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Section 3(c)(5)(C)
of the Investment
Company Act of 1940

June 17, 1991

Mr. Thomas S. Harman
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, D.C. 20549



Dear Mr. Harman:

On behalf of National Asset Bank (a bank in liquidation) (the "Bank") and its wholly owned subsidiary, NAB Asset Corporation, a Texas corporation (the "Company"), we are writing to request advice to the effect that the Division of Investment Management will not recommend that the Securities and Exchange Commission take any enforcement action if, without registration under the Investment Company Act of 1940, as amended (the "1940 Act"), the Company conducts its business and operations in the manner described below in reliance upon the exception to the definition of an investment company set forth in Section 3(c)(5)(C) of the 1940 Act. This letter is supplemental to and restates our prior letters to you dated March 18, 1991, and June 3, 1991, and reflects those additional matters which were discussed in various telephone conferences between Curtis W. Huff and Katie-Pat Vletas of this firm and Dorothy Donohue, Julia Ulstrup and you.

## I. Description of Transaction

### A. Background and Summary

The Bank was created in connection with the merger of Allied Bancshares, Inc. ("Allied") with and into First Interstate Bancorp of Texas, Inc. ("First Interstate").

Immediately prior to the merger, the holders of Allied's common stock as of the close of business on January 28, 1988, received one share of the Bank's common stock, $.01 par value, for each share of common stock of Allied held by them on that date. On January 28, 1988, Allied contributed to the Bank as a capital contribution approximately $250 million in book value (before any applicable reserves as reflected on the books of Allied prior to the transfer) of Allied's and its subsidiaries' non-performing loans, real estate and other assets. Effective January 29, 1988, the Bank adopted a Plan of Voluntary Complete Liquidation (the "Plan of Liquidation") and made various changes to its Articles of Association and By-laws primarily to effect the Plan of Liquidation.

Since the Bank's adoption of the Plan of Liquidation, the business of the Bank has consisted solely of collecting or otherwise realizing on its assets and distributing the net proceeds therefrom not necessary for the continued operations of the Bank to the holders of its common stock pursuant to the Plan of Liquidation. Prior to April 16, 1990, an affiliate of First Interstate acted as the Bank's exclusive agent for the management and servicing of the Bank's loan and other assets in exchange for a fee. On April 16, 1990, such arrangement was terminated in an attempt to reduce the cost of the liquidation of the Bank's assets and the Bank assumed the management and servicing of its own assets.

Management of the Bank believes that the net cost of managing its assets could be further reduced if the Bank were able to spread its cost by providing similar services to other parties for a fee utilizing the Bank's existing expertise and personnel. However, because the management of other entities' assets is not specifically authorized under the Bank's Articles of Association or the Plan of Liquidation and may not be permitted under applicable regulations and policies of the Office of the Comptroller of the Currency (the "OCC"), which has primary regulatory authority over the Bank, the Bank is proposing a transaction pursuant to which the Bank would sell substantially all of its assets to the Company and the Company would assume all of the Bank's liabilities and continue the ownership, management, operation and liquidation of the Bank's current assets, all in accordance with the terms of an Acquisition Agreement and Plan of Reorganization to be entered into between the Company and the Bank (the "Acquisition Agreement") and a proposed amendment to the Plan of Liquidation. The proposed transaction would also involve the issuance by the Company to the Bank of shares the Company's common stock, $.01 par value (the "Common Stock"), of which shares would be distributed by the Bank to its stockholders promptly following the amendment to the Plan of Liquidation as a final liquidating distribution.

Subject to unforeseen events, the Bank anticipates that the final liquidation of the Bank would occur within six to nine months following the effective date of the transaction, but such date could be delayed to the extent the Bank is subject to any litigation not resolved by such date or there exists an asset that was unable to be transferred to the Company or liquidated by such date. During this period, the Company would seek to satisfy all of the Bank's remaining liabilities and the Bank would seek to transfer to the Company all of its assets that have not theretofore been transferred to the Company. To facilitate the final liquidation of the Bank and the satisfaction of its liabilities, an amount of cash equal to the estimated amount of the current liabilities of the Bank at the time of the transaction would be retained by the Bank for a period of six months for the payment of such liabilities and other liabilities of the Bank after which time period any funds not theretofore expended would be paid to the Company.

