

**Alert | Financial Regulatory & Compliance/  
Investment Management**



August 2019

## **Qualifying Assets Under Investment Company Act Section 3(c)(5)(C) Mortgage Exemption**

On Aug. 15, 2019, the staff of the Division of Investment Management at the U.S. Securities and Exchange Commission (the “Staff”) issued a significant **no-action letter**. The letter clarifies the treatment of certain assets held by an entity seeking to rely upon Section 3(c)(5)(C) to be exempt from registration as an investment company under the Investment Company Act of 1940. The letter recognizes that the way that mortgage lending companies conduct their business has changed significantly since the original adoption of the exemption, and contains the Staff’s pronouncements on how the test will be applied.

The exemption as adopted requires that an entity seeking to be exempt from registration pursuant Section 3(c)(5)(C) be primarily engaged in holding mortgages. The Staff has interpreted that language to require that the entity have not less than 55% of its total assets in “mortgages and other liens on ... real estate” (eligible assets), and that such assets taken together with other “real estate-type interests” must comprise not less than 80% of total assets. In recent years, the Staff has recognized that business and liability factors have caused mortgage lenders to utilize separate special purpose vehicles (SPVs) to hold specific mortgages, while the parent entity owns securities representing the ownership of the SPVs. The Staff logically concluded that, subject to relevant limitations, such securities of the SPVs can be treated as the functional equivalent of mortgages for purposes of the 55% test.

In this latest no-action letter, the Staff recognizes that further developments in the mortgage lending industry have created other classes of assets that also may be viewed logically as eligible assets. These asset classes relate to what happens when a company sells a mortgage or pool of mortgages. The letter identifies two categories of assets that may now be considered eligible assets when determining whether an entity has satisfied the 55% test. First, certain contractual rights that are created when a mortgage lender sells mortgages but retains the function of servicing the mortgages may now be counted toward the 55% requirement. Second, cash received upon such a sale that is intended to be reinvested in qualifying mortgage loans within 12 months also will be treated as an eligible asset.

Given the evolution in the way that many firms conduct their mortgage lending business, this modernization of the Staff interpretation will likely make it easier for affected firms to monitor and comply with the requirements of Section 3(c)(5)(C) going forward.

## Author

This GT Alert was prepared by **Steven M. Felsenstein**. Questions about this information can be directed to:

- [Steven M. Felsenstein](mailto:felsensteins@gtlaw.com) | +1 215.988.7837 | [felsensteins@gtlaw.com](mailto:felsensteins@gtlaw.com)
- Or your [Greenberg Traurig](#) attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.<sup>~</sup> Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.\* Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.\* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.*