

PUBLIC

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**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT**

Our Ref. No. 90-470-CC
Citytrust
File No. 132-3

By letter of December 12, 1990, you request that we not recommend any enforcement action to the Commission if Citytrust, a Connecticut chartered bank, sponsors a trust ("Trust") that will issue non-redeemable certificates ("Certificates") 1/ without registering the Trust or anything else under the Investment Company Act of 1940 ("1940 Act") in reliance on clauses (A) and (C) of section 3(c)(5) of the 1940 Act. 2/

The Trust will be formed under a pooling and servicing agreement ("P&S Agreement") between Citytrust as seller and servicer and an unaffiliated bank as trustee ("Trustee"). Citytrust will transfer to the Trust commercial mortgage loans in the form of industrial development bonds ("Mortgage IDBs") and equipment loans in the form of industrial development bonds ("Equipment IDBs"). The Equipment IDBs represent loans made to fund the purchase price of equipment and costs specifically related to equipment acquisition such as installation expenses. 3/ The Mortgage IDBs represent loans made to finance the acquisition or improvement of real estate; they are secured by real estate and generally had an original loan-to-value ratio of not more than 80%. In some cases, the Mortgage IDBs are also secured by other collateral (generally equipment located on the real estate premises which were the subject of the mortgage

1/ The Certificates, which will be issued in a minimum denomination of \$100,000, will be registered under the Securities Act of 1933, and the Trust will be subject to the reporting requirements of the Securities Exchange Act of 1934 for at least one year.

2/ Section 3(c)(5) of the 1940 Act, in part, excepts from the definition of an investment company any person that is not engaged in the business of issuing redeemable securities and

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

3/ In State of Israel (pub. avail. Aug. 12, 1988), the staff took a no-action position under section 3(c)(5)(A) with respect to trusts that would issue certificates, the proceeds of which would be used to refinance loans made "for the purchase of defense articles, defense services, design and construction services and related expenses."

financing and, in some instances, by other assets such as a certificate of deposit and a security interest in receivables) or a guarantee (issued by the parent, another related corporation, the principals, or the individual owner/operators of the borrowing corporation).

You represent that, on the basis of market value, at least 55% of the Trust's assets, ^{4/} will consist of Mortgage IDBs and Equipment Loan IDBs. Each Mortgage IDB included in the 55% will meet the following criteria ("Class I Real Estate"):

(1) the original principal amount of the loan did not exceed 100% of the value of its real estate collateral when the loan was made;

(2) the value of the real estate collateral was confirmed by an appraisal prepared in connection with the original loan by a qualified independent third-party appraiser retained to appraise the particular properties;

(3) Citytrust applied the same underwriting criteria whether the loan was secured exclusively by real estate or additionally by other collateral or a guarantee; and

(4) a Mortgage IDB benefitting from non-real estate collateral will be disqualified as Class I Real Estate if, in connection with a default, the amount recovered from non-real estate collateral (including guarantees) exceeds 40% of the original principal amount of the loan (the "40% test"). The P&S Agreement will require that recovery may not be made against non-real estate collateral on a Mortgage IDB otherwise qualifying as Class I Real Estate if after giving effect to such recovery (i) the 40% test will be violated with respect to such Mortgage IDB and (ii) the consequence of such violation and related disqualification would be to cause the Trust, based upon the Mortgage IDBs that continue to qualify as Class I Real Estate and the Equipment Loan IDBs, to fail the requirement that at least 55% of the value of the Trust assets at the time of the issuance of the Certificates consisted of Class I Real Estate and Equipment Loan IDBs.

^{4/} Because a condition to consummating the transaction is that the sale by Citytrust to the Trust of the assets be treated by Citytrust as a sale for accounting purposes, the book value of all of the Trust assets on the opening balance sheet of the Trust will be their market value.

Further, to qualify as Class I Real Estate or an Equipment Loan IDB includable in the 55%, the related IDB must represent the entire issuance of IDBs. Up to 25% of the Trust's assets, subject to reduction below 25% to the extent that the Class I Real Estate and Equipment IDBs exceeds 55% of the Trust's assets, will consist of Mortgage IDBs that do not qualify as Class I Real Estate because they do not meet one of the criteria for Class I Real Estate ("Class II Real Estate"). Up to 20% of the Trust's assets may consist of assets other than Class I Real Estate, Class II Real Estate, and Equipment IDBs. 5/ The Trust's assets will be fixed at the time Citytrust conveys them to the Trust, 6/ and no substitution of Trust assets will be permitted.

