VIA EMAIL (RULE-COMMENTS@SEC.GOV)

November 7, 2011

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
Attn: Ms. Elizabeth M. Murphy, Secretary

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

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding Release No. IC-29778; File No. S7-34-11, dated September 7, 2011 (the "Concept Release),[2] relating to the treatment of mortgage-related pools under the Investment Company Act of 1940, as amended (the "Investment Company Act").

The Concept Release seeks input as to whether the Commission should take action to clarify prior guidance on the scope of Section 3(c)(5)(C) based on the Commission's concern that there may be interpretive issues affecting the industry and, if so, what sort of action should be taken. As discussed below, it is ASF's view that interpretive guidance affirming prior Staff positions would be useful, so long as such guidance does not foreclose the opportunity for further development as innovation continues to arise. The Concept Release also inquires as to how mortgage companies that rely on Section 3(c)(5)(C) differ from registered investment companies that invest in mortgage-related assets. As to this point, ASF submits that the fact that registered investment companies may invest in certain assets that are also held by Section 3(c)(5)(C) companies does not compel the conclusion that Section 3(c)(5)(C) companies should not

[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues to promote further growth, innovation and efficiency in the U.S. securitization market. ASF institutions include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

[2] *Concept Release: Companies Engaged in the Business of Acquiring Mortgages and Mortgage-Related Instruments*, Release No. IC-29778; File No. S7-34-11, 76 Fed. Reg. 55300 (September 7, 2011).

One World Financial Center, 30th Floor ■ New York, NY 10281-0006 ■ 212.412.7100
Columbia Center ■ 1152 15th Street, N.W., Suite 100 ■ Washington, D.C. 20005-1706 ■ 202.400.3600
www.americansecuritization.com

continue to enjoy an exception from the Investment Company Act; subjecting these companies to the Investment Company Act would have significant, adverse effects on investors and markets well in excess of any investor protection benefits that might inure.

As discussed below, and in a letter submitted by ASF under separate cover discussing the Commission's Advance Notice of Proposed Rulemaking related to Rule 3a-7 under the Investment Company Act published concurrently with the Concept Release,[3] Section 3(c)(5)(C) is critical to those in the capital markets who provide mortgage-related credit, or provide liquidity allowing for the extension of such credit, to consumers and businesses, including small and middle market businesses that are primary engines of job growth for our economy. Section 3(c)(5)(C) issuers, particularly, promote housing growth which, in turn, creates jobs across a wide range of trades. Unnecessary or ill-considered changes that would contract Section 3(c)(5)(C) or lead to regulatory or market uncertainty would interfere with this function. Section 3(c)(5)(C), as it was written by Congress and interpreted by the Commission and its Staff, has worked well for decades and does not need to be changed. ASF believes that, as the Commission reviews and makes decisions related to the concepts presented in the Concept Release, it must take into account: the Congressional mandate behind Section 3(c)(5)(C); the importance of assuring continued sources of liquidity to allow individuals and businesses (particularly, small and middle market businesses) to borrow in order to finance residential and commercial real estate that is a key engine that can drive economic recovery and growth; and Section 2(c) of the Investment Company Act which requires the Commission, when "engaged in rulemaking . . . [to] consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." ASF strongly believes that any investor protection gains that might result from narrowing the Section 3(c)(5)(C) exception would be dwarfed by the harm that would be done to market efficiency, competition and capital formation if certain Real Estate Investment Trusts ("REITs") and others that currently rely on Section 3(c)(5)(C) were required to comply with the strictures of the Investment Company Act, even though Congress recognized, in providing the exception, that these requirements often are not relevant to or consistent with the securitization business.[4]

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[3] *Advance Notice of Proposed Rulemaking: Treatment of Asset Backed Issuers under the Investment Company Act*, Rel. No. IC-29779 (Aug. 31, 2011) 76 FR 55308 (Sept. 7, 2011) (the "ANPR"). ASF has submitted, under separate cover, comments to the ANPR.

