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Via e-mail to rule-comments@sec.gov

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

Dear Ms. Murphy:

American Capital Agency Corp. (the "Company") is a mortgage real estate investment trust ("REIT") that invests primarily in agency securities for which the principal and interest payments are guaranteed by a U.S. Government agency or a U.S. Government-sponsored entity ("GSE"). The Company is externally managed and advised by American Capital AGNC Management, LLC (the "Manager"), an indirect subsidiary of a wholly-owned portfolio company of American Capital, Ltd. ("American Capital").

We are pleased to provide this comment letter in response to the request of the Securities and Exchange Commission (the "Commission") for comment on its concept release entitled *Companies Engaged in the Business of Acquiring Mortgages and Mortgage-Related Instruments* (the "Release"). In particular, this letter addresses the Commission's request for comments on whether "whole pool" certificates ("agency whole pool certificates") issued or guaranteed by federally chartered corporations or U.S. Government agencies ("Agency MBS") should be treated as "mortgages and other liens on and interests in real estate" ("Qualifying Interests") for purposes of the exclusion afforded by Section 3(c)(5)(C) (the "Exclusion") from the definition of investment company under the Investment Company Act of 1940, as amended (the "1940 Act").[1] We commend the Commission's interest in providing clarity, consistency and regulatory certainty to the mortgage industry in a manner that facilitates capital formation, and we hope that our comments will assist the Commission in its efforts.

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[1] *See* 15 U.S.C. § 80a-3(c)(5)(C).

We respectfully submit that the Commission should affirm the 30 year-old position of its staff (the "Staff") that agency whole pool certificates are Qualifying Interests. Taking this action would help the Commission achieve its stated goals of (i) being consistent with the congressional intent underlying the Exclusion; (ii) ensuring that the Exclusion is administered in a manner consistent with the purposes and policies underlying the 1940 Act and Section 3(c)(5)(C), in particular; (iii) providing greater clarity, consistency and regulatory certainty; and (iv) facilitating capital formation.[2] Failing to affirm the Staff's long-held position that agency whole pool certificates are Qualifying Interests could devastate an entire sector of the REIT industry at a time when capital formation is particularly critical in the mortgage market as a result of the anticipated declining role of GSEs and would harm investors that currently invest in those REITs. The mortgage REIT industry has developed in reliance on the Staff's guidance and has grown to be an important source of private capital for the residential mortgage industry without significant regulatory or financial issues. To negate the Staff's established position that agency whole pool certificates are Qualifying Interests would frustrate the congressional intent underlying the Exclusion.

I. Information about the Company.

We were organized on January 7, 2008 and commenced operations on May 20, 2008 following the completion of our initial public offering. Our common stock is traded on the NASDAQ Global Select Market ("NASDAQ") under the symbol "AGNC." We have elected to be taxed as a REIT for U.S. federal income tax purposes under the Internal Revenue Code of 1986, as amended (the "Code").

We earn income primarily from investing in residential mortgage pass-through securities and collateralized mortgage obligations on a leveraged basis. These investments consist of securities for which the principal and interest payments are guaranteed by GSEs. As of September 30, 2011, our investment portfolio totaled $42.0 billion of agency securities, at fair value, comprised of $38.3 billion of fixed-rate securities, $3.2 billion of adjustable-rate securities and $0.5 billion of collateralized mortgage obligations backed by fixed and adjustable-rate securities, including interest-only strips.

We are externally managed and advised by the Manager, pursuant to the terms of a management agreement. The Manager is an indirect subsidiary of American Capital, LLC, which is a wholly-owned portfolio company of American Capital (NASDAQ: ACAS). American Capital is a publicly-traded private equity firm and global asset manager that has elected to be regulated as a business development company. The Manager has established an investment committee, comprised of officers of the Manager, whose role is to monitor (i) the performance of the Manager with respect to our investment guidelines and investment strategy; (ii) the composition and performance of our investment portfolio; and (iii) certain compliance requirements.

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[2] The Release, 76 Fed. Reg. 55,300, 55,301 (Sept. 7, 2011) (to be codified at 17 C.F.R. pt. 270).

II. Exclusion of companies that invest primarily in agency whole pool certificates from investment company status is consistent with congressional intent.