You assert that assets in the Class I Real Estate category will qualify as "mortgages and other liens on and interests in real estate" within the meaning of section 3(c)(5)(C). 7/ In a

- 5/ We take the view that a company is not excepted under section 3(c)(5)(C) unless at least 55% of its assets consist of "mortgages and other liens on and interests in real estate" ("55% test") and the remaining 45% of its assets consist primarily of real estate-type interests ("45% test"). See, e.g., Prudential-Bache Securities, Inc. (pub. avail. Aug. 19, 1985); Salomon Brothers, Inc. (pub. avail. June 17, 1985). To meet the 45% test, a company must invest at least 25% of its total assets in real estate-type interests (subject to reduction to the extent that it invests more than 55% of its total assets in assets meeting the 55% test) and may invest no more than 20% of its total assets in miscellaneous investments. See, e.g., United Bankers, Inc. (pub. avail. March 23, 1988); La Quinta Motor Inns, Inc. (pub. avail. May 23, 1988).
- 6/ We understand that the conveyance of the assets to the Trust and the issuance of the Certificates will occur simultaneously.

- 7/ You state that the mortgage or deed of trust securing each Mortgage IDB was assigned or granted to Citytrust as the IDB trustee under a trust indenture and that the assignment or grant is not set forth in a separate document but is incorporated in the trust indenture that has been recorded in the appropriate real estate office. You further state that it will be a condition to closing for the issuance of the Certificates that Citytrust and the underwriter, Goldman, Sachs & Co., receive an opinion of independent counsel that, if a receiver were appointed for Citytrust under the Connecticut banking law, the property held by Citytrust as IDB trustee, including the related mortgages or
- (continued...)

telephone conversation with Elizabeth Tsai of the staff on December 13, 1990, you represented that, with respect to this category, the Trustee, as holder of 100% of the issuance of each Mortgage IDB, will have the right unilaterally to direct the IDB trustee to foreclose the mortgage securing the IDB in the event of default. You confirmed that Citytrust will use its best efforts to cause the Trustee, or another unaffiliated trustee other than Citytrust, to become IDB trustee for each Mortgage IDB by not later than 120 days after the closing. In a telephone conference with the staff on December 7, 1990, Jordan Yarett, a representative of Citytrust, stated his belief that it will be possible to substitute trustees.

You also assert that the introductory language to section 3(c)(5), by referring to "one or more of the following businesses," indicates that a person may rely on a combination of clauses (A), (B), and (C) of section 3(c)(5). You believe that the Trust will be excepted under clauses (A) and (C) of section 3(c)(5) because it will not be issuing redeemable securities and it will be primarily engaged in the businesses described in clauses (A) and (C).

On the basis of the facts and representations made to us orally and in your letter, we would not recommend any enforcement action to the Commission if Citytrust sponsors the Trust without registering it under the 1940 Act in reliance on clauses (A) and (C) of section 3(c)(5). Because this response is based on representations made to the Division, you should note that any different facts or circumstances might require a different conclusion. Further, this response expresses only the enforcement position of the Division and does not purport to express any legal conclusions on the questions presented.



Thomas S. Harman
Chief Counsel

2/ (...continued)

assignments of mortgages, would not be assets, business, or property of Citytrust subject to disposition by such receiver.

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1940 Act/3(c)(5)

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TELEX 63984 INTERNATIONAL 127826 DOMESTIC
CABLE ADDRESS LADYCOURT, NEW YORK
FACSIMILE 212 558-3588 125 BROAD STREET
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HOMI, CHYODA-KU, TOKYO 100

December 12, 1990

Securities and Exchange Commission,
450 Fifth Street, N.W.,
Washington, D.C. 20549.

Attention: Office of Chief Counsel
Division of Investment Management

Re: Citytrust

Ladies and Gentlemen:

On behalf of Citytrust and Goldman, Sachs & Co., we are writing to request advice to the effect that the Division of Investment Management will not recommend that the Commission take any action if, without effecting registration under the Investment Company Act of 1940, as amended (the "1940 Act"), with respect to any person in reliance upon Sections 3(c)(5)(A) and 3(c)(5)(C) thereof, Citytrust, a Connecticut chartered bank, acts as sponsor of a pass-through trust (the "Trust") in connection with the transaction more fully described below. This letter is intended to restate the letters of September 11, 1990 of the

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undersigned and of October 16, 1990 of Gerald T. Slevin to the Division.

