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Investment Company Act of 1940
Section 3(c)(5)

August 6, 1991

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Judiciary Plaza
Washington, D.C. 20549

Ladies and Gentlemen:

We are writing on behalf of Greenwich Capital Acceptance, Inc. (the "Company") in connection with its establishment of certain trusts (the "Trusts") whose assets consist primarily of loans secured by ownership interests in cooperative housing (the "Coop Loans"). The Coop Loans were acquired from the Resolution Trust Corporation (the "RTC") to facilitate the RTC's disposition of assets as a means of resolving the savings and loan crisis. This letter hereby amends and restates our prior request, dated March 4, 1991, that you confirm that the Division of Investment Management (the "Division") will not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under the Investment Company Act of 1940 (the "Investment Company Act") if the Trusts offer pass-through certificates (the "Certificates") evidencing undivided interests in the assets of the Trusts without registration as investment companies in reliance on Section 3(c)(5) of the Investment Company Act. This amendment and restatement is intended primarily to update certain information discussed in our prior letter and to provide certain additional information requested by

Julia Ulstrup of the Division in a conversation with Brian M. Kaplowitz of this firm.

I. FACTS

The Company, as sponsor of the Trusts, has purchased through affiliates the RTC's interest in approximately $700 million principal amount of existing Coop Loans. The Company has formed several Trusts and has sold Certificates representing interests therein in reliance on Section 3(c)(1) of the Investment Company Act. Section 3(c)(1) generally provides an exception from the definition of an investment company to "any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities." The Company wishes, contingent upon receipt of the no-action position that we request, to be permitted to sell Certificates (and facilitate the sale and resale of Certificates in the secondary market) without being subject to the constraints of that Section. In particular, the Company wishes to permit the sale and transfer of existing Certificates without being subject to the 100 beneficial owner limitation.

Each Coop Loan is a purchase money loan secured fully and exclusively by (a) shares of stock (the "Shares") in a cooperative housing corporation and (b) a proprietary lease (the "Lease") accompanying the Shares and entitling the owner of the Shares to reside in the subject apartment, described below. The Coop Loans were originated by Empire of America Federal Savings Bank, predecessor of Empire Federal Savings Bank of America, to finance or refinance the purchase of cooperative apartments (the "Coop Apartments"), and represent, in effect, first liens on the Shares and Leases.

The Trusts were formed pursuant to pooling and servicing agreements similar to those commonly used in the formation of trusts that publicly offer mortgage-backed pass-through certificates. The Coop Loans have been contributed by the Company to such Trusts. As contributor of the Coop Loans, the Company received all of the Certificates issued by the Trusts in exchange for the contribution of the Coop Loans. The Company has been successful in privately placing certain of the Certificates with sophisticated investors and, with the exception of a relatively small amount of subordinated Certificates which it

proposes to retain, would like to place the balance of the Certificates with third party investors.

The Trusts are passive entities and, with the exception of reinvesting distributions on the Coop Loans in a narrowly defined list of permitted investments, perform no investment functions.[1] The assets of each Trust consist of a separate fixed pool of Coop Loans. The existing Trusts will not acquire new Coop Loans except in substitution for existing Coop Loans where the documentation for such Coop Loans may be deemed defective or where a breach of warranty concerning such Coop Loans is found to exist.[2] Documents would be deemed to be defective, for example, where it is determined that there was insufficient documentation for conveyance of ownership of the Coop Loans. A breach of warranty may exist where certain material representations made in such documentation prove to be false.

The Coop Loans in each Trust are serviced by an independent third party servicer. The servicer collects all payments due under the Coop Loans, sends and receives any notices required or permitted under the terms of the Coop Loans, and generally takes any other servicing actions required under the terms of the Coop Loans.

All of the income of the Trusts, net of fees paid to the servicer and other similar expenses of the Trusts, are distributed periodically to the Certificateholders.

The Certificates of each series have been issued on both a senior and a subordinated basis. There are different classes

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1 Such permitted investments consist generally of U.S. government and U.S. government agency obligations, short-term money market instruments, and obligations rated in the highest rating category by a nationally recognized statistical rating agency or whose rating will not adversely affect the ratings assigned any rated Certificates.

