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Memorandum



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SEC Issues Concept Release Relating to Mortgage Vehicles

On August 31, 2011, the Securities and Exchange Commission (the "SEC") issued a concept release (the "Concept Release") seeking public comment regarding the status of companies engaged in the business of acquiring mortgages and mortgage-related instruments under the Investment Company Act of 1940 (the "Company Act").¹ Specifically, the SEC is seeking general comment relating to the application of Section 3(c)(5)(C) of the Company Act to mortgage related pools. Section 3(c)(5)(C) generally excludes from the definition of investment company (and therefore regulation under the Company Act) any person who is primarily engaged in "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate." Many publicly-traded mortgage vehicles rely on this as a basis to be exempt from regulation under the Company Act.

In its request for comment, the SEC noted that certain entities relying on 3(c)(5)(C) appear similar to traditional investment companies (closed-end funds), yet are not bound by the requirements of the Company Act and, therefore, investors may not receive adequate protections. The SEC further stated its concern that the activities of some mortgage-related pools may increase the potential for abuse such as deliberate mis-valuation of holdings, over-leveraging of assets, and overreaching by insiders.

Section 3(c)(5)(C) was adopted in 1940 with little legislative history and the SEC last formally looked substantively at the exclusion and related issues in 1960. The market has evolved significantly since that time and, in the intervening years, the industry has relied on a series of no-action letters issued by the SEC's staff. The SEC expressed concern that there may be inconsistent interpretation of these no-action letters among industry participants.

The SEC asked commenters to discuss possible alternatives for SEC action, including (i) potential rule making, (ii) issuing interpretive guidance, (iii) undertaking exemptive relief to address mortgage-related pools and the scope of 3(c)(5)(C), or (iv) taking no further action. The comment period will expire 60 days from publication of the Concept Release in the Federal Register.

If you should have any questions or comments regarding the Concept Release or related issues, please contact the persons listed below or your regular Fried Frank contact.

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¹ The Concept Release is available at <http://www.sec.gov/rules/concept/2011/ic-29778.pdf>. On the same day, the SEC issued a companion release, soliciting comment on Rule 3a-7 under the Company Act, which exempts certain issuers of asset-backed securities from regulation under the Company Act (the "3a-7 Release"). Unlike the Concept Release, the 3a-7 Release is prompted by the Dodd-Frank Wall Street and Consumer Protection Act, which requires the SEC to review any reference to or requirements regarding credit ratings in its rulemaking. The 3a-7 Release is available at, <http://www.sec.gov/rules/concept/2011/ic-29779.pdf>.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents.

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