Citytrust will transfer to the Trust its entire ownership interests in assets consisting principally of commercial mortgage loans in the form of tax exempt industrial development bonds ("Commercial Mortgage Loan IDBs") and, to a much lesser extent, equipment loans in the form of tax exempt industrial development bonds ("Equipment Loan IDBs" and, together with the Commercial Mortgage Loan IDBs, "IDBs").

The Commercial Mortgage Loan IDBs are, from Citytrust's perspective, traditional commercial mortgage loans. Accordingly, like commercial mortgage loans generally, they may in some cases be secured not only by a mortgage on real estate but also by a security interest in other collateral (generally equipment) or a guarantee (generally issued by an affiliate or an individual proprietor). The equipment included as other collateral consists of equipment located on the real estate premises which were the subject of the mortgage financing. Although equipment is the common type of collateral where there is collateral other than mortgages on real estate, in some instances the additional collateral consists of other assets

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such as a certificate of deposit or a security interest in receivables. With respect to any guarantee issued by an affiliate or an individual proprietor, in the case of some IDBs the parent or other related corporation of the borrowing corporation or the principals or individual owner/operators of the borrowing corporation furnished guarantees as additional collateral. Nevertheless, real estate mortgages in the case of the Commercial Mortgage Loan IDBs are the principal collateral as set forth below and at least 55% of the initial value of the Trust assets meet the tests for Class I Real Estate set forth below.

The Trust will be established pursuant to a pooling and servicing agreement (a "P&S Agreement") among Citytrust, as seller, an unaffiliated bank, as trustee (the "Trustee"), and Citytrust, as servicer (the "Servicer"). The Trust plans to issue pass-through certificates ("Certificates") to investors in a public offering registered under the Securities Act of 1933, as amended (the "1933 Act").* The net proceeds received from the investors

* The P&S Agreement, like pooling and servicing agreements used in pass-through securitizations generally, will not be qualified under the Trust Indenture Act of 1939 in reliance on Section 304(a)(2) thereof. The Trust will be subject to the reporting requirements of the Securities Exchange Act of 1934 pursuant to Section 15(d) thereof for at least one year.

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will be used by the Trust to purchase the assets described below from Citytrust.* The Trust's assets, based upon book value as shown on the Trust's opening balance sheet prepared in accordance with generally accepted accounting principles ("GAAP")**, will initially have the following composition and be subject to the following tests:

A. Class I Real Estate and Equipment Loan IDBs
(55%). At least 55% of the initial value of the Trust assets will consist of Commercial Mortgage Loan IDBs and Equipment Loan IDBs. The Commercial Mortgage Loan IDBs included in such 55% will meet the following criteria (such Commercial Mortgage Loan IDBs and

* This will actually be accomplished in two steps. First, Citytrust will deposit IDBs with an independent trustee under the P&S Agreement pursuant to which the Trust is formed and will receive, in return, 100% of the Certificates evidencing ownership of the Trust. Second, Citytrust will sell, through Goldman, Sachs & Co. as underwriter, the pass-through certificates to investors in a public offering registered under the 1933 Act.

** Because a condition to consummating the transaction is that the sale by Citytrust to the Trust of the Assets (as hereinafter defined) be treated by Citytrust as a sale for accounting purposes, the book value of all of the Assets on the opening balance sheet of the Trust will be their market value. Due to the difficulty of predicting prepayments, the tests are applied at the initiation of the Trust. The Trust will not be permitted to substitute assets.

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related collateral sometimes being referred to herein as "Class I Real Estate"):

(1) the original principal amount of the loan did not exceed 100% of the value of the real estate collateralizing the loan at the time the loan was extended (i.e., the original loan-to-value ratio ("LTV") was less than 100%);

(2) the value of the real estate collateral, for purposes of confirming the LTV ratio for the loan, was confirmed by an appraisal prepared in connection with the original loan by a qualified independent third-party appraiser not directly employed by Citytrust. Each such appraiser was retained to appraise the particular properties; and

(3) the underwriting criteria applied by Citytrust with respect to the loans secured by real estate collateral was the same for those loans secured exclusively by real estate as for those which, in addition to being secured by real estate, benefitted by either a security interest in other collateral or a guarantee.