2 The Company may acquire new Coop Loans in the future and establish additional trusts in reliance on any no-action position taken by the Division on this letter or on any applicable statutory exception under the Investment Company Act or exception or exemption created by any rule thereunder.

within a series with varying levels of seniority. The more senior Certificates have been rated in one of the top two rating categories by at least one nationally recognized statistical rating organization. Subordinated Certificates are unrated or rated in lower than one of the two top rating categories.

II. LEGAL ANALYSIS

Section 3(a) of the Investment Company Act defines an investment company as:

> [A]ny issuer which --
>
> (1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;
>
> * * * *
>
> (3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

"Investment securities" are defined as:

> [A]ll securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

The Trusts may be viewed as investment companies within the meaning of Section 3(a) since the Trusts have issued securities in the form of the Certificates and have assets that consist primarily of securities, to the extent that the Coop Loans may be considered securities. We believe, however, that the Trusts may rely on the exception from the definition of an investment company provided by Section 3(c)(5) of the Investment Company Act.

Section 3(c)(5) excepts from the definition of an investment company "[a]ny person who is not engaged in the business of

issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; . . . and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate." It is our opinion that the Trusts fall within Subsection (C) or, alternatively, within Subsection (A) of Section 3(c)(5). It is our further opinion that if the Trusts are viewed as holding a combination of assets falling under both Subsections, the Trusts may, nevertheless, be viewed as excepted under Section 3(c)(5). See Citytrust (available December 19, 1990). In that regard, we note that the Section extends to issuers engaged primarily in "one or more" of the specified businesses. We would like the Division to confirm our view that the Coop Loans are the types of assets intended to be covered by Section 3(c)(5) ("qualifying assets").

The Certificates do not constitute any of the proscribed types of securities; i.e., they are neither redeemable securities, periodic payment plan certificates or face amount certificates. Further, if Coop Loans are considered to be qualifying assets, the Trusts maintain a sufficient percentage of such assets so as to be deemed to be engaged primarily in one of the excepted businesses. Thus, at least 80% of the assets of each Trust consists of Coop Loans. The most recent Division "no-action" positions under Section 3(c)(5)(C) generally require that (1) at least 55% of the issuer's assets consist of real estate fee interests or loans secured exclusively by real estate, and (2) at least 25% of the issuer's assets consist of real estate related investments, subject to reduction to the extent that assets described in (1) exceed 55%. See, e.g., NAB Asset Corporation (available June 20, 1991); United Bankers, Inc. (available March 23, 1988).

For purposes of our analysis, we will discuss Subsection (A) separately from Subsection (C). We will begin with Subsection (C), given that the Coop Loans are for most practical purposes identical to mortgage loans, i.e. they both involve liens on what is commonly viewed as real estate (in the present case, the interests in the Coop Apartments). Subsection (A) remains important since if the Coop Apartments are not considered real estate, they may be considered merchandise and thus, the Coop

Loans would be "obligations representing part or all of the sales price of merchandise . . ." within the meaning of that Subsection.

Section 3(c)(5)(C)

To provide a better understanding of our analysis under Section 3(c)(5)(C), it may be helpful to first provide a more complete explanation of the nature of the Coop Apartments. Cooperative housing has arisen as a means of exercising control over one's neighbors and in order to enable the cooperative to retain the benefits of existing favorable financing upon conversion of a rental apartment building and the subsequent sale of such building to a cooperative corporation (the "coop corporation"). As summarized in a relatively recent request for no-action advice, ownership of any cooperative housing unit, including the Coop Apartments, is essentially a real estate interest represented by a proprietary lease entitling the owner to reside in the unit. When a prospective purchaser is considering the purchase of an apartment, he would view a cooperative housing unit in largely the same manner as he would view the purchase of a house or a condominium, which is undeniably a real estate interest (including, in New York, the requirement for coop owners to pay real property transfer taxes, documentary stamps on "deeds", and real property taxes). See D.B.G. Property Investors, Inc. (available December 29, 1986).