To the extent the transfer of any assets to the Company would result in a material violation or default or the loss of a material benefit thereunder, such assets would continue to be held by the Bank until such time that such assets could be transferred, and any collections or realizations by the Bank with respect to such assets prior to such transfer would be required to be remitted by the Bank to the Company. The Bank does not currently expect that any material amount of assets would be required to be retained by it pursuant to the above described arrangement. The Company would also be given an irrevocable power of attorney from the Bank with respect to its assets subject to certain rights of a liquidating committee and the Board of Directors of the Bank to oversee the actions of the Company and to take certain actions in the event of a failure by the Company to comply with its material obligations under the Acquisition Agreement.

The proposed transaction is subject to the approval of the Bank's stockholders, which will be solicited by the Board of Directors of the Bank in connection with its Annual Meeting of Stockholders scheduled to be held in July of this year. A proxy statement with respect to such solicitation has been filed with the OCC pursuant to the provisions of the Securities Exchange Act of 1934 (the "Exchange Act"). The proposed transaction is also subject to the consent of the OCC to the proposed amendment to the Plan of Liquidation. A request for such approval has been filed with the OCC and obtained.

The Company has filed a registration statement on Form S-4 registering under the Securities Act of 1933 the shares of Common Stock to be distributed to the Bank's stockholders. Following the registration and distribution of such shares, the Company will be subject to the reporting obligations under the Exchange Act. A copy of the Company's registration statement as filed with the Commission has previously been provided to you. The proposed amendment to the Plan of Liquidation and the Acquisition Agreement are included as Annexes to the Proxy Statement/Prospectus included in such registration statement.

B. Proposed Businesses of the Company

The Company is a corporation incorporated under the laws of the State of Texas. Upon the distribution of the Common Stock by the Bank to its stockholders, the stockholders of the Bank will become shareholders of the Company.

Except for 68,500 shares of Common Stock that would be issued to the officers and directors of the Company as restricted stock subject to vesting and other conditions, the current stockholders of the Bank would hold all of the outstanding stock of the Company upon the consummation of the proposed transaction. The Company estimates that approximately 49% of the outstanding shares of Common Stock upon the completion of the transaction will be held by financial and other institutional investors, with the remainder of the shares being held by individuals and other shareholders, many of whom were shareholders of Allied prior to the merger with First Interstate. It is anticipated that, like the common stock of the Bank, the Common Stock will be authorized for quotation on the National Association of Securities Dealers, Inc. Automated Quotation System and that a market for the Common Stock will exist.

The primary business of the Company will be the management of and realization on the loans and real estate to be acquired from the Bank. The Company, however, will also seek to manage and service loans and real estate on a fee basis for other parties such as The Resolution Trust Corporation (the "RTC") and potential purchasers of loans and real estate from the RTC and the Federal Deposit Insurance Corporation (the "FDIC"). The Bank believes that revenues from such activities would help to spread the cost of collections with respect to the loans and real estate to be acquired from the Bank and any income from such activities would be available for distribution to the Company's shareholders. For purposes of this request and unless otherwise indicated, all references to "real estate" shall include fee or leasehold interests in real estate or improvements thereon.

The Company may also seek to acquire loans and real estate from the RTC and the FDIC. The types of real estate that may be acquired by the Company may consist of either developed or undeveloped commercial or residential properties. It is anticipated by the Company that any additional loans acquired would generally be fully or primarily secured by real estate. Such real estate and loans may be acquired either directly by the Company or by a wholly owned or majority owned subsidiary or through a general partnership with a third party. To the extent that any loans and real estate are acquired through a general partnership, the Company would expect that it or a wholly owned subsidiary would be a general partner and be active in the management and operation of the partnership and that the agreement of the Company or such subsidiary would be required for all major decisions affecting the partnership and that the Company or such subsidiary would have the unilateral right to foreclose on defaulted loans in accordance with the terms thereof. The Company anticipates that any partnerships involving the acquisition of loans and real estate would be with no more than five other partners.

