

WASHINGTON SERVICE BUREAU, INC.
SUBJECT: First Nat'l. Bank of Fremont (970B2)
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1933 Act/3(a)(2)
1939 Act/304(a)(4)(A)
1940 Act/3(c)(5)(C)

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PUBLIC AVAILABILITY DATE: 11-18-85

ACT	SECTION	RULE
1933	3(a)(2)	---
1939	304(a)(4)	---
1940C	3(c)(5)	---

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
Washington, D.C. 20549

11/18/85

RE: First National Bank of Fremont -- Mortgage
Backed Pass-through Certificates

OFFICE OF APPLICATIONS
AND REPORT SERVICES

Gentlemen:

We are acting as counsel to the First National Bank of Fremont, Indiana ("Fremont"), in connection with its proposed creation of an investment trust (the "Trust") which will hold debt obligations evidenced by promissory notes and secured by first mortgages on or deeds of trust conveying real property (the "Mortgage Loans"); and the proposed sale of one or more series of non-redeemable pass-through certificates (the "Certificates"), each of which will evidence a fractional undivided interest in the Mortgage Loans in the Trust. The structure of the Trust and certain terms of the proposed sale of the Certificates are more fully described herein. On behalf of Fremont, we are seeking a "no-action" letter from the Commission confirming our opinion that:

- (1) the Certificates will be exempt from the registration requirements of the Securities Act of 1933 by reason of the provisions of Section 3(a)(2) thereof; and therefore also exempt from the provisions of the Trust Indenture Act of 1939 by reason of the provisions of Section 304(a)(4)(A) thereof.
- (2) the Trust is exempt from the registration requirements of the Investment Company Act of 1940 by reason of the provisions of Section 3(c)(5)(C) thereof.

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Fremont is a commercial bank which is engaged as part of its business in the origination and servicing of loans secured by mortgages on commercial and residential real estate. Fremont proposes to establish the Trust with San Jose Tri-County Bank (the "Trustee"), an entity related to Fremont through common ownership, as trustee, and to assign to the Trustee, without recourse, one or more Mortgage Loans in their entirety.

After assigning the Mortgage Loans to the Trust, Fremont will offer and sell Certificates which will represent an undivided fractional interest in the Mortgage Loans assembled in the Trust. The Certificates will be in a form suitable for recording and will be offered and sold only to institutional investors. Fremont intends to retain the right to service the Mortgage Loans pursuant to a written Service Agreement between the Trustee and Fremont. The fee charged by Fremont for this service ("Service Fee") will be the same as that charged to unrelated entities for similar services.

The Trust will conduct no independent investment activity of any kind. After the Certificates are issued and sold, no Mortgage Loans will be added to, withdrawn from, or substituted for those originally assigned by Fremont. All payments of principal and interest on the Mortgage Loans, except for the Service Fee, will be passed through to the Certificate holders.

While each of the Mortgage Loans in the Trust will be secured by a first mortgage or other lien on or interest in real estate, Fremont also intends to issue an irrevocable stand-by letter of credit (the "Letter of Credit") to secure repayment of each Mortgage Loan. The Trustee will be authorized to draw upon the Letter of Credit within 10 days of any date on which an insufficient payment is made to the Trustee to the extent of the difference between the amount paid into the Trust by the mortgagors and the amount due to the Certificate holders. Payment by Fremont under the Letter of Credit will not relieve the defaulting mortgagor from its continuing obligation to pay the defaulted principal and interest in accordance with the terms of the particular Mortgage Loan. Moreover, to the extent that the Trustee draws upon the Letter of Credit to make any payment to the Certificate holders, Fremont will be subrogated to the Trustee's right to proceed against a defaulting mortgagor to recover the amount paid pursuant to its obligation under the Letter of Credit.