The shares of stock attributable to ownership of a cooperative housing unit are essentially a technical addition to real estate ownership and do not have the characteristics generally attributable to conventional shares of stock. The cooperative shares are not freely transferable except in connection with the sale and delivery of a lease corresponding to such shares and only upon the approval of the coop corporation's board of directors. The cooperative shares do not pay dividends. The shares may generally be pledged only with the above board of directors approval, which is usually provided in connection with a loan for the purchase of the housing unit relating to such shares or a refinancing of such loan. Real property taxes and mortgage payments with respect to the cooperative building are paid proportionately by each tenant/shareholder to the coop corporation in the form of maintenance payments. Id. Each tenant/shareholder would likewise pay its proportionate share of the costs of repairs and capital improvements to the building. Finally, as with any homeowner or condominium owner, the owner of

the shares and proprietary lease would be entitled to his proportionate share of the equity in the building represented by the net proceeds of a sale of the building or condemnation award.

Inasmuch as the Trusts succeed to the rights of the original lender in the Coop Loans, it is also useful to consider the rights of lenders in those and similar loans, including their rights upon default, and the rights and obligations of borrowers under such loans. Related to this discussion is the relationship between the lender and the coop corporation and its board of directors. We will refer to New York practice for purposes of this discussion since, at the time the Trusts were created, in excess of 99% of the principal amount of Coop Loans related to Coop Apartments located in New York.

Each loan for the purchase of a cooperative housing unit is secured by a pledge of the borrower's interest in the stock of the coop corporation and the proprietary lease. Thus, the lender's rights are determined not only by its agreement with the borrower, but also by the borrower's status as a tenant of and shareholder in the coop corporation. In that regard, the lender stands in much the same position as a mortgagee in a leasehold mortgage, which is a mortgage on real estate.

When the proprietary lease contains no specific provisions permitting financing, the borrower's pledge of the stock and lease is generally acknowledged by the coop corporation pursuant to a document known as the "Recognition Agreement". The Recognition Agreement sets forth the terms of the relationship between the lender and the coop corporation, providing what may generally be regarded as the basic financing provisions which would be required by any leasehold mortgagee providing financing on real property.

Specifically, pursuant to the Recognition Agreement, the lender's interest in its collateral is protected by the coop corporation's obligation to (i) provide notice of its intention to terminate any proprietary lease by reason of the default of the tenant/shareholder and to accept cure of such defaults by the lender or allow the lender to cause the tenant shareholder to so cure, and (ii) refrain from selling or subletting the Coop Apartment without the lender's consent unless the net proceeds thereof are sufficient to pay off the loan. Further, even if lender does not cure monetary defaults under the lease, the coop corporation agrees to recognize lender's rights as lienor upon

the net proceeds of sale or subletting of the apartment, after reimbursement of the coop corporation of any sums outstanding under the lease.

In addition, the lender's right to dispossess the borrower as permitted by law or realize upon its security in accordance with the Recognition Agreement is expressly set forth in the Recognition Agreement, subject to the coop corporation's right of approval of the transfer of the shares and the lease (i.e., a transfer of the shares and proprietary lease, whether to the lender or a third party, requires consent of the coop corporation in the same manner as would any sale of the cooperative housing unit by a tenant/shareholder pursuant to the terms of the lease). With respect to these rights of the lender vis-a-vis the coop corporation, it should be noted that the lender, upon acquisition of the shares and lease, will be in exactly the same position as though it foreclosed on a mortgage on any other leasehold property -- it will replace the tenant/shareholder under the proprietary lease.

As is evident from the foregoing, the relative rights of the lender and coop corporation are primarily that of a leasehold mortgagee and fee owner, respectively. Indeed, although lenders in New York do not typically place mortgages on cooperative apartment leases, the opening sentence of the form of Recognition Agreement most commonly in use contains a statement by the lender that it has been requested to make a loan to be secured by "a pledge, security interest, mortgage and/or assignment . . . of shares of your Corporation . . . and of the Proprietary Lease . . .", contemplating that a mortgage interest may be so granted. It is interesting to note in this regard that, although a pledge of stock would ordinarily be perfected merely by possession of such stock, New York has required, pursuant to legislation adopted in 1988, that the pledge of stock in a cooperative corporation may be perfected only by filing a UCC-1 Financing Statement in the land records where mortgages would be so recorded, and that, like mortgages, such filings shall be effective until terminated, if they so state. The filing requirement, however, does not change the nature of the lender's interest, which remains a security interest enforceable pursuant to the Uniform Commercial Code, rather than a true mortgage. As a consequence, the procedures pursuant to which the lender can realize upon its collateral will differ from those in a mortgage foreclosure. Nevertheless, the end result is the same, i.e., in

either case, the lender acquires the collateral, being in this instance the shares and the proprietary lease.