Although the Company will be authorized to engage in activities other than the ownership and liquidation of the assets to be acquired from the Bank, such other activities will be subject to various restrictions until the earlier of (i) December 31, 1996, (ii) such time that the Company shall have made distributions with respect to the Common Stock aggregating $11.00 per share of Common Stock and (iii) such date on which the book value of the Bank Assets (hereinafter defined) is equal to or less than $250,000 (such date referred to as the "Final Operational Limitation Date"). Such restrictions are designed to minimize the investment risk of the stockholders from activities to be conducted by the Company other than the management, ownership, operation and liquidation of the assets to be received from the Bank.

Under the Company's Articles of Incorporation, until the Final Operational Limitation Date, the business of the Company will essentially be limited to (i) the ownership, operation, improvement, management, disposition, collection and realization of the loan, real estate and other assets to be received from the Bank pursuant to the Acquisition Agreement and any other assets received by the Company in exchange for or in connection with the disposition or collection of such assets (all such assets collectively referred to as the "Bank Assets"), (ii) the management and servicing of loans and other assets of third parties through contractual relationships, joint ventures, partnerships or other similar arrangements and the provision of consulting and other advisory services relating to the management and servicing of loans, real estate and other assets ("Management Services"), (iii) the acquisition, ownership, improvement, management, disposition, collection and realization of loan, real estate and other assets other than the Bank Assets for the account of the Company, (iv) the purchase or acquisition of the Company's own shares, (v) the ownership of stock or other interests in other entities (the activities described in clauses (iii) and (iv) above and this clause (v) being referred to as "Permitted Investment Activities") and (vi) such other activities as may be necessary or desirable to facilitate the foregoing activities or to conduct the general operations of the Company. It is contemplated that the Company's ownership of stock or other interests in other entities will be primarily limited to general partnerships and the stock of wholly or majority owned subsidiaries that would not be subject to registration under the 1940 Act.

The Articles of Incorporation of the Company will also substantially limit the amount of funds that the Company may expend (or commit to expend) and the amount of indebtedness that it may incur prior to the Final Operational Limitation Date in connection with any Permitted Investment Activity as well as limit the Company's ability to issue, prior to the Final Operational Limitation Date, additional shares of Common Stock or any other stock that would be equal or senior to the Common Stock with respect to dividends or distributions or amounts otherwise received from the Bank Assets in the event of a liquidation or winding up of the Company. The Company's ability to enter into contracts for Management Services will also be subject to restrictions prior to the Final Operational Limitation Date. The Company, however, will have broad authority with respect to the activities that may be conducted by it with respect to the Bank Assets. A copy of the Company's Articles of Incorporation, which sets forth the various restrictions on the business and operations of the Company through the Final Operational Limitation Date, is attached as Annex D to the Proxy Statement/Prospectus included in the Company's registration statement.

C. Assets to be Held by the Company

The assets to be held by the Company will initially consist solely of the assets of the Bank to be acquired by the Company pursuant to the terms of the Acquisition Agreement. At December 31, 1990, the composition of the Bank's assets was as follows: (i) approximately $29.3 million in real estate, (ii) approximately $6.6 million in loans secured by real estate, including loans classified as "in substance foreclosures", (iii) approximately $7.4 million in other loans primarily secured by assets other than real estate, primarily vessels used in connection with offshore oil and gas exploration, (iv) approximately $482,000 in assets other than cash and cash equivalents, such as equipment and machinery, and (v) approximately $7.2 million in cash and cash equivalents.

Assuming all of the Bank's assets were to be transferred to the Company at the book values thereof at December 31, 1990 (which values generally reflect the appraised values of the Bank's assets less estimated holding and disposition costs), the Bank were to retain approximately $1.4 million in cash for the payment of certain liabilities as required by the Acquisition Agreement, and the Company were to acquire $4.3 million in "whole pool" mortgage-backed securities in the manner described below, the book value of the Company's assets would have consisted of approximately 59.1% real estate, 13.3% loans fully or primarily secured by real estate, 14.9% of other loans, 8.7% in "whole pool" mortgage-backed securities, 3.0% cash and cash equivalents and 1.0% other assets.

