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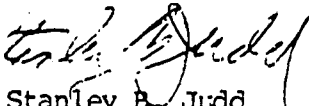
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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 83-242-CC
Realex Capital Corporation
File No. 132-3

We cannot assure you that we would not recommend any enforcement action to the Commission if the proposed limited partnership ("Issuer") does not register as an investment company. We do not believe that the exception in section 3(c)(5)(C) of the Investment Company Act of 1940 ("exception") would be available to the Issuer, which would be formed to invest in limited partnership interests in an underlying limited partnership that would own and operate a building. Such limited partnership interests would be interests in the partnership, rather than mortgages or interests in real estate. See, Investment Company Act Release No. 3140, November 18, 1974. For the same reason, the exception would not be available to the Issuer even if the underlying partnership were a general partnership. This is because the general partnership interests in which the Issuer would invest would be investment contracts and, thus, securities. Such general partnership interests would be investment contracts because the Issuer would be relying on the efforts of the managing partners and an affiliate of one of the managing partners of the underlying partnership for the success of the enterprise. See, Williamson v. Tucker, 645 F.2d 404, 423 (5th Cir. 1981), cert. den. 454 U.S. 897 (1981), where the Fifth Circuit said that a general partnership in which some agreement among the partners places the controlling power in the hands of certain managing partners may be an investment contract with respect to the other partners.

To apply for an exemption under section 3(b)(2) or section 6(c) of the Act, you need to comply with 17 C.F.R. §§ 270.0-2, 270.0-5, and 270.0-8.



Stanley B. Judd
Deputy Chief Counsel

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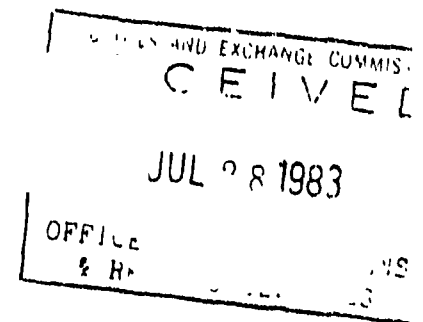
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1940 Act/\$3(a)(1)
1940 Act/\$3(a)(3)
1940 Act/\$3(b)(2)
1940 Act/\$3(c)(5)
1940 Act/\$6(c)

July 27, 1983

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Washington, D.C. 20549



The Realex Capital Corporation

Dear Sirs:

We are acting as counsel for The Realex Capital Corporation ("Realex") which has entered into an agreement to purchase, for \$22,500,000, a 49% interest in a New York general partnership (the "General Partnership"), presently consisting of two general partners (the "General Partners"). The sole business of the General Partnership is the ownership and operation of a single office building in New York City (the "Building"). The structure proposed to implement this transaction has raised questions under the Investment Company Act of 1940 (the "Act").

Facts

The Underlying Partnership. It is the intention of Realex and the General Partners that the General Partnership (the "Underlying Partnership") be converted to a New York limited partnership, in which case the General Partners will remain as the two general partners of the Underlying Partnership and the interest to be purchased by Realex would be that of a limited partner. Such limited partner would be a limited partnership (the "Issuer") to be formed by Realex as described in the following section. If the Underlying Partnership is not converted to a limited partnership, the Issuer will purchase a general partnership interest in the

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Underlying Partnership and the General Partners will be the managing partners of such partnership. The only business of the Underlying Partnership will be the ownership and operation of the Building. The Underlying Partnership will not, and under its partnership agreement will not be permitted to, acquire, or own any other property other than the Building (except for the acquisition of fee title to a portion of the land underlying the Building presently held under lease) or engage in any other activity.

The profits, losses and cash flow of the Underlying Partnership shall be allocated 51% to the General Partners and 49% to the Issuer, except that a partner will first be allocated losses equal to the amount of additional capital contributions it makes to the Underlying Partnership.

The Issuer Partnership. Realex proposes to assign its rights under the purchase agreement to the Issuer, a limited partnership to be formed solely for the purpose of engaging, through its interest in the Underlying Partnership, in the business of owning and operating the Building. The Issuer, under the terms of its partnership agreement, will not be permitted to purchase or own any other property or securities or engage in any other activity and will be required to distribute all cash generated by the Building, after payment of expenses and setting aside reserves, to its partners.