Additionally, the P&S Agreement under which the Trust is formed and the Certificates are

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issued will limit the ability of the Trustee or Servicer to realize upon non-real estate collateral in connection with Commercial Mortgage Loan IDBs which go into default. Specifically, a Commercial Mortgage Loan IDB benefitting from non-real estate collateral will be disqualified as Class I Real Estate if, in connection with a default, the amount recovered from non-real estate collateral (including guarantees) exceeds 40% of the original principal amount of such loan (the "40% test"). The P&S Agreement will require that recovery may not be made against non-real estate collateral on a particular Commercial Mortgage Loan IDB otherwise qualifying as Class I Real Estate if after giving effect to such recovery (i) the 40% test will be violated with respect to such Commercial Mortgage Loan IDB and (ii) the consequence of such violation and related disqualification of such Commercial Mortgage Loan IDB as Class I Real Estate would be to cause the Trust, based upon the Commercial Mortgage Loan IDBs which continue to qualify as Class I Real Estate and the Equipment Loan IDBs, not to satisfy the requirement that at least 55% of the value of

the Trust assets at the time the Certificates were issued consisted of Class I Real Estate and Equipment Loan IDBs.

Finally, in order to qualify as Class I Real Estate or an Equipment Loan IDB includable for purposes of this paragraph A, the related IDB must represent the entire issuance of IDBs (i.e., a "whole" interest).

The Equipment Loan IDBs will all represent loans made, through a State or municipal developmental authority, to a business to fund the purchase price of equipment and costs specifically related to the equipment acquisition such as installation expenses. The Equipment Loan IDBs represent less than 7½ of the initial value of the Trust's assets.

B. Class II Real Estate (25½). Up to 25½ of the initial value of the Trust assets, subject to reduction below 25½ of the value of the Trust assets to the extent that the initial value of the Class I Real Estate and Equipment Loan IDBs exceeds 55½ of the Trust assets, may consist of Commercial Mortgage Loan IDBs which do not qualify as Class I Real Estate because they do not meet one of the criteria for Class I Real Estate outlined above ("Class II Real Estate").

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C. Other (20%). Up to 20% of the initial value of the Trust assets may consist of loans or assets other than Class I Real Estate, Class II Real Estate and Equipment Loan IDBs ("Class III Assets").

The Class I Real Estate and the Class II Real Estate are sometimes referred to collectively herein as the "Real Estate Assets," and the Real Estate Assets, Equipment Loan IDBs and Class III Assets are sometimes referred to collectively herein as the "Assets" or the "Pool."

Citytrust's objective, in proceeding with the transaction, is to sell all or a substantial part of its IDB portfolio. In excess of 75% of the portfolio of the Trust, based upon the outstanding principal amount of the IDBs at the date hereof, consist of Commercial Mortgage Loan IDBs. The balance of the Trust's portfolio consists of either IDBs secured by a combination of real estate and equipment or of Equipment Loan IDBs. Accordingly, notwithstanding the tests and standards outlined above, Citytrust anticipates that substantially all of the Assets in the Trust will consist of IDBs and will consist principally of Commercial Mortgage Loan IDBs.

Citytrust may sponsor two separate Trusts, one of which will acquire the IDBs relating to Connecticut and the other of which will acquire the IDBs relating to New York.

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If two separate Trusts are sponsored in reliance upon Sections 3(c)(5)(A) and 3(c)(5)(C) of the 1940 Act, all representations made herein with respect to the Trust will be applicable with equal force to each such Trust.

Background of Commercial Mortgage Loan and Equipment Loan
IDBs

The IDBs will be tax-exempt industrial development bonds with fixed, final remaining maturities ranging generally from five to 20 years. The IDBs will vary with respect to interest rate, maturity and redemption or prepayment provisions, and will range generally in outstanding principal amount from \$100,000 to \$6,600,000.

