
November 7, 2011

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

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

Dear Ms. Murphy:

PHH Corporation ("PHH"), on behalf of itself and its subsidiaries, is pleased to respond to the August 31, 2011 concept release¹ issued by the Securities and Exchange Commission (the "Commission") with respect to the status under the Investment Company Act of 1940, as amended (the "Investment Company Act") of certain companies that rely on the exclusion from the definition of investment company under Section 3(c)(5)(C) of the Investment Company Act ("Section 3(c)(5)(C)" or "3(c)(5)(C)"). We appreciate the Commission's interest in determining whether additional clarity is needed with respect to the applicability of the Section 3(c)(5)(C) exemption.

Although the Concept Release reiterates that Section 3(c)(5)(C) was enacted to exclude companies in the mortgage banking business from regulation under the Investment Company Act, we are writing to respectfully request that the Commission clarify that companies engaged primarily in *both* mortgage origination and the servicing of mortgages they have originated or to which they have otherwise acquired the servicing rights are engaged in the mortgage banking business and are, therefore, entitled to rely on Section 3(c)(5)(C) and to conduct their operations without restrictions on the means by which they finance their businesses, including through the use of leverage and the formation of financing vehicles (including real estate investment trusts ("REITs")). We are also writing to ask that the Commission clarify that issuers of whole loan-backed residential mortgage backed securities may continue to rely on Section 3(c)(5)(C) in addition to any other exemptions from the definition of investment company to which such issuers may be entitled to rely under the Investment Company Act. In addition, we have answered some of the specific questions in the Concept Release to the extent we believed they were not addressed elsewhere in this letter.

I. About PHH Corporation

A. Overview

PHH was incorporated in 1953 as a Maryland corporation. Between April 30, 1997 and February 1, 2005, we were a wholly owned subsidiary of Cendant Corporation (now known as Avis Budget Group, Inc.) and its predecessors that provided mortgage banking services, facilitated employee relocations and provided vehicle fleet management and fuel card services. On February 1, 2005, PHH began operating as an independent, publicly traded company pursuant to our spin-off from Cendant.

Through our wholly and majority-owned subsidiaries, we are a leading outsource provider of mortgage and vehicle fleet management services. We provide mortgage banking services to a variety of clients, including financial institutions and real estate brokers, throughout the U.S. Our mortgage banking activities include originating, purchasing, selling and servicing mortgage loans through our wholly owned

¹ Companies Engaged in the Business of Acquiring Mortgages and Mortgage-Related Instruments, SEC Rel. No. IC-29778 (Aug. 31, 2011) (the "Concept Release").

subsidiary, PHH Mortgage Corporation and its subsidiaries (collectively, "PHH Mortgage"). We provide commercial fleet management services to corporate clients and government agencies throughout the U.S. and Canada through our wholly owned subsidiary, PHH Vehicle Management Services Group LLC ("PHH Arval"). PHH Arval is a fully integrated provider of fleet management services with a broad range of product offerings, including managing and leasing vehicle fleets and providing other fee-based services for our clients' vehicle fleets.

We organize and present our business activities in three operating segments: (i) mortgage production/origination (ii) mortgage servicing and (iii) fleet management services. Our comments in this letter relate to our mortgage origination and mortgage servicing segments, the activities of which are described further below and are conducted through PHH Mortgage.

B. PHH Mortgage

(i) *Mortgage Production/Origination*

PHH Mortgage conducts our mortgage production/origination segment by providing mortgage services, including private-label mortgage services, to financial institutions and real estate brokers. PHH Mortgage generates revenue through fee-based mortgage loan origination services and the origination and sale of mortgage loans into the secondary market. PHH Mortgage generally sells the mortgage loans that it originates to secondary market investors, which include a variety of institutional investors, and typically retains the servicing rights on mortgage loans sold. During 2010, 95% of our mortgage loans were sold to, or were sold pursuant to programs sponsored by Fannie Mae, Freddie Mac or Ginnie Mae and the remaining 5% were to private investors.