[4] The Commission and its Staff also recognize that securitizations, whether reliant on Section 3(c)(5) or Rule 3a-7, may "meet the definition of an investment company under the Investment Company Act, but they generally cannot operate under certain of the Investment Company Act's requirements and restrictions." The ANPR at 55308. *See also, Protecting Investors: A Half Century of Investment Company Regulation*, The Treatment of Structured Finance under the Investment Company Act 1-101 (May 1992) (the "Protecting Investors Report"), a report in which the Staff of the Division of Investment Management (the "Staff") surveyed the then fifty-year history of the Investment Company Act and made recommendations for potential improvements; *Exclusion from the Definition of Investment Company for Structured Financings*, Investment Company Act Release No. 18736 (May 29, 1992), 57 FR 23980 (June 5, 1992) (the "Proposing Release"); *Exclusion from the Definition of Investment Company for Structured Financings*, Investment Company Act Release No. 19105 (Nov. 19, 1992), 57 FR 56248 (Nov. 27, 1992) (the "Adopting Release").

MORTGAGE COMPANIES RELYING ON SECTION 3(C)(5)(C) FALL WITHIN THE SCOPE OF THE EXCLUSION AS ORIGINALLY INTENDED BY CONGRESS

The types of companies that currently rely on Section 3(c)(5)(C) may have different areas of focus within the real estate market but each of these companies falls within the scope of the type of issuer that Congress intended to exclude from the substantive restrictions of the Investment Company Act. Section 3(c)(5)(C) was intended to exclude from the definition of investment company "companies dealing in mortgages." Consistent with this purpose, Section 3(c)(5)(C) is broadly drafted to include in its scope a variety of companies that are involved in the mortgage markets, whether through origination and holding of "mortgages and other liens on and interests in real estate" or through the acquisition of such assets in the secondary market. Moreover, as discussed below, prior guidance interpreting Section 3(c)(5)(C) has appropriately considered the statutory terms in confirming that new and innovative structures that are within the purpose and intent of Section 3(c)(5)(C) are able to rely on the exception.

While we recognize that certain registered investment companies may choose to invest in mortgages and mortgage-related securities, we do not agree that similarities to closed-end investment companies should call into question the validity of the Investment Company Act exception specifically allowed by Congress.[5] Rather, we believe that Congress's recognition of the potential similarities (and the inconsistency of the Investment Company Act with the Section 3(c)(5)(C) business) is what led to the exception.[6] The exception, therefore, promotes competition, efficiency and capital formation by allowing issuers to provide liquidity to mortgage and real-estate markets using different structures which may be attractive to different types of investors. Forcing agency or mortgage REITs to conform to the same requirements as,

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ASF views both Section 3(c)(5)(C) and Rule 3a-7 as having continued, separate value as exceptions for securitization transactions and issuers and believes, as discussed in this letter and our comments to the ANPR, that narrowing either exception would have a negative impact on investors and markets. Moreover, and as discussed in greater detail in our comments to the ANPR, while we understand that Rule 3a-7 provides an exception that is available for some securitizations that could rely on Section 3(c)(5), ASF does not believe that it would be appropriate for the Commission to alter its reasonable interpretations of Section 3(c)(5)(C) so as to compel issuers to resort to Rule 3a-7 or to import trading or other restrictions set forth in Rule 3a-7 into Section 3(c)(5)(C), as the terms and conditions of that rule may not be appropriate for many Section 3(c)(5)(C) issuers because Rule 3a-7 includes requirements that are inconsistent with structures commonly used under Section 3(c)(5)(C).

[5] Section 3(c)(5)(C) was among the original exceptions from the definition of an investment company introduced into the Investment Company Act in 1940. In 1970, Section 3(c)(5)(C) was amended to prohibit issuers that rely on the exception from issuing "redeemable securities" in order to distinguish mortgage companies and other Section 3(c)(5)(C) issuers from mutual funds, which, by definition, issue redeemable securities. Congress did not, at that time, consider a need to distinguish Section 3(c)(5)(C) issuers from closed-end funds, which do not generally issue redeemable securities.