The exclusion of companies that invest primarily in agency whole pool certificates from investment company status is consistent with the congressional intent underlying the Exclusion. As noted in the Release, the Exclusion does not have an extensive legislative history. The few statements in the legislative history that address the Exclusion indicate that Congress intended it to exclude companies that own mortgages and other interests in real estate based upon a company's asset composition. In congressional reports and transcripts of congressional hearings, the Exclusion was described alternatively as being for "companies dealing in mortgages,"[3] "companies [that have] portfolios of securities in the form of . . . mortgages and other liens on and interests in real estate"[4] and "mortgage companies, although they in essence deal in securities."[5]

Congress reviewed the Exclusion after mortgage REITs were created without much change to its original intent of excluding companies that own or otherwise acquire mortgages and other liens on and interests in real estate. The amendments to the Code that created REITs were adopted in 1960, and the first public mortgage REIT began trading on the New York Stock Exchange (the "NYSE") in 1965. When Congress amended the Exclusion in 1970, it continued to recognize and reaffirmed that it did not intend for the 1940 Act to regulate companies primarily engaged in the business of owning or otherwise acquiring portfolios of mortgages and other real estate interests, because such companies did not fit the mold of an investment company that the 1940 Act was intended to regulate: a "conventional investment company investing in stocks and bonds of corporate issuers."[6] Congress could have amended or repealed the Exclusion so as to make it unavailable to mortgage REITs or available only for certain types of mortgage REITs or only if mortgage REITs satisfied certain requirements. Instead, the only amendment to the Exclusion adopted by Congress was to prohibit companies relying on the Exclusion from issuing redeemable securities, which was deemed adequate by Congress to ensure that companies relying on the Exclusion did not confuse the public by bearing a resemblance to mutual funds. The issuance of redeemable securities was the one structural element of mutual funds the absence of which Congress thought was adequate to differentiate mortgage REITs from investment companies.[7]

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[3] S. Rep. No. 76-1775, at 13 (1940); *accord* H.R. Rep. No. 76-2639, at 12 (1940).

[4] S. Rep. No. 91-184, at 34 (1969) ("1970 Senate Report").

[5] *Investment Trusts and Investment Companies: Hearings on S. 3580 Before the Subcomm. of the S. Comm. on Banking and Currency*, 76th Cong. 181 (1940) (statement of David Schenker, Staff Counsel).

[6] *See* 1970 Senate Report at 34; *see* H.R. Rep. No. 91-1382, at 17 (1970).

[7] The Release states that some mortgage-related pools, like PennyMac Mortgage Investment Trust ("PennyMac"), were "perceived" by the "media" as being investment companies. In support of this claim, the Release cites an editorial criticizing PennyMac for being "a hedge fund dressed up as a real estate investment trust" even before it had its initial public offering. 76 Fed. Reg. at 55,303 n. 28. However, even a casual review

The Release characterizes the legislative history of the 1940 Act as indicating that Section 3(c)(5)(C) was meant to exclude companies engaged in the “mortgage banking business.” However, in no instance were we able to find a reference to the phrase “mortgage banking business” in the legislative history or the Commission’s report to Congress on investment companies and investment trusts.[8] We respectfully submit that it is inaccurate to characterize the legislative history as suggesting Section 3(c)(5)(C) was meant in any way to exclude only companies in the “mortgage banking business.” The language of the legislative history clearly indicates that owning or otherwise acquiring mortgages and other liens on and interests in real estate, and not any operating characteristic, is the basis for an entity’s eligibility for the Exclusion.

The structure of Section 3(c)(5) also supports the conclusion that the Exclusion was meant to be an asset-based test. Section 3(c)(5) excludes three types of businesses from investment company status, only one of which, Section 3(c)(5)(B), suggests in any way that a company may need to be actively engaged in making loans to rely on the exclusion.[9] It is evident that when Congress intended to require a company to be engaged in certain conduct in order to rely on one of the exclusions provided in Section 3(c), it knew how to do so. For example, a company seeking to rely on the exclusion provided by Section 3(c)(2) is required to be “engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary.”[10] Similarly, a company seeking to rely on the exclusion provided for “banks” and “insurance companies” is required to satisfy the definitions for such types of entities, which require them to be regulated by certain regulators and/or be engaged in certain activities, such as taking deposits or writing insurance.[11] Section 3(c)(4) excludes only companies “substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.”[12] Section 3(c)(5)(C), on the other hand, requires a company to be “purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.”[13] It says nothing about originating or underwriting

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of PennyMac’s portfolio and financial statements would reveal that it has never had any of the characteristics of a hedge fund. For example, unlike a typical hedge fund, PennyMac does not short investments. PennyMac utilizes significantly less leverage than is used by the average hedge fund, and it tends to hold its investments for longer terms, whereas the typical hedge fund tends to trade its investments frequently. *See* PennyMac Mortgage Investment Trust, Quarterly Report (Form 10-Q), at 50-51 (Aug. 5, 2011).