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The Certificates will be issued in serial form, and all principal and interest payments received by the Trust, after payment the Service Fee, will be passed through to the Certificate holders up to the full amount of each Certificate, in the order of issuance of the Certificates. For example, a 20-year Mortgage Loan, paying interest semi-annually and principal annually, might be divided into several separate series of Certificates. One series might represent the right to receive all principal payments for the first five years of the Mortgage Loan and a portion of the interest paid during that period. At the end of the fifth year, this series of Certificates would be redeemed and retired by the Trustee. Another series of Certificates might represent the right to receive principal payments in years six through fifteen, together with a portion of the interest paid in the first five years. This second series would be redeemed and retired by the Trustee at the end of year fifteen. A final series of Certificates in this example would represent the right to receive principal payments in years sixteen through twenty, together with a portion of the interest payments in years one through fifteen. The selling price of each series may vary according to maturity. Alternatively, in order to result in a sale of all of the Certificates at the par value, the interest on the Mortgage Loans and thus the Certificates might increase for the principal installments due in later years. In the above example, the third series would have a higher rate than the first two series. In any event, the Certificates will not be redeemable at the option of the holder thereof.

Based on the foregoing, it is our opinion that the Certificates qualify for exemption from the registration requirements of the Securities Act of 1933 (the "1933 Act") by virtue of Section 3(a)(2) thereof, because they are securities which are "guaranteed by [a] bank." Although for purposes of the banking laws the Letter of Credit will not technically establish a guaranty relationship, the Staff, in taking a previous no-action position, agreed with the assertion that the term "guarantee" encompasses something more than a mere guaranty in the legal sense. Chemical Bank; Lomas & Nettleton Mortgage Investors [71-72 T.B.], Fed. Sec. L. Rep. (CCH) ¶ 78,543 (Nov. 1, 1971). In Chemical Bank, the Staff was apparently concerned with the applicant's assertion that for purposes of the application of the securities laws, the term "guarantee" refers to all arrangements, including bank-issued letters of credit, whereby one person agrees to see to the payment of, or in respect to, a

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security issued by another, without regard to whether a technical guaranty relationship exists between the person and the issuer. In its response to another no-action request on the same issue, the Staff further concluded that while the use of the term "guarantee" in its technical legal sense does not strictly apply to letters of credit, the term should be "interpreted to cover the practical realities of the situation". United California Bank, [70-71 T.B.] Fed. Sec. L. Rep. (CCF) ¶ 78,104 (March 16, 1971). See also Merrill Lynch, Pierce, Fenner & Smith, Inc. [81-82 T.B.] Fed. Sec. L. Rep. (CCH) ¶ 77,089 (Nov. 4, 1981); Banco de Ponce (Sept. 22, 1980); Goldman, Sachs & Co., (July 10, 1978).

In two recent letters, the Staff took a favorable no-action position with respect to the issuance of mortgage-backed pass-through certificates which were entitled to the benefit of bank-issued letters of credit without registration under the 1933 Act. See Merrill Lynch and Banco de Ponce. The fact that in this instance the Letter of Credit will be issued to secure repayment of the Mortgage Loans and not the direct payment of the amounts due under the Certificates should not alter that result. Here, as in the two prior situations, the Mortgage Loans will be the sole source of payment of all amounts due under the Certificates, and all amounts paid into the Trust by the mortgagor, less the Service Fee, will be paid over to the Certificate holders. Fremont's Letter of Credit also will empower the Trustee to draw sufficient funds to make up any deficiency in the amounts paid into the Trust by the mortgagor. Hence, the "practical realities" of the guaranty of the payments to be made by the mortgagor here are the precise equivalent of the guaranty of the payment of the amounts due under the Certificates in the prior situations where the Staff has taken a no action position with respect to registration under the 1933 Act. Based on the foregoing, it is our opinion that the Certificates qualify as securities guaranteed by a bank and are therefore exempted from the registration requirements of the 1933 Act by the provisions of Section 3(a)(2) thereof.

Section 304(a)(4)(A) of the Trust Indenture Act of 1939 (the "1939 Act") provides that any security exempted from the provisions of the 1933 Act by Section 3(a)(2) thereof, is also exempt from the provisions of the 1939 Act. Therefore, based on our opinion that the Certificates would be exempt from registration under the 1933 Act in reliance upon Section 3(a)(2) thereof, we further opine that the Certificates will be exempt from the provisions of the 1939 Act in reliance upon Section 304(a)(4)(A) thereof.