The business of the Issuer will be carried out by its general partner (the "Issuer General Partner"), which will be a newly-formed corporation owned by Realex (or the owners of Realex) and formed solely for the purpose of acting as general partner of the Issuer. The Issuer General Partner will not engage in any business or activity other than managing the business of the Issuer; in engaging in activities relating to the business of the Underlying Partnership, the Issuer General Partner will do so solely on behalf of, and in its capacity as general partner of, the Issuer and not on its own account. The Issuer General Partner is not affiliated with the General Partners of the Underlying Partnership.

The limited partners of the Issuer will be Accredited Investors who will purchase limited partnership

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interests in the Issuer pursuant to a non-public offering under Rule 506 of Regulation D. The Limited Partnership Interests will be sold in Units anticipated to be \$200,000, payable in installments. Since an insurance company will deliver to the Issuer a bond guarantying payment of such installments, each limited partner must, in addition to being an Accredited Investor, meet such other standards as the insurance company will impose as a prerequisite to issuing the bond. Approximately 250 units will be offered. Accordingly, the Issuer expects that it may have over 100 limited partners.

Control of Underlying Partnership. The business of the Underlying Partnership will, in general, be managed by the General Partners, and an affiliate of a General Partner will manage the building pursuant to a management agreement, in form and substance satisfactory to the Issuer, to be entered into between such affiliate and the Underlying Partnership. However, the Issuer will not merely be a passive investor, but will have control over certain significant aspects of the Underlying Partnership.

First, by reason of limitations in the Underlying Partnership's partnership agreement (which limitation may not be amended without the Issuer's consent), the Underlying Partnership's business is limited to the ownership and operation of the Building. All earnings of the Underlying Partnership must be reinvested in the Building or distributed to the partners.

Second, neither of the General Partners may transfer its interest in the Underlying Partnership or withdraw without the consent of the Issuer. In addition, in the event that the General Partners wish to sell all or more than 50% of their partnership interest in the Underlying Partnership, the Issuer has a right of first refusal with respect to the purchase thereof. (Similarly, the General Partners have a similar right of first refusal with respect to a sale of more than 50% of the Issuer's interest in the Underlying Partnership.)

Third, the Underlying Partnership may not sell the Building without the consent of the Issuer unless, upon such sale, the Issuer receives net cash proceeds equal to the capital contributions made to the Issuer by its partners.

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Fourth, the Issuer will have the right to require the Underlying Partnership to make an election under Section 754 of the Internal Revenue Code. Also, the Issuer's consent will be required for any change in the Underlying Partnership's fiscal year or accounting method. The Underlying Partnership will be required to furnish audited financial statements to the Issuer on a regular basis, and the Issuer has the right to approve independent accountants selected for the Underlying Partnership. The Issuer's consent is also required if the General Partners wish to use Partnership funds for the purchase of the land underlying the Building. In addition to the above situations where the Issuer's consent or approval is specifically required, the Issuer has the right to enforce the General Partners' fiduciary obligation to the Issuer with respect to the management of the Underlying Partnership.

Requests

Section 3(c)(5) - Request For No Action Letter. On behalf of Realex, we respectfully request a letter from the Staff stating that it will not recommend that the Commission take any action on the basis of a claim that the Issuer is an investment company, if the Issuer acts in reliance upon our opinion that it is excepted from the definition of an investment company pursuant to Section 3(c)(5) of the Act.

Since the Issuer is not purchasing a fee interest in the Building or a mortgage or lien secured by the Building, the applicability of the exception contained in Section 3(c)(5) must be determined by a consideration of the facts and circumstances of its specific assets. Investment Company Act Release No. 3140, November 29, 1960 (17 C.F.R. 271.3140). In our view, the facts and circumstances set forth above establish that the exemption provided by Section 3(c)(5) is available, whether the Underlying Partnership is a limited partnership or a general partnership, because the Issuer's interest is, in actuality, an interest in real estate. Our belief is based, in particular, upon the elements of control that the Issuer has with respect to the Underlying Partnership, upon the provisions of the partnership agreement of the Underlying Partnership which require that it have no business or assets other than the Building, upon the provisions of the partnership agreement of the

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Issuer which provide that it have no business or assets other than its interest in the Underlying Partnership, and upon the provisions of both such agreements that provide that all monies of the partnerships other than those expended on the Building or for the payment of expenses and reserves, be distributed to the partners. Accordingly, we believe, and ask the Staff to concur, that the exception provided by Section 3(c)(5) is available under the facts and circumstances of this particular case.