Commercial mortgage loans funded by banks are often made through governmental development programs which promote local industry by enabling borrowers to get the benefit of lower tax-free interest rates available to governmental development agencies' financings. Commercial mortgage loans, particularly where the borrowers are middle-market companies, usually benefit to some degree by whatever other collateral may be available, such as security interests in equipment or guarantees of the owners or corporate affiliates of the borrower. Taking a lien on other available collateral is simply a matter of prudent lending standards and practices. These mortgage loans are

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nevertheless loans made to purchase or improve real estate, where the lender looks primarily to the real estate as the source of repayment. On a continuum from commercial and industrial loans on the one hand to traditional real estate loans on the other hand, these loans are from the lender's perspective at the real estate end of the spectrum. The role assigned by the lender to the non-real estate collateral is generally insignificant, and is certainly less significant than, for example, the FNMA, FHLMC or GNMA guarantee (each of which may be viewed as an additional form of collateral) attached to pools of residential mortgage loans packaged with those agencies' guarantees for collateralized mortgage obligations secured by GNMA, FNMA or FHLMC certificates.

Loans to middle-market companies to finance the acquisition of equipment similarly are often made in an IDB format in order to get the benefit of lower tax-free interest rates available to governmental agencies' financings.

The characteristics of Citytrust's portfolio of IDBs are illustrative. All of the IDBs which Citytrust will transfer to the Trust were issued by Connecticut or New York developmental authorities which are authorized to make loans

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only for the purpose of financing the acquisition or improvement of real estate or equipment.

All of the Commercial Mortgage Loan IDBs which Citytrust proposes to sell to the Trust are IDBs where (i) Citytrust makes a loan to the issuing development authority by purchasing an IDB of the development authority issued under a trust indenture (the "IDB Indenture") with Citytrust's corporate trust department generally serving as trustee (the "IDB Trustee"), (ii) the issuing developmental authority, in accordance with its statutory authorization, makes a loan to a borrower (generally a middle-market commercial enterprise) secured by a mortgage or deed of trust on real estate and the proceeds of which are used to acquire or improve real estate, or itself acquires fee title to the real estate and leases the real estate to the borrower, (iii) the issuing developmental authority assigns the underlying mortgage or deed of trust to the IDB Trustee (if the IDB is structured in a loan format with the underlying borrower having title to the real estate) or grants a mortgage on the real estate to the IDB trustee (if the IDB is structured in a lease format with the issuing developmental authority having title to the real estate), and (iv) Citytrust's recourse as holder of the Commercial Mortgage Loan IDB is limited to the underlying real estate

loan and any related collateral or guarantees (i.e., the IDBs are without recourse to the issuing developmental authority). In almost all cases, Citytrust's mortgage is a first mortgage. Generally speaking, in the case of Commercial Mortgage Loans IDBs, the assignment or grant of a mortgage contemplated by clause (iii) of the preceding sentence is not set forth in a separate document but instead is incorporated in, and is part of, the IDB Indenture. The entire IDB Indenture has in each case been recorded in the appropriate real estate recording office. Accordingly, a re-assignment of a mortgage or deed of trust to the Trustee under the P&S Agreement or an assignment of a mortgage granted by the issuing developmental authority, whichever is applicable, would have to be effected by causing the Trustee (or another bank's trust department acting on behalf of the Trustee) to become IDB Trustee on each underlying Commercial Mortgage Loan IDB, with the document pursuant to which the new IDB Trustee is appointed being recorded in the appropriate real estate recording office.

The Equipment Loan IDBs are structurally identical, except that the proceeds of the IDBs are used by the issuing developmental authority to make a loan to a borrower the proceeds of which are used to acquire equipment.

At the time Citytrust originates Commercial Mortgage Loan IDBs, Citytrust applies the same underwriting criteria to the IDBs as it applies to its other commercial mortgage loans not made through a developmental authority intermediary. As a general matter, Citytrust requires an original LTV ratio for commercial mortgage loans (including the IDBs) of not more than 80%, in most cases based upon an appraisal by a qualified appraiser.* The LTV exceeds 80% only where to do so is necessary in order to cover costs strictly related to the real estate being financed, such as closing costs. As in the case of its other commercial mortgage loans, the appraisal analyzes the underlying property as an income producing property based upon anticipated rentals that could be achieved in leasing the property to a new tenant. Accordingly, the appraisal does not solely rely on the present corporate tenant and its ability to pay to establish the appraised amount of the underlying property.