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With respect to the Investment Company Act of 1940 (the "1940 Act"), it is our opinion that the Trust will not constitute an "investment company" as that term is defined in Section 3(a)(3) of the 1940 Act, or that the Trust will be excluded from the definition by Section 3(c)(5)(C) thereof.

The proposed structure of the Trust will not qualify it as an "investment company" as that term is defined in Section 3(a) of the 1940 Act. The pertinent portion of Section 3(a) defines an investment company as any issuer which "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of government securities and cash items) on an unconsolidated basis. Section 3(a)(3). The Trust will not fall within this definition of an investment company, because it will not "engage in business". See Merrill Lynch.

The Trust will be a strictly passive entity and will make no investments or investment decisions. Once the Mortgage Loans are transferred to the Trust, it will be fixed and no other mortgage loans may be added or deleted. Funds received by the Trustee, as the agent of the Certificate holders, will be held in the Trust for a brief period prior to their distribution to the Certificate holders. The Mortgage Loans will be serviced by the originator and the Trust will require no employees, officers, board of directors, or investment advisers. The Trust will serve merely as a receptacle into which the Mortgage Loans will be placed.

Even if the Trust is considered to be engaged in business, the Trust would be excluded from the definition of an investment company by Section 3(c)(5)(C) of the 1940 Act as a person with no redeemable securities, face amount certificates of the installment type or periodic payment plan certificates outstanding, who is primarily engaged in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. The Trust's entire portfolio will consist of promissory notes secured by first mortgages on or deeds of trust conveying specific parcels of real estate and improvements thereon.

The positions advocated herein have been advanced on behalf of similar mortgage participation pools in situations where the Staff has agreed to take no action with respect to the creation

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of the pools without registration under the 1940 Act. See, Merrill Lynch, Pierce, Fenner & Smith, Inc., [81-82 T.B.] Fed. Sec. L. Rep. (CCH) ¶ 77,089 (November 4, 1981); Home Savings and Loan Association, [81 T.B.] Fed. Sec. L. Rep. (CCH) ¶ 76,704 (October 16, 1980).

Based on the foregoing, we respectfully request that the Staff recommend to the Commission that it take no action to enforce the 1933 Act, 1939 Act, or the 1940 Act against Fremont or the Trustee in connection with the transactions as described herein.

If any further information is required, please contact the undersigned.

Very truly yours,

ICE MILLER DONADIO & RYAN


Stephen J. Hackman

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cc: George McNaughton, Esq.

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1933 Act/3(a)(2)
1939 Act/304(a)(4)(A)
1940 Act/3(c)(5)(C)

Mr. Gerard S. DiFiore
Division of Corporation Finance
Stop 3-11
Securities and Exchange Commission
Washington, D.C. 20549-1004

Re: First National Bank of Fremont - Mortgage Backed
Pass-through Certificates

Dear Mr. DiFiore:

This letter modifies and supplements our letter of July 17, 1985, requesting, among other things, the concurrence of the staff of the Division of Corporation Finance ("Staff") in our opinion that the proposed offer and sale of one or more series of non-redeemable pass-through certificates ("Certificates") evidencing undivided fractional interests in debt obligations secured by first mortgages on or deeds of trust conveying real property ("Mortgage Loans") held in a trust ("Trust") for the benefit of the holders of the Certificates ("Certificate-holders") are exempt from registration under the Securities Act of 1933 ("1933 Act") under Section 3(a)(2) thereof. You have requested further information with respect to several aspects of the proposed transaction relating to the organization of the First National Bank of Fremont (Indiana) ("Bank"), which proposes to originate the Mortgage Loans and transfer them to the Trust, and the Bank's affiliation with San Jose Tri-County Bank ("Trustee"), the proposed trustee of the Trust; the issuance

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and sale of the Certificates; and the structure of the letter of credit transaction by which the Bank proposes to guarantee the payments to be made to Certificateholders.

