CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

TOM QUAADMAN
VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

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Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Companies Engaged in the Business of Acquiring Mortgages and Mortgage-Related Instruments, Release No. IC-29778, File No. S7-34-11

Dear Ms. Murphy:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective it is an important priority of the CCMC to advance an effective and transparent system for capital formation. The CCMC welcomes this opportunity to comment on the Securities and Exchange Commission's ("SEC") concept release relating to the status under the Investment Company Act of 1940 ("Investment Company Act" or "Act") of companies that are engaged in the business of acquiring mortgages and mortgage-related instruments and that rely on the exclusion from the definition of investment company in Section 3(c)(5)(C) of the Act.

The CCMC has significant concerns with the concept release, including:

- Congress intended to exempt pools engaged in real estate finance from the Investment Company Act;

- The SEC has not identified a specific harm that it seeks to rectify;

- The current regulatory regime provides robust investor protection consistent with efficient means for capital formation;

- Placing new restrictions on mortgage REITs could jeopardize the fragile economic recovery;

- The SEC's efforts should be focused on encouraging efficient and responsible investment in mortgages and mortgage-related investments.

These concerns are discussed in greater detail below.

Congress Intended to Exempt Pools Engaged in Mortgage Finance from the Investment Company Act

In enacting the Investment Company Act, Congress recognized that while that regulatory regime was appropriate to govern funds making investments in certain securities, exemptions were needed for entities making certain other investments, such as investing in real estate and in providing financing for small businesses and real estate. With respect to the real estate market, section 3(c)(5)(C) is a critical component of the Act, as it exempts from the Act:

> "Any person who ... is primarily engaged in...(C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate."

As is required to maintain effective regulation of a deep and dynamic capital markets system, the mortgage market has evolved since 1940, and so has the SEC's interpretation of the 3(c)(5)(C) exemption. Through SEC staff no-action letters issued in the decades since Congress passed the 1940 Act, this statutory exemption has been understood by the market to include fee interests in real estate; loans or liens that are fully secured by real estate; and assets that are the functional equivalent of an actual interest in real estate or a loan or lien fully secured by real estate, such as whole-pool agency mortgage backed securities and certain commercial real estate "B-Notes." This flexibility has been critical to maintaining the liquidity that a modern real estate market needs, and should only be amended upon a showing, based on a balanced and transparent review of empirical evidence, that specific, current shortcomings in the regulation of this sector gives rise the need for agency action.

The SEC has not identified a specific harm that it seeks to rectify

The concept release does not identify a specific need for amending mortgage REITs' status in relation to the Investment Company Act. In all rulemakings, it is crucial that the implementing agency engage at the outset in a rigorous cost benefit analysis to ensure that the proposed regulation appropriately balances the various regulatory ends which the agency is charged with promoting—in the case of the SEC, investor protection, orderly markets, and efficient capital formation. The importance of cost-benefit analysis to the rulemaking process was recognized by the signing of Executive Order 13563 (as applied to independent agencies by Executive Order 13579), which reaffirmed, for executive agencies, regulatory principles and rulemaking processes that include an enhanced process for examining the costs and benefits of proposed rules and their alternatives. Accordingly, it is critical, in any rulemaking process, that the specific regulatory purpose is identified at the outset, so that the resulting rule will be built on a solid economic foundation. However, in this case, the SEC has not demonstrated any specific harms that it seeks to rectify by amending mortgage REITs' status in relation to the Investment Company Act, and therefore runs the very real risk that it is creating a solution in search of a problem.

The Current Regulatory Regime Provides Robust Investor Protection Consistent with Efficient Means for Capital Formation

Public Mortgage REITs that rely on the 3(c)(5)(C) exemption from Investment Company Act registration are nevertheless subject to rigorous statutory and regulatory requirements that provide robust investor protections. The REIT tax rules require that they primarily invest in real estate holdings for the long term and that they do not act as dealers. Public mortgage REITs must meet registration requirements according to Securities Act of 1933; comply with periodic reporting, public disclosure, and other requirements of the Securities Exchange Act of 1934; and fulfill reporting, audit and certification requirements of the Sarbanes Oxley Act. Finally, mortgage REITs listed on the NYSE, NASDAQ or another exchange must meet listing requirements related to independence for their board and audit committees, among other things.

Placing New Restrictions on Mortgage REITs Could Jeopardize the Fragile Economic Recovery

Because commercial and residential mortgage REITs have played such a key role in providing capital to the real estate market the past several years, placing new restrictions on them could jeopardize the fragile economic recovery. Whether primarily invested in commercial or residential real estate debt instruments, mortgage REITs have been an important source of capital in the real estate finance market, particularly during the current post-crisis economic recovery. Since 2008, mortgage REITs have raised more than $30 billion from the public markets and 12 new mortgage REITs have completed initial public offerings. Since 2010, residential mortgage REITs have provided critically important liquidity to MBS markets, purchasing $130 billion in MBS, including $80 billion in the first half of 2011.

Similarly, commercial mortgage REITs have played an important role in commercial real estate finance. For example, in the first half of 2011, commercial mortgage REITs have expanded their holdings by $2.5 billion. Additionally, commercial mortgage REITs have been and will continue to be a critical source of subordinated debt, which will be incredibly important as property owners and their lenders face a wave of over $1.4 trillion of loans that mature and must be refinanced according to stricter underwriting standards and during a period of reduced property values.

The SEC's Efforts Should be Focused on Encouraging Efficient and Responsible Investment in Mortgages and Mortgage-Related Investments

If mortgage REITs were to be regulated as mutual funds, their ability to provide liquidity and financing to the commercial and residential real estate markets would be dramatically undermined, just when that liquidity is needed most. It would also run counter to the bipartisan view that more private capital is needed to shore up these markets. Given the robust regulatory regime currently governing public mortgage REITs, any dramatic change to their regulation would provide insufficient investor protection benefits to warrant such an action.

If the SEC is to move forward with any rulemaking in this area, it should consider ways to flesh out its current interpretation of and approach to the 3(c)(5)(C) statutory exemption, to provide greater certainty for market participants to continue to bring private capital inflows into the real estate finance markets in a well-regulated and efficient way. Furthermore, the SEC should ensure that any action it takes in the short-term allows it to remain flexible as the real estate finance market continues to evolve.

Conclusion

In conclusion, the CCMC believes that any consideration by the SEC of a proposal to regulate REITs as investment companies would be premature, given the lack of demonstrated need for any changes and the potential adverse consequences to capital formation and the broader U.S. economy. The SEC's efforts should be focused on finding ways to continue to encourage investment efficient and responsible investment in mortgages and mortgage-related investments, given the importance of this sector to the fragile economic recovery. We appreciate the opportunity to comment on this concept release and thank you for your consideration. We continue to look forward to working with the SEC throughout this process.

Sincerely,

Tom Quaadman