The additional collateral securing Commercial Mortgage Loan IDBs generally consists of (i) the guarantee of a proprietor or corporate parent or (ii) equipment located on the real estate premises. In no case is

* Generally, the Commercial Mortgage Loan IDBs had original LTV's of not more than 80%.

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additional collateral a principal source of repayment of the loan. Like any prudent lender, Citytrust attempts to take whatever ancillary collateral it can to support commercial mortgage loans. Moreover, because real estate is often held in special purpose corporations owned by the actual property user (generally for state tax reasons), the guarantor (which generally is also the owner of all of the special purpose corporation's stock) is often the user of the property and is the primary cash source for servicing the loan absent selling the property.

Description of the Transaction

The Trust will be formed pursuant to a P&S Agreement to be entered into between Citytrust as Seller, an unaffiliated bank as Trustee and Citytrust as Servicer. Pursuant to the P&S Agreement, the Trust at its formation will issue to investors (the "Holders") the Certificates representing fractional undivided interests in the Pool. The Trustee will use the proceeds of the Certificates to buy from Citytrust the Assets to be included in the Pool.

Responsibility for administering the Assets, including collecting on the Assets and making determinations as to when real estate loans should be foreclosed or real estate sold, will reside with the Servicer pursuant to the P&S Agreement. The Servicer will have responsibility for

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liquidating and collecting upon the Assets, preparing financial information for the Trust and preparing on behalf of the Trust other filings and reports required under the P&S Agreement or applicable law (including the Securities Exchange Act of 1934, as amended). The Trustee, acting on behalf of the Holders, will have authority to substitute another Servicer if the Servicer defaults in its obligations under the P&S Agreement.

Under the P&S Agreement, the Trust will irrevocably instruct the Servicer to remit all payments and collections on the Assets directly to the Trustee after deducting the servicing fee. Cash collections so remitted to the Trustee will be maintained by the Trustee in a collateral account (the "Collateral Account") under the P&S Agreement and used from time to time to make payments on the Certificates to the Holders.

The Trust will not engage in any investment activity with respect to the Assets or any of the proceeds thereof or otherwise, except that the Trustee will be directed in the P&S Agreement to temporarily invest payments received on the Assets in certain "Permitted Investments" until they are passed-through to the Holders on the next succeeding payment date on the Certificates. Permitted Investments are high grade obligations customary for

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temporary investment of funds pending distributions in asset-backed transactions and must mature not later than the next succeeding payment date. Payments and collections with respect to the Assets will be passed through to the Holders monthly or quarterly.

The Trust will have neither employees, officers, managers, a board of directors, a board of trustees or an investment advisor nor the need for any of those parties because the Trust will not conduct any activities requiring their services.

The Pool will be fixed at the time Citytrust conveys the Pool to the Trust. No substitution or exchange of the Assets of the Pool will be permitted. The Trust will conduct only the business relating to its ownership and liquidation of the Assets and issuance of the Certificates. The Trust is expected to terminate promptly after the date on which less than a designated percentage (expected to be 5%) of the total original principal amount of all of the IDBs in the Pool is outstanding. Any Assets remaining in the Pool at such time are expected to be liquidated into cash, with the proceeds of such liquidation then distributed to the Holders. The Certificates are not redeemable or otherwise payable at the election of Holders. The only source of liquidity for investors who require more liquidity

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than that provided by the pass-through of regular payments as the IDBs will by the sale of their Certificates.

The Certificates will evidence fractional undivided interests in the corpus of the Trust, which will be comprised of the Assets. The Certificates will not be redeemable at the option of the Holders.

Each Commercial Mortgage Loan IDB will be in the form of a bond issued under an indenture (that is, the IDB itself) with an IDB Trustee, with the IDB in turn secured by the loan from the issuing developmental authority to the ultimate borrower as well as the mortgage or deed of trust (in each case herein called a mortgage) securing that loan. Because the IDBs are securities for purposes of the Uniform Commercial Code, the transfer of the IDBs from Citytrust to the Trustee at closing will be accomplished by delivering certificates evidencing the IDBs to the Trustee, together with endorsements to the Trustee permitting ultimate registration of the IDBs in the name of the Trustee. Promptly after the closing each IDB will be re-registered in the name of the Trustee. The Trustee, as holder of the IDB, by virtue of its right to direct actions taken by the IDB trustee, effectively becomes the beneficiary of the mortgage or deed of trust.