[6] Put another way, if the Section 3(c)(5)(C) business were not, absent the exception, an investment company business, the exception would be unnecessary. Instead, it is appropriate to view the exception as providing a carve-out from the Investment Company Act where the nature of the assets held (*i.e.*, "mortgages and other liens on and interests in real estate") are such that Congress viewed application of the Investment Company Act as unnecessary.

for example, a closed-end GNMA Fund would serve only to reduce competition and, therefore, available capital.

SECTION 3(c)(5)(C) HAS ENCOURAGED THE DEVELOPMENT OF THE MORTGAGE MARKETS; CHANGE COULD BE DETRIMENTAL TO OUR ECONOMY

The Section 3(c)(5)(C) exception fosters growth and innovation in the residential and commercial real estate markets in the United States. With this exception, Congress recognized the unique importance of the mortgage markets to the United States economy. REITs and other companies relying on Section 3(c)(5)(C) have made significant investments in the residential and commercial mortgage origination business that could not otherwise have been made by traditional investment companies. Likewise, these companies have contributed significant capital to the purchase and acquisition of mortgages and mortgage-backed securities in the secondary mortgage market, promoting competition, providing efficiency and driving capital formation in this critical sector. As a result, the American consumer benefits from one of the most efficiently priced secondary mortgage markets. The demand for mortgages and mortgage-related securities generated by these companies has helped keep the interest rates on residential and commercial mortgages at historic lows, which has directly or indirectly benefited every U.S. consumer. Moreover, with the recent upheaval in the banking industry, it has now become even more important to maintain this exception so that mortgage companies can supplement the balance sheet capacity of the banking system. This is especially important at a time when the ability of the banks to securitize mortgages is constrained because of global market conditions. If these issuers were required to comply with the Investment Company Act, the affiliate transaction restrictions might preclude them from serving as financing vehicles for affiliated originators and the asset coverage requirements would require them to de-leverage their holdings. This would result in decreased efficiency, reduced availability of capital, fewer future investments and, potentially, further destabilizing of current markets as these companies would be compelled to sell off large volumes of mortgages and related interests, causing additional downward pressure.

For the reasons discussed in this letter, we believe the Section 3(c)(5)(C) exception continues to be well suited to serve the purposes for which it was adopted and that changes to the exception are not warranted. We also believe that the exception as drafted and interpreted furthers the Commission's goal of encouraging efficient capital formation. Given the importance of the mortgage markets to the U.S. economy, care should be taken to assure that no change to Section 3(c)(5)(C), or the interpretations thereof, would have the effect of reducing the availability of mortgage credit to consumers and businesses. As we have seen over the past several years, reductions in available mortgage credit have direct and deleterious impact on the American public. Any further restriction would only exacerbate the current fragile economic environment and could well derail the nascent recovery in the U.S. real estate markets. This would be directly contrary to clearly stated goals of the administration to broaden the availability of affordable mortgage financing (especially refinancing), as demonstrated by the Federal Housing Finance Agency's recent revisions to extend eligibility for the Home Affordable Refinance Program to a greater number of borrowers. We caution against any actions with respect to Section 3(c)(5)(C) that could reduce the amount of capital committed to the U.S. real estate markets at this point in time.

INVESTORS IN SECTION 3(c)(5)(C) COMPANIES HAVE THE PROTECTION OF EXISTING RULES AND REGULATIONS THAT MITIGATE THE CONCERNS OF THE COMMISSION

In the Concept Release, the Commission noted its concern that reliance on Section 3(c)(5)(C) may raise the potential for certain abuses that have affected pooled investment vehicles, including deliberate misvaluation of a company's holdings, extensive leveraging, and overreaching by insiders. While we recognize that there have been significant developments in the sector since 1940, when the precursor to Section 3(c)(5)(C) was adopted, and 1970, when Section 3(c)(5)(C) was amended to take its current form, we do not believe that these developments have fundamentally altered the analysis such that Congress's decision to extend the Section 3(c)(5)(C) exception should be reconsidered. Rather, it is our belief that there are numerous investor protection mechanisms already in place under existing statutes and regulations that mitigate these potential abuses, where relevant.