PHH Mortgage includes PHH Home Loans, LLC (together with its subsidiaries, "PHH Home Loans"), which is a joint venture that we maintain with Realogy Corporation ("Realogy"). We own 50.1% of PHH Home Loans through our subsidiaries and Realogy owns the remaining 49.9% through their affiliates. We have the exclusive right to use the Century 21, Coldwell Banker and ERA brand names in marketing our mortgage loan products through PHH Home Loans and other arrangements that we have with Realogy.

PHH Mortgage's production/origination segment also includes our appraisal services joint venture, Speedy Title & Appraisal Review Services LLC, which provides appraisal services utilizing a network of approximately 2,200 third-party professional licensed firms offering local coverage throughout the U.S. and also provides credit research, flood certification and tax services. The appraisal services business is closely linked to the processes by which our mortgage operations originate mortgage loans and derives substantially all of its business from our various channels.

We originate mortgage loans through three principal business channels as described below.

(a) *PRIVATE LABEL SERVICES CHANNEL*. We are a leading provider of private-label mortgage loan originations for financial institutions and other entities throughout the U.S. In this channel, we offer a complete outsourcing solution, from processing applications through funding, for clients that wish to offer mortgage services to their customers but are not equipped to handle all aspects of the process cost-effectively. We also purchase closed mortgage loans from financial institutions including Merrill Lynch Credit Corporation, Key Bank and UBS.

(b) *REAL ESTATE CHANNEL*. We work with real estate brokers to provide their customers with mortgage loans. Through our affiliations with real estate brokers, we have access to home buyers at the time of purchase. We work with brokers associated with NRT Incorporated, Realogy's owned real estate brokerage business, brokers associated with Realogy's franchised brokerages ("Realogy Franchisees") and third-party brokers that are not affiliated with Realogy. NRT Incorporated is the largest owner and operator of residential real estate brokerages in the U.S. and Realogy is a franchisor of some of the most recognizable residential real estate brands. During the year ended December 31, 2010,

approximately 27% of our mortgage loan originations were derived from our relationship with Realogy and its affiliates. The following presents a summary of the relationships with Realogy-owned brokers and its franchisees and third-party brokers within the Real Estate Channel.

Realogy has agreed that the real estate brokerage business owned and operated by NRT Incorporated and the title and settlement services business owned and operated by Title Resource Group LLC will exclusively recommend PHH Home Loans as provider of mortgage loans to: (i) the independent sales associates affiliated with Realogy, excluding the independent sales associates of any Realogy Franchisee; and (ii) all customers of Realogy Services Group LLC and Realogy Services Venture Partner, Inc., excluding Realogy Franchisees. In general, our capture rate of mortgage loans where we are the exclusive recommended provider is much higher than in other situations.

Certain Realogy Franchisees have agreed to exclusively recommend PHH Mortgage as provider of mortgage loans to their respective independent sales associates. Additionally, for other Realogy Franchisees and third-party brokers, we endeavor to enter into separate marketing service agreements or other arrangements whereby we are the exclusive recommended provider of mortgage loans to each franchise or broker. We have entered into exclusive marketing service agreements with 5% of Realogy Franchisees as of December 31, 2010.

(c) *RELOCATION CHANNEL.* In this channel, we work with Cartus Corporation, Realogy's relocation business, to provide mortgage loans to employees of Cartus' clients. Cartus is the industry leader of outsourced corporate relocation services in the U.S. Substantially all of the originations through this channel during the years ended December 31, 2010, 2009 and 2008 were from Cartus.

(ii) *Mortgage Servicing*

We principally generate revenue in our mortgage servicing segment through fees earned from our servicing rights or from our sub-servicing agreements. Mortgage servicing rights are the rights to receive a portion of the interest coupon and fees collected from the mortgagors for performing specified mortgage servicing activities, which consist of collecting loan payments, remitting principal and interest payments to investors, managing escrow funds for the payment of mortgage-related expenses such as taxes and insurance, performing loss mitigation activities on behalf of investors, and otherwise administering our mortgage loan servicing portfolio. Mortgage servicing rights are created through the sale of an originated loan or through direct purchase of servicing from a third party.