The Bank is a national bank which is subject to the provisions of the National Bank Act and is currently operating under the supervision of the Office of the Comptroller of the Currency. The Trustee is a bank chartered under the laws of the State of Illinois. Its business is substantially confined to banking and it is supervised by the Illinois Commissioner of Banks and Trust Companies. The Bank and the Trustee are both "banks" as that term is defined in Section 3(a)(2) of the 1933 Act.

The Bank and the Trustee are affiliated entities in that both are controlled, directly or indirectly, by the same persons. Approximately 76% of the outstanding common shares of the Bank are owned by three persons. These same persons own approximately 74% of the outstanding common shares of San Jose Banco, a bank holding company, the assets of which consist of approximately 85% of the outstanding shares of the Trustee. We submit that this affiliation should have no effect on the availability of the Section 3(a)(2) exemption because the interests of Certificateholders will be adequately protected by the "guarantee" of a bank as defined in the 1933 Act. The Trustee will be bound by the terms of a trust indenture ("Indenture" which will require it to draw upon a letter of credit ("Letter of Credit"), which will be issued by the Bank, promptly if on any interest payment date there is a deficiency in the payments made by the mortgagors, and by general principles of trust law which require it to act in good faith and in the best interests of the Certificateholders. Moreover, the Indenture will permit the holders of a specified percentage of the outstanding principal balance of a series of Certificates to direct the Trustee's action as described further herein.

The Staff has taken a favorable no-action position with respect to the exemption provided by Section 3(a)(2) where the proposed originator-settlor of a trust established to hold mortgage loans, the trustee of that trust and the person proposing to provide additional security to the certificateholders were the same entity. See Banco de Ponce (Sept. 22, 1980) (letter of credit); Banco de Ponce (Dec. 27, 1978) (letter of credit); and Washington Federal Savings & Loan Association of University Heights (Jan. 23, 1975) (agreement to repurchase).

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These letters seem to indicate that the relationship between the trustee, the guarantor and the originator/settlor of a mortgage pass-through trust should be given little weight in making the determination of whether the exemption provided by Section 3(a)(2) of the 1933 Act is available.

You further requested additional information with respect to the issuance and sale of the Certificates. The Certificates will be issued in series and each series will represent an interest in a particular Mortgage Loan which will be identified on the face of the Certificate. It is currently anticipated that the Certificates will be issued by the Trustee and sold, on a best efforts basis, by Summers & Company, Inc. ("Underwriter"), a brokerage house with offices in Fort Wayne and Indianapolis, Indiana. The Certificates will be offered and sold exclusively to "accredited investors" as that term is defined in Section 2(15) of the 1933 Act. The Underwriter will receive a commission on each sale of Certificates, the amount of which will not exceed the reasonable and customary commission paid to underwriters generally for similar transactions. The Bank does not anticipate that the Certificates will be rated or graded by a recognized rating agency.

Holders of the Certificates will be entitled to the benefit of one or more irrevocable stand-by letters of credit in the full face amount of each Mortgage Loan to secure the payments to be made on the Certificates. Each Letter of Credit will be issued by the Bank for the account of a specific mortgagor and will relate to the particular series of Certificates which represent interests in the Mortgage Loan for which that mortgagor is responsible. The Trustee will hold the Letters of Credit for the benefit of the Certificateholders and, if the payments of principal or interest actually made by a particular mortgagor are insufficient to meet the obligations under the Certificates representing an interest in the deficient mortgagor's Mortgage Loan, the Trustee will be required to draw upon the Letter of Credit to fund the deficiency for the benefit of the Certificateholders whose Certificates relate to the underpaid Mortgage Loan.