The limited liquidity of certain investments in Section 3(c)(5)(C) companies is disclosed to investors under the disclosure regimes already in place for public offerings or private placements of securities. This disclosure results in a generally more sophisticated investor base. Moreover, in many cases, investors have the opportunity to conduct their own due diligence on the assets of the companies.

We also believe that the existing disclosure and reporting regimes contained in the Securities Act of 1933, the Securities Exchange Act of 1934 and the related regulations promulgated thereunder require the disclosure of the procedures, policies and operating history of the issuer, mitigating the potential for abuse, including misvaluation and overreaching by insiders. In addition, many Section 3(c)(5)(C) companies are REITs that are subject to numerous additional requirements under the Internal Revenue Code. Public companies relying on Section 3(c)(5)(C) would also be subject to the requirements of the Sarbanes-Oxley Act as well as any requirements applicable to the specific exchange on which such companies have listed their securities. These requirements include significant investor protections, including corporate governance rules relating to independent directors and independent auditors. We also note that many of the investor protections contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") would be applicable to the operation and securities offerings of companies relying on Section 3(c)(5)(C).

With respect to any offerings of asset-backed securities which may rely on Section 3(c)(5)(C), the disclosure and reporting regime set forth in Regulation AB is designed to ensure transparency in transactions undertaken by the issuer and thereby prevent the aforementioned abuses. Regulation AB (and "Regulation AB II", when adopted), the Dodd-Frank Act and related regulations (such as the Rule 193 review of assets) and other related securities laws and regulations applicable to a public or private offering of asset-backed securities require the disclosure of the material terms of an asset-backed securities transaction, as well as risk factors and potential conflicts of interest associated therewith. The rating agencies, underwriter or placement agent, issuer and certain investors in a rated transaction, and the underwriter or placement agent, if any, sophisticated investors and issuer in an unrated transaction, typically review and analyze the terms set forth in the organizational, transaction and disclosure documentation associated with the asset-backed securities transactions to assure themselves that the asset-backed securities transaction is structured to avoid self-dealing, dumping of assets and similar abuses. Rating agencies and other participants in asset-backed securities transactions also review and analyze the requirements and restrictions in the transaction documents regarding the eligibility of the assets that can be included in the transaction, acquisition and disposition restrictions and the likelihood that the cash flow from such assets will be sufficient to repay holders of asset-backed securities based on various models and assumptions.

For these reasons, we believe that the Commission's goal should be to ensure that the exception continues to be administered in a manner that is consistent with the purposes and policies underlying the exception, taking into account the public interest and the protection of investors as relevant to these issuers, but not in such a manner as to unnecessarily impose investment company concepts on a business that Congress and the Commission have both viewed as fundamentally different from the business of investment companies.

THAT SECTION 3(c)(5)(C) ALLOWS COMPANIES TO TAKE ON LEVERAGE OR ENGAGE IN AFFILIATE TRANSACTIONS NOT AVAILABLE TO INVESTMENT COMPANIES PROMOTES COMPETITION, EFFICENT MARKETS AND AVAILABILITY OF CAPITAL

We are also concerned that the Concept Release does not adequately consider whether a "potential abuse" exists in light of the nature and structure of Section 3(c)(5)(C) issuers but, instead, ascribes to the category "abuse" any circumstance where a Section 3(c)(5)(C) issuer may have greater freedom of action than an investment company. The mere fact that Section 3(c)(5)(C) issuers can deal more freely with affiliates or incur more leverage than a registered investment company does not, in itself, mean that Section 3(c)(5)(C) issuers are ripe for "abusive" affiliate transactions or leverage. Rather, it reflects prior Congressional determinations that these sorts of issuers ought to have greater freedom of action to conduct their business than would a registered investment company. Even so, a change in course that would subject these companies (including, particularly, REITs that are, or hold majority interests in, Section 3(c)(5)(C) issuers) to the Investment Company Act could harm competition, hinder capital formation and deprive investors of the ability to participate in good and sound investments.