While the security interest held by lenders in Coop Loans is not technically a mortgage, we believe that it falls under the rubric of "other liens on and interests in real estate" within the meaning of Section 3(c)(5)(C), given the nature of the Coop Apartments and the rights of the various parties, as described above. We reach this conclusion based on the treatment of cooperative housing in the context of other Federal legislation, decisions of the Supreme Court and of the lower Federal courts and state courts, and on positions previously taken by the Division. It bears repeating that while much of that authority focuses primarily on the share ownership aspect of cooperative housing, the proprietary lease aspect especially reveals the real estate nature thereof. The lease effectively provides the owner of such shares with a residence and is clearly, to use the words of Section 3(c)(5)(C), an "interest in real estate. . . ."

Two pieces of legislation in particular reflect Congress' view of loans for cooperative housing as the equivalent of mortgage loans secured by residential real estate. In the Secondary Mortgage Market Enhancement Act of 1984 ("SMMEA"), Pub. L. No. 98-440, 98 Stat. 1689 (1984), Congress amended several of the Federal securities laws to encourage the development of a private secondary market in mortgages as a means of addressing the nation's housing needs. In connection with that legislation, Section 3(a)(41) of the Securities Exchange Act of 1934 was enacted to define the type of security that would receive the special securities law treatment afforded by SMMEA. Section 3(a)(41) thus sets forth the term "mortgage related security," which specifically includes certain notes and participation certificates that "are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation. . . " (emphasis added). Similarly, in amendments to the Internal Revenue Code regarding the tax treatment of real estate mortgage investment conduits, a loan secured by stock in a cooperative housing corporation is treated as a "qualified mortgage", i.e. is specifically considered as being secured by an interest in real property. See I.R.C. § 860G(c)(3)(A). It is also worth mentioning that the Internal Revenue Code treats payments under a loan for the purchase of shares in cooperative housing as equivalent to payments on a mortgage loan for purposes of the deductibility of interest. See I.R.C. § 163(h)(5)(B).

Federal courts also have addressed the nature of instruments such as the Leases and Shares. The Supreme Court, in holding that the purchase of stock representing an interest in a government subsidized cooperative housing corporation does not constitute the purchase of a security, stated that such a transaction involves the purchase of housing. United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975). The Forman principles have been applied by the lower Federal courts. See, e.g., Grenader v. Spitz, 537 F.2d 612 (2d. Cir. 1976), cert. denied., 429 U.S. 1009 (1976); Malken v. U.S. Dept. of Treasury - I.R.S., 645 F. Supp. 229, 231 (S.D.N.Y. 1986); Lee v. Echotree Associates Limited Partnership et al., 1990 U.S. Dist. Lexis 7732 (E.D. Penn. June 20, 1990).