With respect to the Bank's real estate loans at December 31, 1990, such loans consisted of loans that were either originated (i) by Allied or one of its affiliates or that were the result of a restructuring by the Bank of such a loan or (ii) by the Bank in connection with the sale or disposition of its assets. Based on information available to the Bank, all of its real estate loans were originally made for the purpose of acquiring, holding, developing or improving real estate and the appraised collateral value of real estate securing the payment of the loans was generally in excess of 100% of the original principal amount of the loan at the time of origination. Although the Bank originally acquired its interest in its loans through 100% participations with the actual loan being held by FI, all of the Bank's loans are currently held directly by the Bank, or in the case of one loan, a wholly owned subsidiary of the Bank, and the Bank has the unilateral right to take all action, including foreclosure, that is available to the holder of the loan.

Although the credit files of FI with respect to the Bank's real estate loans indicate that the appraised value of the real estate collateral for such loans was in excess of the original principal amount thereof at the time of origination, except for those loans that were made by the Bank to finance the sale of its real estate, the current appraised value of the real estate securing the Bank's real estate loans is generally substantially less than the original principal amount of such loans due to subsequent declines in real estate values and the absence of payments on the loans. This circumstance is particularly the case for those loans that were originated by Allied and have not yet been foreclosed on or restructured. This circumstance is also the case with respect to many of the Bank's restructured loans due to the Bank's desire to maximize the potential recoveries on such loans and benefit from any increase in the value of the collateral securing the loan. Although the collateral value of many of the Bank's real estate loans is less than the current remaining balance of the loans, the Bank has advised us that the appraised value of the real estate collateral securing such loans is generally in excess of the fair market value of such loans.

The real estate collateral for the repayment of the real estate loans held by the Bank consists of both developed and undeveloped properties and commercial and residential properties. The Bank's security interests in the real estate securing its loans are evidenced by mortgages or deeds of trust on such properties. In certain circumstances, the real estate loans held by the Bank are also collateralized by assets other than real estate. Such additional collateral generally consists of (i) the guaranty of a proprietor or corporate parent or (ii) equipment located on the real estate premises. Although equipment is a common type of collateral where there exists collateral other than mortgages on real estate, in some instances the additional collateral consists of other assets such as stock or a security interest in receivables. In no case with respect to such real estate loans is the additional collateral considered by the Bank to be a principal source of repayment of the loan. Such collateral, however, is included in the collateral for the repayment of the loan and is desirable in that the holding of such ancillary collateral is considered prudent by the Bank.

For purposes of this request, the Bank and the Company have classified the types of loans held by the Bank and the types of loans that will be acquired by the Company as "Class I Real Estate Loans", "Class II Real Estate Loans" and "Other Loans". The criteria for including a loan as a Class I Real Estate Loan are (i) the loan must be secured by a mortgage or deed of trust on one or more tracts or parcels of real estate, (ii) 100% of the principal amount of the loan as indicated in the credit files of the originating bank must have been secured by real estate at the time of origination and (iii) 100% of the fair market value of the loan must be secured by real estate at the time the loan is received by the Company. A loan will qualify as a Class II Real Estate Loan if it does not qualify as a Class I Real Estate Loan, but at least 55% of the fair market value of the loan is secured by real estate at the time the loan is acquired by the Company. Other Loans consist of all other loans held by the Company. To the extent that any Class I Real Estate Loan or Class II Real Estate Loan may be held by the Company through a general partnership in which it or a wholly owned subsidiary acts as a general partner, the Company's interest in the loan will be determined based on a percentage of its or its subsidiary's capital contribution to the partnership. However, if the Company or such subsidiary does not exercise the right to be active in the management and operation of the partnership and in all major decisions affecting the partnership and have the unilateral right to foreclose, such loan will be considered an Other Loan. To the extent a loan is owned by a wholly owned or majority owned subsidiary of the Company, such loan will be classified as a Class I Real Estate Loan, Class II Real Estate Loan or Other Loan on the same basis as such loan would be classified if it were held by the Company and the Company's interest in the loan will be determined by the percentage ownership interest of the Company in the subsidiary. Class I Real Estate Loans and Class II Real Estate Loans held by minority owned subsidiaries will not be considered to be Class I Real Estate Loans or Class II Real Estate Loans held by the Company. The value of the real estate securing the loans to be acquired by the Company will be determined by recent independent third party appraisals and the fair market value of the loans will be determined, in the case of the loans to be initially acquired by the Company, at the book value thereof on the books of the Bank, which the Company believes reflects the best estimate of the fair market value of the loans today. The fair market value of real estate loans to be acquired by the Company in the future will be based on the acquisition price of such loans. The Company believes that the book value of the Bank's loans represents the best estimate of the fair market value of the loans given the fact the Bank's assets are primarily recorded on its books at the amounts the Bank estimates in good faith would be received if they were to be sold for or converted into cash within a 12 month period.