In fact, some of the "abuses" cited by the Concept Release confer significant benefits on the market and investors, without actual risk of material harm, given the other protections that exist in other regulatory regimes and, more importantly, the competitive market. For example, the ability to incur leverage beyond what is permissible for a registered closed-end fund can support the payment of regular dividends to REIT investors, since the Internal Revenue Code requires distribution of a significant percentage of a REIT's income. Similarly, many Section 3(c)(5)(C) issuers originate or support origination activities by affiliates. Structures where affiliates are involved in the origination of mortgages that will be held by a Section 3(c)(5)(C) securitization or subsidiary promote efficiency that would be lost if the affiliate transaction restrictions of the Investment Company Act applied.

SECTION 3**(c)**(5)(C) EXISTING NO-ACTION LETTERS SHOULD BE CONFIRMED THROUGH INTERPRETIVE GUIDANCE; ANY NARROWING SHOULD BE A LEGISLATIVE, NOT ADMINISTRATIVE, DECISION

We do not believe that the current landscape of Staff no-action letters is creating an environment that is inconsistent with investor protection or fundamentally changing the intended scope of Section 3(c)(5)(C). However, in light of the many different types of mortgage companies that have come to rely on the exception and the ever-expanding types of mortgage-related investments available in the marketplace, we believe that the industry could benefit from a more systematic approach in how guidance is communicated. We are particularly concerned that Staff views are communicated selectively through the registration comment process associated with public offerings, such that not all issuers have access to these views and, in some cases, it is not clear what the view is as to a particular asset or structure. For that reason, we suggest that the Commission first issue interpretive guidance, in the form of a formal interpretive release, to confirm the fundamental points covered by the Staff no-action letters with respect to the scope of qualifying assets (*e.g.*, the Staff's fundamental equivalence test). We would also expect that, as new issues are brought to the attention of the Commission or its Staff, future guidance would be provided through further interpretive releases following notice and comment, or through public no-action or interpretive letters appropriately vetted within the Staff to assure consistency of view.

We believe that the industry would benefit from a comprehensive set of interpretive guidance that would put all industry participants on a level playing field. The interpretive guidance approach would still preserve the flexibility that has greatly benefited the mortgage companies relying on Section 3(c)(5)(C). The ability of this exception to evolve over time in parallel with the new developments in the mortgage finance market is critically important to market participants. Importantly, this approach provides flexibility for the Commission or the Staff to provide guidance that will encourage the development of innovative mortgage products by including them within the scope of the exception through interpretations. Moreover, by assuring broad public dissemination of Commission and Staff positions (as opposed to current circumstances where Staff views are communicated principally through the registration process), issuers will be working on a level playing field.

A structure of formal interpretive guidance supplemented, as necessary, by the no-action process strikes the correct balance between the lengthy and rigid rulemaking process which could stunt innovation and the current practice of disseminating Staff views through the registration comment process. Moreover, because of the importance of Section 3(c)(5)(C) to the mortgage finance markets and the availability of consumer credit and capital formation generally, we believe that all market participants should receive new interpretations simultaneously, and in a clear and efficient manner. Doing so will alleviate any concerns that the exception is being applied by the industry either too narrowly (such that there are fewer resources being invested efficiently in the mortgage markets) or too broadly (such that the exception could be used by those with a proclivity to avoid the Investment Company Act in circumstances where it should properly be applied). This balance should allow the mortgage markets to continue to benefit from the interpretations that have been developed over the last fifty years by the Commission and its Staff.