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It will be a condition to closing for the issuance of the Certificates with respect to each Trust that

Citytrust and Goldman, Sachs & Co. receive an opinion of independent counsel acceptable to them to the effect that, if a receiver were appointed for Citytrust under the applicable provisions of the Connecticut banking law, the property held by Citytrust as IDB Trustee, including the related mortgages or assignments of mortgages, would not be assets, business or property of Citytrust which would be subject to disposition by such receiver pursuant to the applicable provisions of the Connecticut General Statutes. Citytrust has authorized us to confirm that it will use its best efforts to cause the Trustee, or the trust department of another acceptable commercial bank other than Citytrust, to become IDB Trustee for each Commercial Mortgage Loan IDB by not later than 120 days after the closing.

The Trustee will be required to monitor the performance of the Servicer on behalf of the Holders. In the event of a default by the Servicer in the performance of its obligations, the Trustee will have the right, on behalf of the Holders, (i) to remove the Servicer and (ii) to assume all of the rights and obligations of the Servicer or to appoint another appropriate entity to act as Servicer.

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Legal Analysis

Section 3(c)(5) of the 1940 Act exempts from the definition of "investment company," and therefore from the registration requirements of the 1940 Act,

"any person who is not engaged in the business of issuing redeemable securities, face amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; . . . and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate." (Emphasis added)

If the Trust, despite its passivity, were to be deemed to be a person engaged in an activity sufficient to bring it within the definition of an "investment company" under Section 3(a) of the 1940 Act, in our opinion, the Trust will nonetheless be excluded from that definition by clauses (A) and (C) of Section 3(c)(5) of the 1940 Act, and, therefore, from the registration requirements of the 1940 Act, because it will be engaged primarily in the businesses of "purchasing . . . notes . . . and other obligations representing . . . the sales price of merchandise" and "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate."

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As discussed below, we do not think that there is any question but that the Trust, as described herein, should not be deemed to be issuing "redeemable securities, face amount certificates of the installment type or periodic payment plan certificates." Rather, we think this proposal raises only two issues: first, does the Class I Real Estate, as described above, qualify as "mortgages and other liens on and interests in real estate" within the meaning of clause (C) of Section 3(c)(5); and, second, may an issuer which holds both "notes . . . and other obligations representing part or all of the sales price of merchandise" qualifying under clause (A) of Section 3(c)(5), such as Equipment Loan IDBs, and "mortgages and other liens on and interests in real estate" qualifying under clause (C) of Section 3(c)(5), such as the Class I Real Estate, aggregate such assets for purposes of reaching a determination that the issuer is "primarily engaged in one or more of" the businesses described in clauses (A), (B) and (C) of Section 3(c)(5).

A. Face-Amount Certificates of the Installment Type:
Periodic Payment Plan Certificates.

The Trust will not be engaged in the business of issuing "face-amount certificates of the installment type" or "periodic payment plan certificates." The term "face-

amount certificates of the installment type" is defined in Section 2(a)(15) of the 1940 Act as "any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount."

Section 2(a)(27) of the 1940 Act defines "periodic payment plan certificate" as "(A) any certificate, investment contract, or other security providing for a series of periodic payments by the holder, and representing an undivided interest in certain specified securities or in a unit or fund of securities purchased wholly or partly with the proceeds of such payments and (B) any security the issuer of which is also issuing securities of the character described in clause (A) and the holder of which has substantially the same rights and privileges as those which holders of securities of the character described in clause (A) have upon completing the periodic payments for which such securities provide." Since the Certificates do not provide for periodic payments or installments to be made by the Holders, the Trust will not be engaged in the

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business of issuing "face amount certificates of the installment type" or "periodic payment plan certificates."

B. Redeemable Securities.

Likewise, the Trust will not be engaged in the business of issuing "redeemable securities." Section 2(a)(32) of the 1940 Act defines a "redeemable security" as "any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled . . . to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof." In the proposed transaction, the Trust will be modeled after a "closed end" investment company, not an "open end" investment company. As set forth above, the Holders of Certificates will not have the right to force any early payment or redemption.