State courts also often treat the interests created by cooperative apartment leases and shares in the same manner as realty, although the result may differ depending on the context. See, e.g., Presten v. Sailer, 542 A.2d 7 (N.J. Super. Ct. App. Div. 1988); Generas v. Hotel Des Artistes, Inc. 117 A.D.2d 563 (1st Dept. 1986), app. den. 68 N.Y.2d 606, 498 N.E.2d 150, 506 N.Y.S.2d 1030 (1986); Moloney v. Weingarten, 118 A.D. 2d 836 (2d Dept. 1986), app. den. 69 N.Y.2d 608 (1987); Chiang v. Chang, 137 A.D.2d 371 (1st Dept. 1988). See also Note, Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty? 73 Column. L. Rev. 250 (1973). But see, e.g., State Tax Commission v. Shor, 43 N.Y.2d 151 (1977); Silverman v. Alcoa Plaza Associates, 37 A.D.2d 166 (1st Dept. 1971). Moreover, state courts in New York have predominately viewed the landlord/tenant relationship created between cooperative corporations and shareholders (and their tenants) in the same manner as owners and occupants of other residential properties. Southridge Cooperative Section No. 3, Inc. v. Menendez, 535 N.Y.S.2d 299 (N.Y. City Civ. Ct. 1988), Linden Hill No. 1 Cooperative Corp. v. Kleiner, 478 N.Y.S.2d 519 (N.Y. City Civ. Ct. 1984). See also Star v. 308 Owners Corp., 130 Misc.2d 732, 497 N.Y.S.2d 282 (N.Y. City Civ. Ct. 1985), in which the court recognized the shareholder of a cooperative apartment to be responsible as an "owner" with respect to the non-purchasing tenant residing in it, and McMunn v. Steppingstone Management Corp., 131 Misc.2d 340, 500 N.Y.S.2d 219 (N.Y. City Civ. Ct. 1986) in which the court acknowledged that proprietary leasehold provisions placing responsibilities of an "owner" on the tenant/shareholder are enforceable. Further, other statutory provisions governing real property (such as N.Y. Real Prop. Action §721 regarding the right to bring a summary dispossess

action, and N.Y. Real Prop. Law §235-b, regarding the warranty of habitability) have been found applicable in the cooperative setting. See Curtis v. Le May, 186 Misc.2d 853, 60 N.Y.S.2d 768 (1945), Suarez v. Rivercross Tenants Corp., 107 Misc.2d 135, Sup., 438 N.Y.S.2d 164 (1st Dept. 1981), and Minton v. Domb, 63 A.D.2d 36, 406 N.Y.S.2d 772 (1st Dept. 1978). Section 5206 of the Civil Practice Law and Rules of New York (the homestead exemption) is also applicable to cooperative apartments. In this regard, we note that the Division, in construing Section 3(c)(5)(C), has in the past often looked to state law as relevant in determining whether a note or other debt instrument may be considered to be secured by real estate under the Section. See, e.g. Apache Petroleum Co. (available April 30, 1982); Great American Management and Investment, Inc. (available September 27, 1982).

The Division has previously recognized the real estate nature of cooperative housing in the context of the Investment Company Act. Specifically, in the D.B.G. letter, supra page 6, the Division took a no-action position with respect to a partnership that wished to invest the proceeds of a public offering in condominium units and "occupied cooperative residential apartments (by purchasing the shares of stock and proprietary leases attributable thereto)" without registering under the Investment Company Act. While the Division did not express its rationale, the letter requesting such position focused primarily on the argument that the proposed investments constituted investments in real estate. Id. In addition, the Division has recognized other types of leasehold interests as "real estate" for purposes of Section 3(c)(5)(C). See, e.g., NAB Asset Corporation (available June 20, 1991); Health Facility Credit Corp. (available February 6, 1985). It is a logical corollary to those positions to say that the Coop Loans, which are purchase money or refinancing loans secured by Coop Apartments, constitute "liens on and other interests in real estate," thus falling plainly under the Section.

We do not believe that the earlier letter of P&B Realty Development Corp. (available December 4, 1985) (the "P&B Realty" letter) leads to a different conclusion. In that letter, the Division took a no-action position with respect to a partnership that wished to invest at least 55% of its assets in debt secured by mortgages and in fee interests and up to 45% of its assets in debt secured by shares in cooperative apartments, together with assignments of proprietary leases. To the extent that the P&B

Realty letter may appear inconsistent with the position that loans such as the Coop Loans are Section 3(c)(5)(C) qualifying assets, the letter apparently was superseded by the D.B.G. letter. Moreover, the Division was not asked in the P&B Realty letter to address the nature of the shares or leases; a complete evaluation of the nature of those instruments was not necessary to reaching a conclusion under the Section.

Section 3(c)(5)(A)

Even if one were to conclude that the Coop Loans are not qualifying assets under Section 3(c)(5)(C), we submit that the Trusts could rely upon Section 3(c)(5)(A). The only alternative to considering the Shares and Leases comprising the Coop Apartments to be real estate is to consider them to be a form of merchandise. Thus, the Trusts would be primarily engaged in the business of "purchasing or otherwise acquiring ... obligations representing part or all of the sales price merchandise..." within the meaning of that Subsection. In this regard, we note that, for example, the courts in the Shor and Silverman cases cited above, supra at page 10, treated similar shares and leases as goods falling under the ambit of the Uniform Commercial Code.