II. Summary of Observations

A. Clarification is Needed Regarding the Availability of 3(c)(5)(C) for Businesses Engaged Primarily in Mortgage Origination and Servicing

(i) *Existing Asset-Based Thresholds for Determining 3(c)(5)(C) Compliance*

Section 3(c)(5)(C) generally excludes from the definition of investment company any person who is primarily engaged in, among other things, "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate." As noted in the Concept Release, the staff, in providing guidance on this exclusion, generally has focused on whether 55% of the issuer's assets will consist of mortgages and other liens on and interests in real estate (called "qualifying interests") and the remaining 45% of the issuer's assets will consist primarily of "real estate-type interests." In a no-action letter to Greenwich Capital Acceptance, Inc. (the "Greenwich Capital Letter"), the staff stated that it would not recommend enforcement action to the Commission where the applicant represented its intention to invest at least 25% of its total assets in real-estate type interests (subject to reduction to the extent that the issuer invested more than 55% of its total assets in qualifying interests) and no more than 20% of its total assets in miscellaneous investments.² The 55%, 25% and 20% asset composition thresholds in the Greenwich

² Greenwich Capital Acceptance, Inc., SEC No-Action Letter (Aug. 8, 1991).

Capital Letter are now widely utilized as a means of determining whether an entity may rely on 3(c)(5)(C).³ Entities that rely on 3(c)(5)(C) look to prior statements of the staff in no-action letters or to statements made by other 3(c)(5)(C)-reliant entities in registration statement comment letters on file with the Commission to determine whether assets may constitute "qualifying interests" or "real estate-type investments."

(ii) *Status of Businesses Engaged Primarily in Both Mortgage Origination and Mortgage Servicing Under Section 3(c)(5)(C) is Unclear*

The staff has previously expressed the view that mortgage loans secured by real estate are "qualifying interests" for purposes of 3(c)(5)(C).⁴ To our knowledge, the staff has not, however, indicated whether mortgage servicing rights would constitute either "qualifying interests" or "real-estate related interests" for purposes of 3(c)(5)(C). Any business that is principally engaged in *both* mortgage origination and mortgage servicing, like PHH Mortgage, therefore has difficulty relying with certainty on 3(c)(5)(C) under existing guidance. Although the mortgage loan assets such businesses acquire through their production/origination activities are likely to constitute "qualifying interests," the treatment of their mortgage servicing rights under 3(c)(5)(C) remains uncertain. We do not believe, therefore, that the existing asset test-related guidance on 3(c)(5)(C) is particularly helpful to businesses engaged primarily in mortgage origination and servicing, although it is our view that such businesses were within the class of entities that 3(c)(5)(C) was originally intended to benefit.

(iii) *Mortgage Originators and Mortgage Servicers are Mortgage Bankers Engaged in Non-Investment Company Businesses*

As noted in the Concept Release, Section 3(c)(5)(C) was originally intended to exclude from regulation under the Investment Company Act companies that were engaged in the mortgage banking business and that did not resemble, or were not considered to be, issuers in the investment company business.⁵ While "mortgage banking business" is not defined under the Investment Company Act, issuers engaged in both mortgage origination and the servicing of mortgage loans have used the term "mortgage banking" to describe their businesses or have otherwise been identified as mortgage bankers.⁶ In addition, the staff's prior no-action letter positions are consistent with the view that neither mortgage origination nor mortgage servicing is an investment company business subject to regulation under the Investment Company Act.⁷ We believe, therefore, that entities like PHH Mortgage that are engaged primarily in mortgage origination and servicing are *bona fide* mortgage bankers engaged in non-investment company businesses and may, therefore, rely on 3(c)(5)(C) if they do not otherwise issue redeemable securities, face-amount certificates of the installment type or periodic plan certificates.

(iv) *Other Exemptions From the Definition of Investment Company for Mortgage Originators and Mortgage Servicers May be Inapplicable or Impractical*

³ See, e.g., SEC Staff Comment Letters, PREFERRED APARTMENT COMMUNITIES INC. (Jul. 18, 2011) and SEC Staff Comment Letters, AMERICAN REALTY CAPITAL HEALTHCARE TRUST INC. (Apr. 5, 2011).

⁴ See, e.g., Statement of the Commission as to the Application of the Federal Securities Laws to Real Estate Investment Trusts, 5 Fed. Sec. L. Rep. at 36,329.

⁵ Concept Release at 4.