In making the foregoing classifications, the Company has taken into account the fact that many of the Bank's loans were not originated by it, that there have been declines in the value of the real estate collateral securing the Bank's loans and that the nature of such loans may have changed from the time the loans were originated to the date on which the Company is to acquire them. For example, it is possible that the Company could acquire a loan from the Bank the original principal amount thereof was, at the date of its origination, fully secured by real estate, but as a result of declines in the real estate market, the outstanding principal amount is no longer fully secured. Under these circumstances, it is likely the fair market value of the loan will also have declined reflecting both a decline in the collateral value of the real estate securing the loan and the financial condition of the borrower. In such a case, as long as the appraised value of the real estate collateral exceeds the fair market value of the loan at the time it is acquired by the Company, the loan should be considered a fully secured real estate loan from the standpoint of the Company in that the appraised value of the real estate will equal or exceed the "original" purchase price of the loan by the Company. Similarly, if the Company were to acquire a real estate loan that is secured by real estate having an appraised value in excess of 55% of the fair market value of the loan on the date of acquisition, that loan in the hands of the Company should be considered a loan primarily secured by real estate regardless of the percentage of the original principal amount that the collateral value of the real estate represented at the time of origination in that such percentage is immaterial to the question of whether that loan was acquired by the Company as a real estate loan. Accordingly, the Company believes that such a loan should be considered a loan primarily secured by real estate.

It is contemplated by the Company that in the course of the Company's business, the Company may have a portion of its assets in cash or cash equivalents. Pending the use or distribution of such funds, such funds may be invested by the Company in United States government securities and may be used to purchase "whole pool" mortgage-backed securities, such as Government National Mortgage Association ("GNMA") certificates secured by a particular underlying pool of mortgages and certificates issued by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association backed by specific pools of mortgages.

## II. Legal Analysis

Section 3(a)(3) of the 1940 Act defines an "investment company" as "any issuer which. . . is engaged . . . in the business of. . . owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40% of the value of such issuer's total assets (exclusive of Government securities and cash items). . ." Based upon the composition of the Bank's assets at December 31, 1990, had the proposed transaction occurred as of such date, the investment securities of the Company as of such date would have represented less than 40% of the total assets of the Company (excluding cash and cash equivalents and assuming that such cash equivalents had been invested in United States government securities). Accordingly, under such circumstances, the Company would not have fallen within the definition of an "investment company" under the 1940 Act.

The composition of the Company's assets, however, has since changed and is expected to change over time and it is possible that during the course of collecting and realizing on its assets, the Company could hold more than 40% of its total assets, excluding cash and government securities, in "investment securities" as defined under the 1940 Act. Such circumstance could occur through a decline in the values of the Company's real estate or through the sale of an item of real estate either for cash or in consideration of a promissory note secured by the real estate to be sold. In that regard and by way of example, the Bank recently sold an item of real estate having a book value of approximately $6,400,000 for which the Bank received a secured non-recourse promissory note for approximately 90% of the purchase price thereof. This transaction resulted in a decrease in the Bank's real estate and an increase in its real estate loans. Although there have also been some reductions in the Bank's loans and increases in the Bank's real estate through collections and foreclosures since December 31, 1990, it is possible that the investment securities that will be held by the Company as of the closing of the proposed transaction will constitute more than 40% of the total assets of the Company, exclusive of cash and cash equivalents. Accordingly, absent an exception from the definition of an investment company under the 1940 Act, the Company could, either at the time of the closing of the transaction or at any time during the course of its future operations, be considered an investment company within the meaning of the 1940 Act.

The primary exception from the definition of an investment company which would apply to the Company is set forth in Section 3(c)(5)(C) of the 1940 Act. That section provides an exception for:

> "[a]ny person who is not engaged in the business of issuing redeemable securities, face-amount securities of the installment type or periodic plan certificates, and who is primarily engaged in. . . purchasing or otherwise acquiring mortgages and other liens on and interests in real estate."