The Division has previously taken no-action positions with respect to pools of leases. See, e.g., State of New Jersey (available May 21, 1984); U.S. Municipal Lease Acceptance Corp. (available April 11, 1983); City National Bank (available March 9, 1984); Woodside Group (available April 14, 1982). The Leases in the instant case should be treated no differently, and the Shares even more closely resemble merchandise as that term is commonly understood. We also make particular reference to the no-action position under Section 3(c)(5)(A) taken by the Division in Ziegler Mortgage Securities, Inc. (available October 8, 1984) ("Ziegler"). Ziegler involved a company formed to issue debt securities secured by a portfolio of GNMA certificates which, in turn, were to be backed by installment sale contracts creating security interests in manufactured homes. The Trusts in the instant case have a much closer nexus to the underlying merchandise than did the company in Ziegler.[3]

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[3] In addition, the Division has taken the position that refinancing loans are qualifying assets under Section 3(c)(5)(A). See, e.g., State of Israel (available (continued...)

The Division's emphasis under Section 3(c)(5)(A) has been placed primarily on whether the notes or other obligations representing the sales price of merchandise were tied to sales financing. See, e.g., Raymond James & Associates (available July 14, 1988); Australian Industry Development Corporation (available August 11, 1980). The Coop Loans meet that test since they were made to finance or refinance the purchase of the Coop Apartments.

C. Policy Considerations

While we firmly believe that the Trusts may rely upon Section 3(c)(5) as a matter of proper legal interpretation, we would be remiss if we failed to point out that there are profound policy considerations in support of the no-action position that we request. The activities of the Trusts and of their sponsor, the Company, are in furtherance of the goals of the RTC.

Congress established the RTC as a means of addressing the savings and loan crisis.[4] Specifically, the RTC is authorized by law to resolve that crisis through the orderly disposition of assets which are held by failed savings and loan associations. H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 308 (1989).

Among the RTC's primary objectives in liquidating the assets under its jurisdiction, the RTC is required to maximize the returns on the disposed assets, minimize the adverse effects of its activities on local markets and make efficient use of the

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[3](...continued)
August 17, 1988), Republic of Turkey (available November 3, 1988), Hashemite Kingdom of Jordan (available November 21, 1988), Islamic Republic of Pakistan (available January 18, 1989) and Hellenic Republic (available January 10, 1991) (refinancing loans made in connection with the sale of military equipment and services).

[4] The RTC was established by §501(1) of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") of 1989 which amended the Federal Home Loan Bank Act by adding Section 21A.

funds which it receives from the proceeds of sale. H.R. Conf. Rep. No. 101-222, 101st Cong., 1st Sess. 411 (1989). To achieve these goals, the drafters of FIRREA expressly authorized the RTC to enter into business arrangements for the sale of assets with non-government entities. H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 441 (1989). The private firms with which the RTC was authorized to enter into contractual relationships are expected to demonstrate a level of expertise in the marketplace when assisting the RTC in disposing of its assets. The RTC is thus encouraged to "examine the usefulness of public/private partnerships and risk-sharing arrangements among mortgage originators, credit intermediaries, and federally chartered secondary market entity." Id. at 447. Programs should then be designed between the RTC and private companies to dispose of assets through "secondary mortgage market products." Id. at 447.

The Company was formed for the very purpose of, and is engaged exclusively in, the sponsoring of secondary mortgage market products, and its affiliates have expertise in the marketplace described above. Moreover, the transactions described above resulting in the RTC's disposal of the Coop Loans serve the goals of the drafters of FIRREA. By buying the assets from the RTC at a fair value and then selling them through the Trusts, the Company serves a useful function in maximizing the returns which the RTC will realize from the sale of similar assets and minimizing the adverse effects on local markets. Similarly, the RTC will indirectly benefit from the enhanced liquidity of securities such as the Certificates derived from the ability of the initial purchasers of such securities to sell them without regard to the 100 beneficial owner limitation of Section 3(c)(1). Conversely, effectively precluding the sale or resale of Certificates by requiring registration of the Trusts under the Investment Company Act would frustrate the will of Congress.