[8] U.S. Sec & Exch. Comm’n, *Investment Trusts and Investment Companies: Report of the Securities and Exchange Commission, Part One: The Nature, Classification, and Origins of Investment Trusts and Investment Companies*, (1939).

[9] Even with respect to Section 3(c)(5)(B), the Staff has issued a no-action letter stating that merely owning the necessary types of loans is sufficient to rely on such exclusion. *See* Woodside Group, SEC No-Action Letter, 1982 WL 29947 (Apr. 14, 1982).

[10] 15 U.S.C. § 80a-3(c)(2)(A).

[11] *See* 15 U.S.C. § 80a-3(c)(3).

[12] 15 U.S.C. § 80a-3(c)(4).

[13] 15 U.S.C. § 80a-3(c)(5)(C).

those assets. Accordingly, the Staff has historically focused on the assets owned by companies seeking to rely on clause (C) and required them to invest (i) at least 55% of their assets in Qualifying Interests[14] and (ii) at least an additional 25% of their assets in additional Qualifying Interests or in real estate-related assets. We believe that the more stringent requirements historically applied to the Exclusion adequately ensure that only those companies that are primarily engaged in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in real estate can rely on the Exclusion. Accordingly, we respectfully submit that the Commission should affirm the Staff's position that agency whole pool certificates are Qualifying Interests.

III. Treatment of whole pools as Qualifying Interests is consistent with the purposes and policies of the 1940 Act.

We are a company primarily engaged in owning or otherwise acquiring mortgages and other interests in real estate. Although we generally do not directly own whole mortgages, by acquiring and holding agency whole pool certificates, we own beneficial interests in all of the mortgages constituting a pool, which is a means of "otherwise acquiring" those mortgages and also constitutes an "other interest in" real estate. As discussed above, Congress has consistently indicated that companies that are primarily engaged in owning or otherwise acquiring mortgages and other interests in real estate are not the type of companies that the 1940 Act was meant to regulate.

Congress effectuated its intent by drafting the Exclusion so that it not only applies to companies directly acquiring mortgages, but also to companies *otherwise acquiring* mortgages and to companies that own *other interests in* real estate. [15] An agency whole pool certificate is a beneficial interest in a pool of individual mortgages. As a result, an agency whole pool certificate provides its holder with an indirect means of obtaining the same economic experience as owning the underlying mortgages directly, on an insured or guaranteed basis. As the Staff recognized in *Protecting Investors: A Half-Century of Investment Company Regulation*, such economic experience includes "the receipt of both principal and interest payments and the risk of prepayment on the underlying mortgage loans."[16] In *Protecting Investors*, the Staff also noted that a guarantee by a federally chartered corporation or a unit of the U.S. Government on an underlying mortgage loan does not detract from the economic experience of owning the

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[14] *See* NAB Asset Corp., SEC No-Action Letter 1991, WL 176787, at *2 (Jun. 20, 1991) (the "NAB Letter").

[15] *See* 15 U.S.C. § 80a-3(c)(5)(C).

[16] Division of Investment Management, U.S. Sec & Exch. Comm'n, *Protecting Investors: A Half-Century of Investment Company Regulation* at 72 n. 267 (May 1992) ("Protecting Investors") (citing American Home Finance Corp., SEC No-Action Letter, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76, 860 (publicly available Apr. 9, 1981) (the "American Home Letter"); *see also* Investors GNMA Trust, Inc., SEC No-Action Letter, 1983 WL 28500 (July 22, 1983) (Staff implicitly accepted issuer's counsel's opinion that issuer's ownership of GNMA Mortgage Pass-Though Securities representing 100% beneficial interests in mortgage pools constituted an investment in mortgages within the meaning of Section 3(c)(5)(C) because ownership of these securities "is the functional equivalent of ownership of the underlying mortgage loans").

mortgage loan.[17] When we own an agency whole pool certificate, we do not share any interest in any of the mortgages in our pool with any other class of investor or with a holder of another interest in the pool that may conflict with our interest. As a result, the hallmarks of the economic experience that the owner of multiple mortgage loans experiences are hallmarks we experience fully and exclusively with respect to the mortgages underlying our agency whole pool certificates. Ownership of an agency whole pool certificate is the functional equivalent of otherwise acquiring and owning the underlying mortgages and acquiring insurance on the mortgages.[18] We respectfully submit that it would be illogical and would frustrate the intent of Congress to treat a mortgage as a Qualifying Interest but to take the view that certificates representing 100% of the ownership interests in a pool of mortgages are not Qualifying Interests.