⁶ See, e.g., First Deed Corp., SEC No-Action Letter (Mar. 29, 1979) ("First Deed"). "First Deed intends to engage in the mortgage banking business, with primary emphasis on the servicing of mortgage loans originated by it and possibly by others." Id. at 2. See also, H. & Val J. Rothschild, Inc., SEC No-Action Letter (Sep. 5, 1976) ("Rothschild").

⁷ First Deed at 7. Rothschild at 10.

Although Section 3(b)(1) of the Investment Company Act ("3(b)(1)") provides that an issuer that is primarily engaged in one or more non-investment company businesses is not an investment company for purposes of the Investment Company Act, 3(b)(1) applies only to entities that conduct their non-investment company businesses directly or through wholly-owned subsidiaries. To the extent that an issuer conducts such businesses directly or through *majority-owned* subsidiaries (like PHH Mortgage), it may apply for a Commission order exempting it from the definition of investment company pursuant to Section 3(b)(2) of the Investment Company Act. We note, however, that the exemptive order process is lengthy and may not always be an efficient alternative to what we believe should be a readily identifiable exemption from investment company status for mortgage bankers in Section 3(c)(5)(C). In addition, mortgage originators and servicers must make determinations about their status under the Investment Company Act on an ongoing basis in order to continue their operations, and may not be able to complete the exemptive process without having to devote substantial resources to complete complicated interim analyses of their status as investment companies.

- (v) *Proposal to Create New Definition of "Mortgage Banking Business" Pursuant to Commission Rulemaking to Include Businesses Engaged Primarily in Mortgage Origination and Mortgage Servicing and to Clarify That Such Businesses May Rely on Section 3(c)(5)(C)*

It is our view, therefore, that the Commission may provide meaningful and much needed clarity to mortgage banking businesses like PHH Mortgage by permitting entities engaged primarily in the origination of mortgages and in the servicing of mortgages that they have originated (or to which they have otherwise acquired the servicing rights) to rely on Section 3(c)(5)(C) in addition to any other exemptions from investment company determination to which they may be entitled under the Investment Company Act. We respectfully submit that, pursuant to its rulemaking authority under the Investment Company Act, the Commission consider creating a new definition of "Mortgage Banking Business" for purposes of 3(c)(5)(C) to include mortgage origination and mortgage servicing activities and to clarify that entities engaged primarily in the Mortgage Banking Business may rely on 3(c)(5)(C) without reference to the asset tests set forth in the Greenwich Capital Letter.

- (vi) *Mortgage Originators and Mortgage Servicers Operate Non-Investment Company Businesses and Should Not be Subject to Restrictions on Leverage and Other Activities Used to Finance Their Businesses (Including the Formation of REITs)*

As noted above, prior staff guidance is consistent with the view that mortgage origination and mortgage servicing are non-investment company operating businesses. To the extent that an entity or group of entities is primarily engaged in one or more of these activities, it is our view that such entities are not analogous to the leveraged mortgage-related pools referenced in the Concept Release and should continue to be able to utilize leverage without restriction as needed to support their operating businesses. We further believe that such entities should continue to be able to finance their businesses without new restrictions on the means by which they obtain leverage or structure their financings. Consequently, we respectfully request that the Commission impose no leverage or other new restrictions on financing vehicles, including REITs, that may be formed by an entity or group of entities that is primarily engaged in mortgage origination and/or mortgage servicing businesses to the extent such vehicles are used to provide financing to or to otherwise support such operating businesses.

B. 3(c)(5)(C) Should Continue to Apply to Issuers of Whole Loan-Backed Securities

We note that the staff has previously taken the position that a security representing the entire ownership interest in a pool of mortgages (a "whole pool certificate") may be a "qualifying interest" for purposes of Section 3(c)(5)(C) if it provides the holder of those securities with the same economic experience as a person holding the underlying mortgages directly.⁸ It also appears as if the "same economic experience" analysis generally requires that the holder of a whole pool certificate retain the

⁸ Premier Mortgage Corp., SEC No-Action Letter (Mar. 14, 1983) ("Premier").

right to foreclose on the real estate underlying the related mortgages when the whole pool certificates are not issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae (*i.e.* are "non-agency whole pool certificates").⁹ As a result, holders of non-agency whole pool certificates with rights of foreclosure on the real estate underlying the related mortgages, including issuers of securities backed by the residential mortgages underlying such certificates ("RMBS"), have treated the whole pool certificates they own as "qualifying interests" and have relied on 3(c)(5)(C) to the extent they can satisfy the asset thresholds established in the Greenwich Capital Letter and do not otherwise issued redeemable securities of face-amount certificates of the installment type or periodic plan certificates.