ASF appreciates the flexibility the Commission and the Staff have shown in addressing innovations in the mortgage markets. This flexibility has been vital to market participants. ASF, therefore, cautions against any retrenchment in the scope of the exception that would run contrary to this long history and believes that an approach which relies on rulemaking may have the effect of ossifying the exception. As described previously in this letter, we do not believe that investor protection is meaningfully enhanced by diminishing the availability of Section 3(c)(5)(C) and, moreover, the likely negative effects on innovation, efficiency, competition and capital formation in the mortgage markets clearly outweigh any perceived investor protection benefits. Therefore, while we believe that the Commission could (and should) now, and in the future, through the interpretive process (preferably through a release confirming current interpretations followed by future releases or no-action/interpretive letters of the Staff interpreting the application of the statute and Commission guidance to innovations in the market) take steps to ensure that the industry enjoys the certainty necessary to continue to do the good work that it has done in providing liquidity, we are concerned about any diminution to the status quo being imposed through agency or Staff action. Rather, given the importance of Section 3(c)(5)(C) to the economy as a whole, we believe that any narrowing of the exception should result only from the legislative process. It is important to note that in developing the Dodd-Frank Act, Congress did not propose any changes to the scope of the Section 3(c)(5)(C) exception.[7] As discussed above, the basic premise that companies holding mortgage and mortgage-related assets should not be regulated as, and are distinct from, traditional investment companies bears the Congressional imprimatur. We believe, therefore, that Section 3(c)(5)(C), as it has been interpreted through public guidance from the Commission and its Staff, represents (or at least implies) Congress's intent that these issuers should not be regulated as investment companies. Although we are certainly opposed (for the reasons set forth throughout this letter) to any change that would adversely impact the mortgage markets, we believe that such a sweeping change, which would likely have profoundly deleterious effects on efficiency, competition and capital formation in the U.S. economy, should be implemented only through legislative action.

[7] Given the sweeping reforms introduced by the Dodd-Frank Act, we expect that Congress considered "everything as on the table" for reform. While the legislation was pending, Representative Frank commented that "Senator Dodd has put forward a thoughtful, comprehensive bill," and stated that the House and Senate would work together to produce a "tough, comprehensive bill." Rep. Barney Frank, House Financial Services Committee Chairman, Frank Statement on Senator Dodd's Financial Reform Package (Mar. 15, 2010), *available at* http://democrats.financialservices.house.gov/press/PRArticle.aspx? NewsID=584. We also expect that Congress, in making decisions about what reforms to include in Dodd-Frank, was fully aware of the Commission's existing interpretations of Section 3(c)(5)(C).

SECTION 2(c) OF THE INVESTMENT COMPANY ACT

Section 2(c) of the Investment Company Act requires the Commission, in its rulemaking, to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Given the growth, innovation and resilience of the mortgage markets which has been supported by the many mortgage companies relying on Section 3(c)(5)(C), the need for these mortgage companies to provide credit and liquidity that is crucial to the resurgence of the mortgage markets, the fact that investor protections are embedded in other existing securities laws and regulations, and the fact that changing the exception in the currently fluctuating regulatory environment could have significant negative unintended consequences, we respectfully suggest that the Commission not propose changes to the scope of Section 3(c)(5)(C) or, should the Commission desire to propose changes, take care that any such proposed changes not jeopardize the existing efficiency, competition and capital formation in the mortgage markets.

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ASF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's Concept Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me via telephone at 212.412.7107 or via email at tdeutsch@americansecuritization.com, Evan Siegert, ASF Managing Director, Senior Counsel, via telephone at 212.412.7109 or via email at esiegert@americansecuritization.com, or ASF's outside counsel on this letter, Ralph R. Mazzeo of Dechert LLP, via telephone at 215.994.2417 or via e-mail at ralph.mazzeo@dechert.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

cc: Mary L. Schapiro, Chair
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Jr., Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith Cross, Director, Division of Corporation Finance
Paula Dubberly, Deputy Director (Policy and Capital Markets), Division of Corporation Finance
Katherine W. Hsu, Chief, Office of Structured Finance
Eileen Rominger, Director, Division of Investment Management
Nadya Roytblat, Assistant Chief Counsel, Office of the Chief Counsel, Division of Investment Management
Rochelle Kauffman Plesset, Senior Counsel, Office of the Chief Counsel, Division of Investment Management