Moreover, although the Commission and Staff have stated that a non-controlling interest in a person engaged in a real estate business may not be a Qualifying Interest,[19] this position should not be used as a basis to repeal the Staff's long-standing position that agency whole pool certificates are Qualifying Interests. As noted above, an agency whole pool certificate is a 100% beneficial interest in a pool of mortgages. The pool is a passive entity formed for administrative convenience to facilitate the transfer of mortgage titles among investors, the servicing of the underlying mortgage loans and the provision of a guarantee from a federally chartered corporation or U.S. Government agency. While title transfer services, loan servicing and insurance could be purchased by a mortgage investor on a mortgage-by-mortgage basis, it could only be done on a much less efficient basis and at a much greater cost. Accordingly, an agency whole pool certificate is not an interest in an entity actively managed by a third-party who is engaged in the real estate business in which the return is dependent primarily on the real estate management skills of others. Instead, it is a 100% beneficial interest in a passive entity holding mortgages, the returns of which are derived primarily from interest and principal payments on the underlying mortgages.

IV. The Commission should not impose additional regulations on the operation of companies that invest primarily in agency whole pool certificates.

As discussed in the preceding sections of this letter, we believe that mortgage REITs and other companies whose assets consist primarily of agency whole pool certificates are exempt from registration under the 1940 Act pursuant to Section 3(c)(5)(C). Congress elected to exclude each of the types of companies described in Section 3(c)(5) from regulation as "investment companies" under the 1940 Act because of the nature of their assets. As described below,

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[17] Protecting Investors, *supra* note 17, at 72.

[18] In the American Home Letter, *supra* note 17, the applicant likened the guarantees of mortgage loans by GNMA to private mortgage insurance, which was used to insure mortgage loans that were the subject of a letter from a previous applicant in which the Commission had granted relief (*See* U.S. Home Finance Corp., SEC No-Action Letter, 1980 WL 15058 (May 30, 1980)). The Commission granted relief to the applicant in the American Home Letter.

[19] *See, e.g.*, Real Estate Investment Trust, Investment Company Act Release No. 3140, 25 Fed. Reg. 12178 (Nov. 18, 1960); Realex Capital Corp., SEC No-Action Letter, 1984 WL 44978 (Mar. 19, 1984).

companies whose assets consist primarily of whole pool mortgages typically operate in a manner, as a result of existing regulatory and market structures, that already addresses the problems and behavior that the 1940 Act was intended to regulate, such as over-leveraging and overreaching by insiders. Consequently, we believe there is no compelling need to subject such companies to regulation under the 1940 Act.

A. Leverage

We are unaware of any empirical evidence that the amount of leverage used by publicly traded REITs like the Company has unduly put investors at risk. The Release errs in its characterization of Carlyle Capital Corp. (the "Carlyle Fund") as a mortgage REIT. Not only was the Carlyle Fund not a REIT, but it was not even a mortgage pool; instead, it was a Euronext[20] listed corporation that was publicly offered outside the United States. The Carlyle Fund was designed to invest generally in fixed-income instruments, and it happened to invest in non-whole pool MBS at the height of the financial crisis just as the value of those assets declined precipitously.[21] Moreover, regardless of the type of investments the Carlyle Fund made, it never relied on Section 3(c)(5)(C) for its exclusion from the 1940 Act. The Carlyle Fund was organized and publicly offered only outside the United States. The Carlyle Fund's securities were privately placed inside the United States only to sophisticated investors, and the Carlyle Fund was excluded from registration as an investment company under the 1940 Act by Section 3(c)(7). Therefore, even if the Commission had implemented rules and restrictions on companies relying on the Exclusion prior to the Carlyle Fund's offering, such regulations would not have been applicable to the Carlyle Fund, would not have limited its operations or private placement to investors in the United States and would not have prevented the losses suffered by its investors.