* * *

If the Staff is unwilling to concur with our opinion as expressed above, we request that, as envisioned by Investment Company Act Release No. 8456, August 9, 1974 (17 C.F.R. 271.8456), the Staff issue a no action letter under Section 3(a)(1) of the Act and the Commission issue an order under Section 3(b)(2) of the Act.

Section 3(a)(1) - Request For No Action Letter. On behalf of Realex, we respectfully request a letter from the Staff stating that it will not recommend that the Commission take any action on the basis of a claim that the Issuer is an investment company within the meaning of Section 3(a)(1) of the Act.

Since the sole activity of the Issuer will be the ownership of a partnership interest in the Underlying Partnership, it could be argued that the Issuer "proposes to engage primarily in the business of investing, reinvesting or trading in securities". However, as described above,

(1) the Issuer will not (and will not be permitted to) acquire any securities other than this one interest in the Underlying Partnership; the Issuer will continue to hold such interest and will not be engaged in any reinvesting or trading;

(2) the Underlying Partnership will not engage (and will not be permitted to engage) in any activity other than the ownership and operation of the Building;

(3) the Issuer will not hold such interests as a passive investment but, will have some control over

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certain activities of the Underlying Partnership; in particular, the Issuer's consent is required for any transfer of the General Partners's interest or (except where the Issuer receives proceeds equal to its partners's capital contributions) for any sales of the Property.

Accordingly, we submit that the Issuer proposes to engage primarily in the business of owning and operating the Building and does not propose to engage primarily in "the business of investing, reinvesting or trading in securities".

Section 3(a)(3) - Application for Order Under Section 3(b)(2). The Issuer may be considered to be an investment company under Section 3(a)(3) since it may be considered to propose to engage in the business of "holding" securities (i.e., its partnership interest in the Underlying Partnership) which will be its only significant asset.

On behalf of Realex, we respectfully make this application for an order by the Commission, pursuant to Section 3(b)(2), declaring that the Issuer "is primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses".

On the same basis as set forth in the above discussion of Section 3(a)(1), we submit that the Issuer proposes to engage primarily in the business of owning and operating a single building, and therefore qualifies for exemption under Section 3(b)(2).

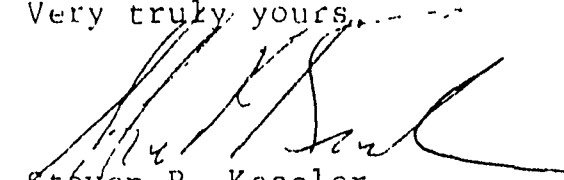
Application for Order Under Section 6(c). Alternatively, on behalf of Realex, we respectfully make this application for an order by the Commission, pursuant to Section 6(c) declaring that the Issuer is exempt from the provisions of the Act on the ground that such exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

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As discussed above, each limited partner in the Issuer will be an Accredited Investor and will be required to make a substantial investment (anticipated to be at least \$200,000) in the Issuer. In addition, each investor will be required to demonstrate to the insurance company providing the bond that he is ready, willing and able to make all of the installments of his capital contribution when they are due. It has been Realex' experience in the past, and Realex anticipates that it will be the case in connection with this transaction, that the insurance company will require that each investor have significantly greater financial assets than would be required for the investor to be an Accredited Investor. Accordingly, we submit that such investors do not need the protections of the Act, even if, in fact, it is applicable, in connection with an investment that is, in actuality, the purchase of an interest in the Building.

Please do not hesitate to telephone the undersigned or Joanne C. Eaton, collect, to discuss this letter or to indicate any further information that may be required.

Very truly yours, ---



Steven P. Kessler

SPK:nl