C. Mortgages and Other Liens on and Interest in Real Estate.

The description of proposed transactions in three no-action requests seeking confirmation that the Division would not recommend enforcement action to the Commission if the requesting party proceeded in reliance upon Section 3(c)(5)(C), described the real estate assets as being secured exclusively by real estate, at least as to 55%

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(in the case of the two most recent letters) and 65% (in the oldest letter) of the assets described in the requests.

Merrill Lynch, Pierce, Fenner & Smith, Inc. (pub. avail.

November 4, 1981) (involving IDBs); United Bankers, Inc.

(pub. avail. May 23, 1988) (involving a variety of different

types of assets in connection with a bank's proposed spin-

off of low quality assets); and La Quinta Motor Inns, Inc.

(pub. avail. January 4, 1989) (involving IDBs). The letters

raise a concern as to whether a traditional commercial

mortgage loan which benefits from non-real estate collateral

(such as a security interest in equipment or a guarantee) as

a consequence fails to qualify, in the Staff's view, as a

"good" interest in real estate for purposes of Section

3(c)(5)(C).

We submit that the Real Estate Assets, under the circumstances described above, should be considered

qualifying interests in real estate for purposes of Section

3(c)(5)(C). All of the Commercial Mortgage Loan IDBs were

originated, from Citytrust's perspective, as traditional

commercial mortgage loans. Their proceeds were used to

finance the acquisition or improvement of real estate, they

are secured by real estate, and Citytrust applied its

customary criteria for commercial mortgage loans in

underwriting the loans. Although Citytrust views all of the

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Commercial Mortgage Loan IDBs as traditional commercial mortgage loans, the criteria described above for the Class I Real Estate are even more stringent and are intended to demonstrate unequivocally that those Commercial Mortgage Loan IDBs are "mortgages" on or other "interests in real estate" within the meaning of Section 3(c)(5)(C).

As indicated, Class I Real Estate, together with Equipment Loan IDBs, will constitute at least 55% of the Assets of each Trust. Moreover, although Citytrust proposes to have the flexibility to have up to 20% of a Trust's Assets not qualify under either clause (A) or clause (C) of Section 3(c)(5), consistent with the standards outlined in United Bankers, Inc., supra, Citytrust in fact expects that substantially all of the Assets in each Trust will consist of Class I Real Estate, Class II Real Estate or Equipment Loan IDBs.

D. Aggregation for Purposes of Clauses (A) and (C) of Section 3(c)(5).

Section 3(c)(5) exempts any person who "is primarily engaged in one or more of" the businesses described in clauses (A), (B) and (C). Although we are not aware of any interpretive or no-action letter addressing whether a person can rely on a combination of clauses (A), (B) and (C) for a particular transaction, as opposed to only

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one of such clauses, the introductory language to Section 3(c)(5) clearly and unequivocally states on its face, by referring to "one or more of the following businesses", that a combination of the three clauses may be relied upon.

Moreover, assuming an entity does not issue redeemable securities, face amount certificates of the installment type or periodic payment plan certificates and, accordingly, is a passive investment vehicle, we are aware of no policy reason why reliance on a combination of the sub-clauses in Section 3(c)(5) should not be permitted. Accordingly, we believe the Trust should qualify under Section 3(c)(5) if at least 55% of the Assets consist of Class I Real Estate or Equipment Loan IDBs.

Investment Company Act Exemption

We believe that the Trust should be regarded as falling within the exemption provided in Section 3(c)(5)(C) of the Investment Company Act. We believe that none of the other aspects of the proposed transaction gives rise to concerns resulting in regulation appropriate under the Investment Company Act. We therefore respectfully request the Staff to indicate that it will not recommend action to the Commission if registration under the 1940 Act is not effected with respect to any person.

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Because Citytrust and Goldman, Sachs & Co. are anxious to proceed with the formation of the Pool and the distribution of the Certificates, we would appreciate a response to the request made hereby as promptly as practicable. If for any reason the Staff is disposed not to grant the requested no-action positions, we request an opportunity to discuss this situation with the Staff prior to the issuance of any formal letter.

We thank you for your attention to this matter. If you have any questions or if we may provide further information, please telephone John E. Baumgardner, Jr. (212-558-3866), Mark J. Welshimer (212-558-3669) or Gerald T. Slevin (212-558-3855) of this office.

Very truly yours,

Mark J. Welshimer
Mark J. Welshimer

cc: Jordan Yarett