As a publicly traded REIT, we regularly and clearly disclose our leverage policies, the amount of leverage we incur and the types of risks associated with an investment in the Company as a result of such leverage to our investors so that they can make informed investment decisions. Our leverage disclosure is included in our prospectuses, registration statements, shareholder reports and filings on Forms 10-Q and 10-K.[22]

In addition, our leverage policies are overseen and monitored by our board of directors (our "Board"), a majority of the members of which are "independent directors" within the

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[20] Euronext is a European equities and derivatives exchange that is a part of NYSE Euronext, Inc., a New York-based corporation that operates the NYSE and other stock exchanges.

[21] *See* Henry Sender, *Leverage Levels a Fatal Flaw in Carlyle Fund*, Fin. Times (Nov. 30, 2009), *available at* http://www.ft.com/intl/cms/s/0/1590c700-dde8-11de-b8e2-00144feabdc0.html#axzz1b6X5I118 (last visited Nov. 2, 2011).

[22] For example, the Company's public filings include risk factors on leverage. *See* American Capital Agency Corp., Annual Report (Form 10-K) at 27 (Feb. 25, 2011) ("Our strategy involves significant leverage, which may cause substantial losses.").

meaning of NASDAQ Rule 5605(b)(1)[23] and are set and adjusted from time to time with a view towards the best interests of our shareholders. The amount of leverage we incur varies based upon our Manager's assessment of risk and returns. Our Manager, through its investment committee, ensures that our hedging and financing strategies, and in particular our leverage utilization, adhere to our investment guidelines, which are established by our Board. On at least a quarterly basis, our Manager provides our Board with an investment report that includes, among other things, information about our leverage utilization. Our Board uses the investment report to review our investment portfolio (including the amount of leverage we employ), compliance with our investment guidelines and decisions on whether to revise our investment guidelines. Such procedures better position our Manager to generate attractive risk-adjusted returns for our shareholders while preserving our net asset value.

The amount of leverage that we incur is also influenced by prevailing market conditions. If we become over-leveraged, our share price may be adversely affected and our access to financing may become limited because our lenders may no longer lend to us or lend only on terms that are so onerous that the additional leverage becomes uneconomical. In this regard, we note that, as of June 30, 2011, the Company's debt ratio was 88.23[24] – just under an 8-to-1 debt-to-equity ratio. By contrast, as of June 30, 2011, the average debt ratio for all institutions insured by the Federal Deposit Insurance Corporation (the "FDIC") was 88.70[25] – just under a 10-to-1 debt-to-equity ratio. Moreover, as of June 30, 2011, some of the largest insured deposit institutions had higher debt ratios than the Company, including Wells Fargo Bank, N.A., with a debt ratio of 88.79; Citibank, N.A., with a debt ratio of 89.49; U.S. Bank, N.A., with a debt ratio of 89.77; and J.P. Morgan Chase Bank, N.A., with a debt ratio of 93.00.[26] Even in interest rate environments where there was considerably less interest rate risk than in the current environment, our leverage was slightly below the average leverage levels employed by banks and other financial companies, which we believe have riskier businesses than ours. In addition, our leverage is also limited by the fact that our lenders are subject to governmental restrictions on the amount they can lend to individual borrowers.

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[23] NASDAQ OMX Group, Inc., NASDAQ Stock Market Equity Rules, Rule 5605(b)(1) (Mar. 12, 2009), *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=/nasdaq/main/nasdaq-equityrules/ (navigate to 'Rule 5600 Corporate Governance Requirements' on side menu) (last visited Nov. 2, 2011).

[24] *See* American Capital Agency Corp., Quarterly Report (Form 10-Q), at 36 (Aug. 9, 2011) (debt ratio calculated by dividing leverage of 7.5 by 8.5).

[25] *See* Fed. Dep. Ins. Corp., Statistics at a Glance as of June 30, 2011, *available at* http://www.fdic.gov/bank/statistical/stats/2011jun/industry.html (last visited Nov. 3, 2011). The FDIC, when calculating the leverage ratio for insured institutions, makes certain minor subtractions and additions to the GAAP-reported equity and assets amounts (e.g., equity does not include non-controlling (minority) interests in consolidated subsidiaries). "GAAP" refers to U.S. generally accepted accounting principles.

[26] *See* Statistics on Depository Institutions Report as of June 30, 2011, Fed. Dep. Ins. Corp., http://www2.fdic.gov/sdi/main.asp (web page provides customizable options to generate report) (last visited Nov. 2, 2011).