Conclusion

We believe that, based on the above-cited legislative history, case law and no-action positions, the Trusts may correctly rely upon the exception from the definition of an investment company provided by Section 3(c)(5). We request that the Division confirm our views in that regard. In light of the importance of the outcome of this request to our client, we respectfully request a response to this letter as soon as practicable. If you have any questions concerning the Trusts or the issues raised in this letter, please do not hesitate to contact Brian M. Kaplowitz at (212) 839-5370 or Edward J. Fine at (212) 839-5864.

Very truly yours,

Brown & Wood

PUBLIC

8 AUG 1991

Our Ref. No. 91-377-CC
Greenwich Capital
Acceptance, Inc.
File No. 812-6934

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter, dated August 6, 1991, requests our assurance that we would not recommend that the Commission take any enforcement action if certain trusts (the "Trusts"), established by Greenwich Capital Acceptance, Inc. (the "Company") and whose assets consist primarily of loans secured by ownership interests in cooperative housing (the "Coop Loans"), 1/ offer pass-through certificates (the "Certificates") 2/ evidencing undivided interests in the assets of the Trusts without registering as investment companies in reliance on Section 3(c)(5)(C) or, in the alternative, Section 3(c)(5)(A) of the Investment Company Act of 1940 (the "1940 Act"). 3/

You have indicated that the Company formed the Trusts under pooling and servicing agreements similar to those commonly used in the formation of trusts that publicly offer mortgage-backed pass-through certificates. The Company contributed the Coop Loans it acquired from the Resolution Trust Corporation (the "RTC") 4/ to the Trusts in exchange for all of the

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1/ The Trusts are passive entities and, with the exception of reinvesting distributions on the Coop Loans in the list of permitted investments described in your letter, are fixed.

2/ You state that the Certificates are neither redeemable securities, periodic payment plan certificates, or face-amount certificates.

3/ Section 3(c)(5) of the 1940 Act, in part, excepts from the definition of an investment company any person that is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type, or periodic payment plan certificates, and

> is primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring ... obligations representing part or all of the sales price of merchandise, insurance, and services; ... and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

4/ The Company, as sponsor of the Trusts, purchased through affiliates the RTC's interest in approximately $700 million in principal amount of existing Coop Loans.

Certificates. 5/ You represent that at least 80% of the assets of each Trust consist of Coop Loans and that the Coop Loans in each Trust are serviced by an independent third party servicer. 6/ Moreover, the assets of each Trust consist of a separate fixed pool of Coop Loans. 7/

The Company has already sold Certificates representing interests in several of the Trusts in reliance on Section 3(c)(1) of the 1940 Act. 8/ However, you have stated that the Company

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5/ You state that the Company may acquire new Coop Loans in the future and establish additional Trusts in reliance on any no-action position taken by the Division in response to your incoming letter or on any applicable statutory exception under the 1940 Act or exception or exemption created by any rule thereunder.

6/ We take the view that, with respect to issuing no-action letters under Section 3(c)(5)(C), a company is not excepted under Section 3(c)(5)(C) unless at least 55% of its assets consist of "mortgages and other liens on and interests in real estate" ("55% test") and the remaining 45% of its assets consist primarily of real estate-type interests ("45% test"). See, e.g., NAB Asset Corporation (pub. avail. June 20, 1991); Citytrust (pub. avail. Dec. 19, 1990); Prudential-Bache Securities, Inc. (pub. avail. Aug. 19, 1985); Salomon Brothers, Inc. (pub. avail. June 17, 1985). To meet the 45% test, a company must invest at least 25% of its total assets in real estate-type interests (subject to reduction to the extent that it invests more than 55% of its total assets in assets meeting the 55% test) and may invest no more than 20% of its total assets in miscellaneous investments. See, e.g., NAB Asset Corporation; Citytrust; United Bankers, Inc. (pub. avail. March 23, 1988); La Quinta Motor Inns, Inc. (pub. avail. Jan. 4, 1989).

7/ The existing Trusts will not acquire new Coop Loans except as a substitute for existing Coop Loans where the documentation for such Coop Loans may be deemed defective or where a breach of warranty concerning such Coop Loans is found to exist.