As indicated above, the primary business of the Company will, at least until the Final Operational Limitation Date, be the ownership and management of the real estate, loan and other assets of the Bank. The outstanding securities of the Company upon the consummation of the proposed transaction will consist solely of the Common Stock to be distributed to the Bank's stockholders (and to its directors and certain officers as restricted stock), which stock will be non-redeemable. Further, the Company has no current intent of issuing shares of preferred stock or debt obligations in the future, the terms of which would provide for a right of redemption in the holders thereof or call for any payments by the holders thereof that might bring such securities within the definition of "face-amount certificates of the installment type" or "periodic plan certificates." Any dividends or distributions on the Common Stock or preferred stock will be paid if, as and when declared by the Company's board of directors in its sole discretion. Thus, the Company will not be engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic plan certificates as those terms are defined in Sections 2(a)(32), (15) and (27), respectively, of the 1940 Act.

Although the specific amount of real estate and loans secured by real estate that the Company may hold from time to time is expected to vary as the Company collects and realizes on its assets, the Company anticipates that at any time during which it may hold investment securities having a value in excess of 40% of the value of its total assets, excluding cash and government securities, at least 55% by value of the Company's total assets would consist of real estate, Class I Real Estate Loans and "whole pool" mortgage-backed securities. In addition, the Company anticipates that during all such times, at least 25% by value of the Company's assets would consist of Class II Real Estate Loans, subject to reduction below 25% to the extent the value of the real estate, the Class I Real Estate Loans and the "whole pool" mortgage-backed securities held by the Company exceeds 55% of the total value of the assets of the Company. The remaining assets of the Company would consist of Other Loans, cash and government securities, investments in partnerships or other businesses not qualifying as a Class I Real Estate Loan or a Class II Real Estate Loan.

For purposes of the foregoing classifications, the Company's interests in any real estate that is owned by a wholly owned or majority owned subsidiary of the Company or by a general partnership in which the Company or a wholly owned subsidiary owns an interest will be determined by the percentage ownership interest of the Company in the subsidiary or the general partnership. Real estate owned by a minority owned subsidiary or by a general partnership in which the Company or a wholly owned subsidiary is not actively involved in the management and operation of the general partnership or in which the agreement of the Company or a wholly owned subsidiary for all major decisions affecting the general partnership will not be required will be considered by the Company to be a miscellaneous investment and will not be included in the 55% Test as real estate.

In prior no-action letters, the Staff has taken the view that a company may be excepted from the definition of an investment company pursuant to the provisions of Section 3(c)(5)(C) of the 1940 Act if "at least 55% of its assets consist of mortgages and other liens on and interests in real estate" (the "55% Test") and the remaining 45% of its assets consist primarily of real estate-type interests (the "45% Test"). See, *e.g.*, *Citytrust* (available December 19, 1990); *United Bankers, Inc.* (available March 23, 1988); *Prudential-Bache Securities, Inc.* (available August 19, 1985); *Salomon Brothers, Inc.* (available June 17, 1985). The Staff has also stated in recent no-action letters that 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.*, *Citytrust*, *United Bankers Inc.* (available March 23, 1988); *La Quinta Motor Inns, Inc.* (available May 23, 1988).

The Staff has also addressed on various occasions when a loan secured by real estate would be considered "exclusively" or "primarily" secured by real estate and real estate-type interests. In *Citytrust* (available December 19, 1990), the Staff allowed the inclusion of loans partially secured by non-real estate assets in the 55% Test if (i) the original principal amount of the loan did not exceed 100% of the value of its real estate collateral when the loan was made, (ii) 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, (iii) the same underwriting criteria was used for such loans as for loans secured exclusively by real estate, and (iv) any loan benefitting from non-real estate collateral would be disqualified from the 55% Test if, in connection with a default thereon, the amount recovered from the non-real estate collateral (including guarantees) exceeded 40% of the original principal amount of the loan. The type of additional collateral involved in the *Citytrust* no-action letter included equipment, guarantees, certificates of deposit and receivables.