We agree with the view that non-agency whole pool certificates provide their owners with the same economic experience as owning the underlying mortgages directly. We also agree with the classification of such certificates as "qualifying interests" for purposes of Section 3(c)(5)(C). We respectfully request, therefore, that issuers of RMBS backed by non-agency whole pools of residential mortgages (that do not otherwise issue redeemable securities, face-amount certificates of the installment type or periodic plan certificates) be permitted to continue to rely on Section 3(c)(5)(C) in addition to any other exemptions from the definition of investment company to which they may be entitled under the Investment Company Act.

III. Responses to Specific Questions Posed in the Release

Below are our responses to a number of the questions posed in the Concept Release that we have not otherwise addressed in this letter.

A. How do companies that originate mortgages and then continue to hold all or portions of those mortgages differ from those that only invest in mortgages and mortgage-related instruments?

PHH Mortgage does not hold the mortgages it originates as conventional investments (*i.e.* in order to obtain their loan yields) but does so pending sale to third parties in order to preserve its capital to continue its operating business or otherwise in support of its operating business (*i.e.* when it is necessary for PHH Mortgage to retain or repurchase mortgage loans that do not comply with applicable underwriting guidelines or agreed upon representations and warranties). We note that the Commission has previously distinguished between loans that are held for "investment purposes" (*i.e.* those purchased for the rate of return they offer) and loan notes held as part of a "lending business."¹⁰ As a mortgage lender licensed in all 50 states, PHH Mortgage operates a *bona fide* lending business and holds all or portions of the mortgages it originates or otherwise owns as part of this business. Its parent company, PHH, has consistently maintained in its public filings that its mortgage origination and servicing activities are conducted as operating businesses.

As the Concept Release noted, the legislative history of Section 3(c)(5)(C) states that "[a]lthough . . . companies . . . have portfolios of securities in the form of . . . mortgages and other liens on and interests in real estate, they are excluded from the [Investment Company A]ct's coverage because they do not come within the generally understood concept of a conventional investment company investing in stocks and bonds of other issuers."

As an operating mortgage lender/servicer, we believe that PHH Mortgage is readily distinguishable from entities that acquire mortgages and mortgage-related instruments principally to benefit from their interest yields and other conventional investment-like characteristics.

⁹ See, *e.g.*, Premier and Remarks of Charles C. Cox, Commissioner, SEC, H. Rep. No. 98-994 51 (1984).

¹⁰ Brief of the SEC, *Amicus Curiae*, at 14-43, *Banco Espanol de Credito c. Security Pac. Nat'l Bank*, 973 F.2d 51 (2d Cir. 1992) cited in Richard Y. Roberts and Randal W. Quinn, *Leveling the Playing Field: The Need for Investor Protection for Bank Sales of Loan Participations*, 63 *Fordham L. Rev.* 2115 (1995) at 2122, <http://ir.lawnet.fordham.edu/flr/vol63/iss6/5>.

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B. Does PHH or its subsidiaries rely on Section 3(c)(5)(C) or on other exclusions or exemptions under the Investment Company Act?

PHH, as parent company of the PHH group, relies on Section 3(a)(1)(C). At various times in the past, depending on the composition of its assets, PHH Mortgage has been able to rely on Section 3(c)(5)(C). It has also been able to rely on other exemptions from the definition of investment company under the Investment Company Act, including Rule 3a-1. PHH Home Loans, as an entity engaged solely in the origination of whole loans, whether directly or through its wholly owned subsidiaries, relies on 3(c)(5)(C).

We appreciate the opportunity to comment on the Concept Release. If you have questions concerning our comments or if a conversation about our analysis would be of assistance to the Commission or to you, please do not hesitate to contact me at (856) 917-6156.

Sincerely,



J. Christopher Clifton

cc: William F. Brown, Esq.
Stephen S. Kudenholdt, Esq.
Curtis Stefanak, Esq.