8/ Section 3(c)(1) of the 1940 Act provides an exception to the definition of an investment company for

> any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities.

wishes to sell Certificates (and facilitate the sale and resale of Certificates in the secondary market) without being subject to the constraints of that Section, in particular, the 100 beneficial owner limitation. 9/

Each Coop Loan is a purchase money loan secured fully and exclusively by the borrower's interest in a cooperative apartment ("Coop Apartment"), which interest consists of (a) shares of stock (the "Shares") in a cooperative housing corporation and (b) a proprietary lease (the "Lease") accompanying the Shares and entitling the owner of the Shares to reside in a Coop Apartment. The Coop Loans were originated to finance or refinance the purchase of Coop Apartments, and, according to your letter, represent, in effect, first liens on the Shares and Leases. 10/

You state that, while the security interest held by a lender in a Coop Loan is not technically a mortgage, it falls under the rubric of "other liens on and interests in real estate" within the meaning of Section 3(c)(5)(C). You note that the treatment of cooperative housing in Federal legislation, 11/ Supreme Court, 12/ lower Federal court and state court decisions, 13/ and

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9/ The Certificates of each series have been issued on both a senior and a subordinated basis. Your letter states that, with the exception of a relatively small amount of subordinated Certificates which it proposes to retain, the Company intends to place the balance of the Certificates with third party investors.

10/ Although the state law under which a lender in a Coop Loan can realize upon its collateral in the event of a default may differ from that in a mortgage foreclosure, you maintain that, at least with respect to New York law, the end result is the same; in either case, the lender acquires the collateral. We note that, in your discussion of the lender's rights in a Coop Loan, you refer to New York practice because, at the time the Trusts were created, more than 99% of the principal amount of the Coop Loans related to Coop Apartments located in New York.

11/ See Section 3(a)(41) of the Securities Exchange Act of 1934 (the "1934 Act") and Sections 860G(c)(3)(A) and 163(h)(5)(B) of the Internal Revenue Code.

12/ In United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), the Supreme Court held that shares of stock held in a government subsidized cooperative housing project in New York City did not constitute "securities" within the purview of the Securities Act of 1933 (the "1933 Act") and the 1934 Act. In deciding that the transaction in question was not

(continued...)

Division no-action responses support considering Coop Loans to be within Section 3(c)(5)(C). While much of your cited authority focuses primarily on the share ownership aspect of cooperative housing, you emphasize that the proprietary lease aspect reveals the real estate nature of cooperative housing. 14/ You maintain that the shares of stock attributable to ownership of a cooperative housing unit are essentially a technical addition to such real estate ownership. Finally, you assert that the Division previously recognized the real estate nature of cooperative housing in the context of the 1940 Act in D.B.G. Property Investors, Inc. (pub. avail. Dec. 29, 1986). In that letter, the staff stated that it would not recommend any enforcement action to the Commission under the 1940 Act if, without registering under that act, the proposed partnership made a public offering of its securities and invested the proceeds thereof in condominium units and occupied cooperative and residential apartments.

On the basis of the facts and representations made to us in your letter and without necessarily agreeing with your legal analysis, we would not recommend any enforcement action to the Commission if the Trusts offer the Certificates without registering as investment companies under the 1940 Act in reliance on Section 3(c)(5)(C). Because this response is based on representations made to the Division, you should note that any

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12/(...continued)
within the scope of the 1933 Act or the 1934 Act, the Court noted that "the purchasers were interested in acquiring housing rather than making an investment for profit..."

13/ You represent that state courts often treat the interests created by cooperative apartment leases and shares in the same manner as realty, although the result may differ depending on the context. In particular, you note that state courts in New York have found certain statutory provisions governing real property to apply to cooperative housing.

14/ The staff has recognized other types of leasehold interests as "real estate" for purposes of Section 3(c)(5)(C) in prior no-action letters. See, e.g., NAB Asset Corporation; Health Facility Credit Corp. (pub. avail. Feb. 6, 1985).

different facts or circumstances might require a different conclusion. Further, this response expresses only the enforcement position of the Division and does not purport to express any legal conclusions on the questions presented.

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