In the Company's circumstances, most of the loans to be held by it will not have been originated by it or the Bank. Further, any future loans that may be held by the Company are not expected to be originated by the Company except in connection with the sale or disposition of its real estate and other assets. As such, the Company is not in a position, and will not be in a position, to confirm or represent that the underwriting criteria applied by the originating bank with respect to real estate loans with some non-real estate collateral is the same as that applied by such bank for loans that were originally fully secured by real estate. The Company, however, will generally be able to ascertain (but not independently confirm) from the credit files for its real estate loans that the value of the real estate collateral at the time of origination was in excess of the principal amount of the loan and that such value was confirmed by an outside appraisal. If such determination cannot be ascertained, the loan would not be considered a Class I Real Estate Loan.

Because the loans that will be held by the Company will not have been originated by it, the Company believes that a modification to the *Citytrust* criteria would be appropriate to reflect the distinction between loans originated by a company such as Citytrust and the acquisition by a company like the Company of an existing loan. In the situation involving the acquisition of an existing loan, we believe that the criteria should not focus on the relationship between the original principal amount of the loan and the appraised value of the real estate securing the loan at the time of origination, but rather on the relationship between the fair market value of the loan at the time of acquisition and the appraised value of the real estate collateral at such time. Where the appraised value of the real estate collateral securing an existing loan at the time of acquisition is greater than the fair market value of the loan at such time, the loan in the hands of the purchaser is a loan fully secured by real estate and should therefore be included in the 55% Test. Similarly, an existing loan that is secured by real estate which has an appraised value of at least 55% of the fair market value of the loan at the time of acquisition by a purchaser of such loan should be considered primarily secured by real estate and included in the 45% test in that such a loan is primarily secured by real estate when compared to the cost of the loan to the purchaser. We believe that the foregoing distinction is consistent with *Citytrust* and recognizes the economic realities of a situation where there are declining real estate values and where many loans in the market have fair market values that are substantially less than their outstanding principal amounts.

The inclusion in the 55% Test of "whole pool" GNMA certificates comprising the whole issue of certificates secured by a pool of mortgage loans and other mortgage-backed securities is also consistent with prior no-action letters. The Staff has on numerous occasions taken a no-action response with respect to exceptions under Section 3(c)(5)(C) of the 1940 Act where at least 55% of the assets of the issuer have, at all times, consisted exclusively of such "whole pool" mortgage-backed securities. See *Ray Ellison Mortgage Acceptance Corp.* (available January 17, 1985); *MSA Realty Corp.* (available March 19, 1984); and *Guaranteed Mortgage Corp. II* (available January 9, 1984) The inclusion of such "whole pool" mortgage-backed securities with other qualifying assets should not change the fundamental nature of such securities as "mortgages and other liens on and interests in real estate".

Finally, in our view, the general partnership arrangements in which the Company and its subsidiaries may be engaged should be functional equivalents of direct ownership in the real estate and loans held by the partnerships and not be "securities" for securities law purposes. Because the Company's and its subsidiaries' partnership investments in real estate and loans will (i) involve not more than five other partners, (ii) actively involve the Company or a wholly owned subsidiary in the management and operation of the partnership and (iii) require the agreement of the Company or a wholly owned subsidiary for all major decisions affecting the partnership, these partnerships should satisfy the conditions described in the Staff's no-action letter issued to *United States Property Investments, N.V.* (available May 1, 1989) and other letters described therein. Further, because the Company's and its subsidiaries' partnerships will involve (i) the right of the Company or a wholly owned subsidiary to unilaterally foreclose on the mortgage loans held by the partnerships in the event of a default, (ii) the ownership of loans that are primarily Class I Real Estate Loans and Class II Real Estate Loans and (iii) permit the Company or a wholly owned subsidiary to make fundamental decisions involving the partnerships, such partnerships should satisfy the conditions established in *United States Property Investments* as well as the Staff's no-action letters issued to *Dayton Area Building & Construction Industry Foundation* (available May 7, 1987); *Baton Rouge Building & Construction Industry Foundation* (available August 31, 1984); *Northwestern Ohio Building & Construction Trades Foundation* (available May 21, 1984); and *MGIC Mortgage Corporation* (available August 1, 1974).