We are not aware of any authority for the Commission to impose substantive limits on the use of leverage by companies excluded by Congress from regulation as investment companies.[27]

B. Corporate governance

Regulation of mortgage REITs like the Company as investment companies is unnecessary in light of the numerous investor protections that exist in their structure and operations. Currently applicable regulations and our policies and procedures minimize potential abuses and protect investors. We are subject to extensive regulatory regimes that prevent us from engaging in the practices intended to be addressed by the 1940 Act even though we are not regulated as an investment company. In addition, we are not aware of any wellspring of public or congressional concern that mortgage REITs, which have been offered to investors for over 40 years and structured in reliance on the Staff's longstanding interpretations of the Exclusion, pose a risk to investors that the 1940 Act was designed to protect against. We also are not aware of any evidence that mortgage REITs present a regulatory risk. In fact, the enforcement actions cited in the Release generally did not involve publicly traded mortgage REITs, and the one that did involved a violation of disclosure and reporting requirements under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The regulation of mortgage REITs as investment companies at a time when there is no evidence that such regulation is necessary to protect investors would only harm the investors that today own more than $38 billion of common stock issued by mortgage REITs and would adversely affect the mortgage industry at a challenging time when federal policy makers are seeking ways to increase the flow of private capital to the industry.

As a publicly traded REIT listed on NASDAQ, we are subject to NASDAQ's listing standards, which include the requirement that a majority of our board members be independent. Our Board is currently comprised of seven directors, four of whom are "independent directors" within the meaning of NASDAQ Rule 5605(b)(1). We maintain an audit committee and a compensation and corporate governance committee, each comprised solely of independent directors.

In addition, in accordance with NASDAQ's listing standards and federal securities laws, our Board has adopted written policies designed to protect our investors, such as our Code of

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[27] We note that any such limitation on leverage comparable to the leverage limits imposed on registered investment companies would have a material adverse effect on the market price of common stock issued by mortgage REITs. As a result, we believe it is highly unlikely that the Commission would be able to satisfy the requirements imposed on it by the Administrative Procedure Act if it were to impose leverage limitations on mortgage REITs comparable to the leverage limitations imposed on registered investment companies and that any such attempted rulemaking likely would be vacated by the courts. *See*, *e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011); Chamber of Commerce v. SEC, 412 F.3d 133, 139 (D.C. Cir. 2005); *see also Goldstein v. SEC*, 451 F.3d 873, 884 (D.C. Cir. 2006) (overturning a change to a long-standing provision of the Investment Advisers Act of 1940). In addition, Section 2(c) of the 1940 Act requires the Commission to consider in connection with any potential rulemaking not only investor protection, but also whether the rule will promote efficiency, competition and capital formation. 15 U.S.C. § 80a-2(c).

Ethics and Conduct (the "Code of Ethics") and related persons transaction policy. Our Code of Ethics requires each of the following persons to abide by high standards of business conduct and ethics: our directors, executive officers and employees, our Manager and its officers and employees and the employees of American Capital and its affiliates who provide services to our Manager or the Company. Our Code of Ethics is also designed to deter wrongdoing and to promote honest and ethical conduct, full and accurate disclosure in our filings with the Commission, compliance with applicable laws and prompt internal reporting of violations of provisions of the Code of Ethics. Our related persons transaction policy requires the prior approval of a majority of our independent directors for an investment transaction between American Capital or any of its affiliates and the Company and any of its subsidiaries. Our Board oversees our compliance with such policies.

Such policies are designed to prevent and address conflicts of interest (both actual and perceived) between us and our investors and serve to promote the highest duty of loyalty to the Company from our directors, executive officers and employees, our Manager and its officers and employees, and the employees of American Capital and its affiliates who provide services to our Manager or the Company. Such policies serve to address the practice of organizing, operating, managing or selecting portfolio securities for the benefit of someone other than the investors – one of the primary concerns the 1940 Act was intended to address.