This arrangement differs from that proposed in our letter of July 17, 1985, in at least one significant respect. Originally, the Bank had proposed that the Letters of Credit secure repayment of the individual Mortgage Loans, rather than the payment to be made under the Certificates. We argued that

Mr. Gerard S. DiFiore
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because the funds received in repayment of the Mortgage Loans were to be the sole source of payment of all amounts due under the Certificates and all amounts paid by the mortgagors, less the customary service fee, would be paid over to the Certificateholders, the "practical realities" of the guaranty of the repayment of the Mortgage Loans were the precise equivalent of the guaranty of the payment of amounts due under the Certificates. In response to comments received by the undersigned in telephone conversations with the Staff, the Bank now has determined to issue the Letters of Credit to guarantee the payments to be made under the Certificates directly. As previously noted, these Letters of Credit will be irrevocable; and draws under the Letters of Credit will be conditioned only upon the receipt by the Bank of notice from the Trustee that the amounts received are not sufficient to meet the obligations to the Certificateholders of a particular series. In light of the prior no-action positions discussed in our letter of July 17, 1985, issuing the Letters of Credit to back the Certificates directly significantly strengthens the Bank's prior assertion that the Certificates qualify as securities "guaranteed by a bank" and should therefore be exempted from the provisions of the 1933 Act by virtue of Section 3(a)(2) thereof.

The existence of the Letters of Credit will not impair the Certificateholders' right to enforce the terms of each Mortgage Loan against the mortgagor. The Indenture will provide that the holders of 25% in principal amount of the outstanding Certificates in a series will be entitled to direct the Trustee to proceed to enforce its rights under the mortgage to which that series relates or to draw upon the appropriate Letter of Credit if the Trustee fails to do so. Consequently, as in State of New Jersey (Avail. May 21, 1984) and Gen Savings Association (Avail. August 12, 1983), similar transactions in which the Staff advised that it would not recommend enforcement action, the Certificateholders, through their representative, the Trustee, will have direct recourse to the respective mortgagors without being required to join the Bank as a party, and the mortgagors will be unable to raise any action or inaction by the Bank as a defense to such a claim.

Based upon the foregoing and upon our letter of July 17, 1985, we respectfully request that the Staff not recommend to the Commission that it take any action to enforce the 1933 Act, the Trust Indenture Act of 1939, or the Investment Company Act of 1940 against the Bank, the Trustee, or the Underwriter in

Mr. Gerard S. DiFiore
August 26, 1985
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connection with the described transactions. Because the Bank has delivered a non-binding commitment to one mortgagor in connection with the proposed transaction, the Bank would appreciate a response to the request made hereby as promptly as may be practicable. If for any reason the Staff determines that it is unable to respond favorably to this request, we respectfully request the opportunity to discuss with the Staff the reasons for such determination prior to the issuance by the Staff of a formal response.

Thank you for your consideration.

Very truly yours,

ICE MILLER DONADIO & RYAN


Stephen C. Hackman

SJH:je

cc: George T. McNaughton, Esq.

October 17, 1985

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**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE**

**Re: First National Bank of Fremont (the "Bank")
Incoming letters dated July 17, and August 26, 1985**

Based upon the facts presented in your letters and particularly noting that the full amount of the principal and interest payable pursuant to the certificates will be guaranteed by a bank through the issuance of letters of credit directly relating to the Certificates, this Division will not recommend any enforcement action to the Commission if the Bank, in reliance upon your opinion as counsel that the exemptions provided by Section 3(a)(2) of the Securities Act of 1933 (the "1933 Act") and Section 304(a)(4)(A) of the Trust Indenture Act of 1939 (the "1939 Act") are available, issues and sells the certificates without compliance with the registration requirements of the 1933 Act or qualification of a trust indenture pursuant to the 1939 Act.

The Division of Investment Management has requested us to inform you that, on the basis of the facts presented in your letters of July 17, and August 26, 1985, that Division would not recommend any enforcement action to the Commission under the Investment Company Act of 1940 if, in reliance upon your opinion as counsel that the Trust is expected under section 3(c)(5)(C) of that Act, the Certificates are sold without registration of the Trust as an investment company.

Because this position is based upon the representations made to the Commission in your letters, it should be noted that any different facts or conditions might require a different conclusion. Further, this response only expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

Sincerely,

Anne M. Krauskopf
Anne M. Krauskopf
Special Counsel