Applicant states that bank consolidation has been accompanied by the expansion of banks into investment banking. Applicant

states that banks and bank affiliates are now significant participants in securities underwriting, particularly for ABS Transactions.

8. Applicant states that due to these banking industry changes, most trustees that provide services to Issuers, including the Applicant, have affiliations with underwriters to Issuers. Applicant states that, as a result, when, as is frequently the case, an affiliate of Applicant is selected to underwrite ABS in an ABS Transaction, Rule 3a-7(a)(4)(i)'s Independent Trustee Requirement generally prevents Applicant from serving as trustee for the Issuer.

9. Applicant states that the Independent Trustee Requirement therefore imposes an unnecessary regulatory limitation on trustee selection and causes market distortions by leading to the selection of trustees for reasons other than customary market considerations of pricing and expertise. Applicant states that this result is disadvantageous to the ABS market and to ABS investors and that exemptive relief therefore is necessary and appropriate in the public interest.

#### Timing and Nature of the Roles of the Trustee and the Underwriter

10. Applicant submits that due to the nature and timing of the roles of the trustee and the underwriter, Applicant's affiliation with an underwriter would not result in a conflict of interest or possibility of overreaching that could harm investors.

11. Applicant states that the trustee's role begins with the Issuer's issuance of its securities, and the trustee performs its role over the life of the Issuer. Applicant states that, in contrast, the underwriter is chosen early in the ABS Transaction process, may help to structure the ABS Transaction, distributes the Issuer's securities to investors, and generally has no further role subsequent to the distribution of the Issuer's securities.

Applicant submits that, consequently, given the nature and timing of their respective roles in an ABS Transaction, an ABS trustee does not monitor the distribution of securities or any other activity performed by underwriters and there is no opportunity for a trustee and an affiliated underwriter to act in concert to benefit themselves at the expense of holders of the ABS either prior to or after the closing of the ABS Transaction.

12. Applicant states that the trustee is neither expected nor required to exercise discretion or judgment. Applicant states that the trustee of the Issuer has virtually no discretion to pursue anyone in any regard other than preserving and realizing on the assets. Applicant states that trustees are not required to pursue securities law or fraud claims on behalf of debt holders and may often be foreclosed from such enforcement because debt holders may have different and conflicting rights.

13. For all of these reasons, Applicant submits that exemptive relief is therefore appropriate and consistent with the protection of investors.

Consistent with Policies and Purposes Underlying the Independent Trustee Requirement and the Rule

14. Applicant submits that the concerns underlying the Independent Trustee Requirement are not implicated if the trustee for an Issuer is independent of the sponsor, servicer, and credit enhancer for the Issuer, but is affiliated with an underwriter for the Issuer, because, in that situation, no single entity would act in all capacities in the issuance of the ABS and the operation of an Issuer. Applicant states that Applicant would continue to act as an independent party safeguarding the assets of an Issuer regardless of an affiliation with an underwriter of the ABS. Applicant submits that, in addition, the concern that affiliation could lead to a trustee monitoring the activities of an

affiliate also is not implicated by a trustee's affiliation with an underwriter, because, in practice, a trustee for an Issuer does not monitor the distribution of securities or any other activity performed by underwriters.

15. Applicant submits that exemptive relief permitting the participation of the Applicant and an affiliated underwriter in an ABS Transaction would be consistent with the broader purposes of Rule 3a-7, because in adopting Rule 3a-7, the Commission intended that, consistent with investor protection, the Rule not hamper the growth and development of the structured finance market. Applicant submits that the requested exemption would allow the selection of a trustee for an ABS Transaction based on the trustee's qualification, rather than technical regulatory restriction, and therefore would alleviate unnecessary market distortions that result from the current Independent Trustee Requirement.

Applicant's Conditions:

Applicant agrees that any order granting the requested relief will be subject to the following conditions:

- (1) Applicant will not be affiliated with any person involved in the organization or operation of the Issuer in an ABS Transaction other than the underwriter.
- (2) Applicant's relationship to an affiliated underwriter will be disclosed in writing to all parties involved in an ABS Transaction, including the rating agencies and the ABS securities holders.
- (3) An underwriter affiliated with Applicant will not be involved in the operation of an Issuer, and its involvement in the organization of an Issuer

will extend only to determining the assets to be pooled, assisting in establishing the terms of the ABS to be underwritten, and providing the sponsor with a warehouse line of credit with which to purchase the pool assets.

- (4) An affiliated person of Applicant, including an affiliated underwriter, will not provide credit or credit enhancement to an Issuer if Applicant serves as trustee to the Issuer.
- (5) An underwriter affiliated with Applicant will not engage in any remarketing agent activities, including involvement in any auction process in which ABS interest rates, yields, or dividends are reset at designated intervals in any ABS Transaction for which Applicant serves as trustee to the Issuer.
- (6) All of an affiliated underwriter's contractual obligations pursuant to the underwriting agreement will be enforceable by the sponsor.
- (7) Consistent with the requirements of Rule 3a-7(a)(4)(i), Applicant will resign as trustee for the Issuer if Applicant becomes obligated to enforce any of an affiliated underwriter's obligations to the Issuer.

- (8) Applicant will not price its services as trustee in a manner designed to facilitate its affiliate being named underwriter.

By the Commission.

Nancy M. Morris  
Secretary