As a publicly traded REIT, we are also subject to the requirements of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), the registration requirements imposed by the Securities Act of 1933, as amended and the disclosure and reporting requirements of the Exchange Act. We note that, in certain cases, the reporting requirements under the Exchange Act require more disclosure than under the 1940 Act, such as requiring quarterly, instead of semi-annual, reporting. Additionally, under Sarbanes-Oxley, we are required to maintain sound accounting practices and keep accurate records of all our accounts. In accordance with such regulations, we maintain stringent internal controls over financial reporting in order to provide our shareholders with reasonable assurance regarding the reliability of our financial reports and the preparation of financial statements for external purposes in accordance with GAAP. As part of this process, we have retained an independent auditor to audit our financial statements. Our independent auditor audits and opines on our annual financial statements in accordance with the standards of the Public Company Accounting Oversight Board (United States). We also value our securities and derivative and hedging assets and liabilities based on Accounting Standards Codification Topic 820, which provides for a three-level valuation hierarchy for disclosure of fair value measurement. The valuation hierarchy is based upon the transparency of inputs to the valuation of an asset or liability as of the measurement date. A financial instrument's categorization within the hierarchy is based upon the lowest level of input that is significant to the fair value measurement.

These practices, which today are required by the regulatory regimes of the federal securities laws applicable to us, including Sarbanes-Oxley, effectuate one of the principal goals of the 1940 Act: eliminating the past practices of investment companies of engaging in unsound and misleading accounting and financial practices and avoiding independent third-party scrutiny.

V. Mortgage REITs are critical to capital formation for the mortgage industry, and additional regulation of mortgage REITS would harm the mortgage market.

Regulation by the Commission of mortgage REITs like the Company would run counter to the Commission's stated goal of facilitating capital formation. Mortgage REITs provide a significant conduit for private capital to enter into the mortgage market. Almost 30 years ago, Congress enacted laws designed to increase private participation in what had been a mortgage finance market dominated by GSEs and U.S. Government agencies.[28] However, since the onset of the 2008 financial crisis, federally chartered corporations and U.S. Government agencies like the Federal Housing Administration have become responsible for an even larger share of mortgage-related credit.[29] The cost of credit from non-governmental sources has remained high, and private lenders have continued to adhere to tight lending standards that have made access to non-guaranteed credit difficult.[30] With the continuing decline of investment in Agency MBS by foreign central banks,[31] private market participants like the Company are one of the only potential buyers of Agency MBS left. As the U.S. Government revisits its role in the mortgage market, mortgage REITs like the Company are also best situated to replace the U.S. Government's participation in the domestic mortgage market.

Another historically important source for MBS demand has been commercial banks, but they face an uncertain regulatory environment, potentially facing higher capital charges. If capital requirements increase, commercial banks may need to sell their portfolios of Agency MBS in order to comply with the new regulatory environment. In the event commercial banks begin selling their Agency MBS holdings in high quantities, mortgage REITs will be one of the few market participants able to absorb that supply.

In fact, given the current economic climate, we believe that private participation in the U.S. mortgage market is critical to the resumption of large scale lending (and securitization of those loans) and the future health and stabilization of the domestic housing market. The Exclusion, along with the unique tax status of REITs, puts the mortgage REIT industry in an

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[28] *See* The Secondary Mortgage Market Enhancement Act of 1984, S. Rep. No. 98-293 at 2 (1983) ("Due to the projected magnitude of the demand for mortgage credit, the existing Federal agencies simply will not be able to provide all of the liquidity for mortgages that will be required during the remainder of this century. . . . The clearly defined course of action for this Committee became, therefore, one of seeking to broaden the number of participants channeling investor capital to the homebuyer. If Fannie Mae and Freddie Mac have met the objectives for which they were originally created, then the foundation is in place for the private sector to assume a more significant market role.").

[29] Credit Suisse Group AG, Agency MBS Trends, Presentation to the Mortgage Bankers Association, at 2, 12 (May 2010) *available at* http://www.mortgagebankers.org/files/Conferences/2010/NationalSecondary/SMKT10AgencyMBSTrends.pdf (last visited Nov. 2, 2011).

[30] *See id.*

[31] Henry Sender and Michael MacKenzie, *Fannie and Freddie Debt Fuels Anxiety*, Fin. Times (Oct. 9, 2011), http://www.ft.com/cms/s/0/1de57e0e-f22d-11e0-b439-00144feab49a.html (stating "[s]ince its peak in mid 2008, foreign central banks holdings of GSE debt have fallen 26.4 per cent to $724 [billion]").

ideal position to assist the U.S. Government as it aims to wean the mortgage market from the GSEs. The mortgage REIT industry can also assist in the creation of new loans through actively purchasing MBS and/or originating new loans, thus reducing the need for GSEs and decreasing the U.S. Government's financial exposure. Further restriction of the Exclusion's availability to mortgage REITs like the Company, however, would harm the potential for mortgage REITs to buoy the domestic mortgage market as the economy continues to sputter and as the U.S. Government reexamines its role in the mortgage market. Such harm would likely damage the mortgage market as a whole, and the effects of such damage could spread to the entire domestic economy, of which the ailing housing market is still a significant piece.

In this connection, we note that the Commission, along with other regulators, has proposed rules requiring securitization sponsors to retain a portion of the credit risk in the assets that they securitize (the "Risk Retention Rules"). Subject to its final terms and language, the Risk Retention Rules could prevent a REIT from holding 100% of the equity portion of an MBS issuance, which would damage the ability of the REIT to consider such an investment, like agency whole pool certificates, a Qualifying Interest. This could lead to circumstances restricting REITs' ability to make such an investment. We respectfully request the Commission to consider the continued ability of REITs to hold a Qualifying Interest in an MBS issuance when determining whether and in what form to issue the final version of the Risk Retention Rules.

In addition, we believe that restricting or reducing the amount of leverage mortgage REITs can incur as a result of regulation under the 1940 Act would negatively impact the domestic economy. Implementing leverage restrictions on mortgage REITs would reduce the amount of capital available for real estate investment. Leverage restrictions would also prevent mortgage REITs from fully availing themselves of the positive attributes that make Agency MBS such appealing and popular instruments for raising mortgage capital. Agency MBS enjoy considerably lower haircuts, reduced funding costs and a significantly broader array of funding sources (including the Federal Reserve) than non-Agency MBS. Limiting the amount of leverage available to mortgage REITs would hinder them from fully utilizing a cost-efficient source of financing like Agency MBS. This could increase borrowing costs to potential homeowners, dampening demand for housing and placing downward pressure on housing prices. A drop in housing prices would further harm existing homeowners, as the value of their homes decrease towards, and potentially below, the balance on their mortgages, causing homeowners to reduce their spending elsewhere in their budget.

VI. Conclusion

Congress has recognized and reaffirmed on several occasions that it did not intend for the 1940 Act to regulate companies primarily engaged in the business of owning or otherwise acquiring mortgages and other liens on and interests in real estate because they do not come within the generally understood concept of a conventional investment company investing in stocks and bonds of corporate issuers. Accordingly, treating whole pools as Qualifying Interests is consistent with the congressional intent and the purposes and policies of the 1940 Act.

Since their creation in 1960, mortgage REITs have become critical to capital formation for the mortgage industry. To regulate the operations of mortgage REITs by imposing restrictions, such as leverage limitations, on them that are similar to restrictions applicable to registered investment companies would be inconsistent with the Commission's stated goal of facilitating capital formation.

We are a company primarily engaged in owning or otherwise acquiring mortgages and other liens and interests in real estate. Our structure and operations contain numerous safeguards that protect our investors and that address the concerns the 1940 Act was intended to prevent. For example, our Manager has established an investment committee to oversee its activities. Our Board has established an audit committee and compensation and corporate governance committee comprised entirely of independent directors. Our Board has also adopted a Code of Ethics which ensures that we adhere to the highest standards of fiduciary duty to our shareholders. We also adhere to rigid valuation procedures and employ an independent third party auditor to review our financial statements.

In addition, we utilize leverage that is lower than other financial companies that are excluded from registration as investment companies under the 1940 Act. Our leverage usage is approved by our Board, our lenders and ultimately our shareholders through our public disclosures.

Altering the application of Section 3(c)(5)(C) would devastate the housing market, stymie capital formation, lower mortgage liquidity and would be contrary to the public interest. Accordingly, we respectfully submit that the Commission should affirm the Staff's 30 year-old position that agency whole pool certificates are Qualifying Interests.

We are pleased to have provided this comment letter to the Commission in response to the Commission's solicitation for comment on the Release. We again commend the Commission's interest in providing clarity, consistency and regulatory certainty to the mortgage industry in a manner that facilitates capital formation, and we hope that our comments will assist the Commission in its efforts.

Please contact me at (301) 841-1405 with any questions relating to this comment letter.

Very truly yours,

/s/ Samuel A. Flax

Samuel A. Flax

Executive Vice President
and Secretary

cc: Mary L. Schapiro, Chairman
Elisse B. Walter, Commissioner
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Daniel M. Gallagher, Commissioner
Eileen Rominger, Director, Division of Investment Management