## III. No Action Request

Based on the foregoing, we believe that the Company should be regarded as being primarily engaged in purchasing or otherwise acquiring mortgages and other liens on real estate and, therefore, should fall within the exception provided in Section 3(c)(5)(C) of the 1940 Act as long as the Company conducts its business in the manner described above and (i) at least 55% in value of its total assets consists of real estate, Class I Real Estate Loans and "whole pool" mortgage-backed securities, (ii) at least 25% in value of its assets consists of Class II Real Estate Loans, subject to reduction below 25% to the extent that the value of the assets described in clause (i) above exceeds 55% of the value of the Company's total assets, and (iii) not more than 20% in value of the Company's total assets consists of miscellaneous investments. We believe that none of the other aspects of the proposed transaction gives rise to concerns resulting in regulation appropriate under the 1940 Act. We therefore respectfully request the Staff to indicate that it will not recommend any enforcement action to the Commission if the Company does not register under the 1940 Act based on the foregoing facts.

Because the Bank and the Company are anxious to mail the Bank's proxy materials to the Bank's stockholders, 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 any member of the Commission's Staff has any questions or desires clarification as to the matters set forth herein, he or she should telephone either Curtis W. Huff (713) 651-5657 or Katie-Pat Vletas (713) 651-5131 of this Firm.

Very truly yours,

Fulbright & Jaworski

Fulbright & Jaworski

cc: Ms. Dorothy Donohue
Ms. Julia Ulstrup
Mr. Michael A. Hrebenar

PUBLIC

20 JUN 1991

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 91-265-CC
NAB Asset Corporation
File No. 33-39488

By letter of June 17, 1991, you request that we not recommend any enforcement action to the Commission if NAB Asset Corporation (the "Company") conducts its business and operations in the manner described in your letter without registering under the Investment Company Act of 1940 ("1940 Act") in reliance on Section 3(c)(5)(C) of the 1940 Act. 1/

The Company is a wholly-owned subsidiary of National Asset Bank (the "Bank"). Since the Bank's adoption of a Plan of Voluntary Complete Liquidation, effective January 29, 1988, the Bank has only collected or otherwise realized on its assets and distributed the net proceeds therefrom not necessary for the continued operations of the Bank to the holders of its common stock. The Bank proposes to sell substantially all of its assets to the Company in exchange for shares of the Company's common stock (the "Common Stock"). The Company would assume all of the Bank's liabilities and continue the ownership, management, operation, and liquidation of the Bank's current assets.

The Company's primary business initially will be the management of and realization on the loans 2/ and real estate 3/ to be acquired from the Bank. The Company will, however, also be

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1/ Section 3(c)(5)(C) of the 1940 Act 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 "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate." You represent that the Company will not issue redeemable securities.

2/ Your letter indicates that some of the real estate loans to be acquired by the Company from the Bank are also collateralized by assets other than real estate (generally, the guaranty of a proprietor or corporate parent or equipment located on real estate premises, and, in some instances, stock or a security interest in receivables). You state, however, that in no case with respect to such real estate loans does the Bank consider the additional collateral to be a principal source of repayment of the loan.

3/ Your letter states that for purposes of your request and unless otherwise indicated, all references to "real estate" includes fee or leasehold interests in real estate or improvements thereon.

authorized to engage in certain activities other than owning and liquidating the Bank's assets, 4/ including (1) managing and servicing loans and real estate on a fee basis for other parties such as the Resolution Trust Corporation (the "RTC") and potential purchasers of loans and real estate from the RTC and the Federal Deposit Insurance Corporation (the "FDIC"), and (2) acquiring loans and real estate from the RTC and FDIC.

We take the view that, with respect to issuing no-action letters under Section 3(c)(5)(C), 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"). 5/ 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. 6/

You represent that, at any time during which the Company may hold investment securities having a value exceeding 40% of the value of its total assets, excluding cash and government securities, at least 55% of the value of its total assets will consist of real estate, "whole pool" mortgage-backed securities, 7/ and certain real estate loans. Each real estate

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4/ Such other activities will be subject to various limitations designed to minimize the investment risk to shareholders until the earlier of (i) December 31, 1996, (ii) such time that the Company shall have made distributions to its shareholders aggregating $11.00 per share of Common Stock of the Company, and (iii) the disposition of substantially all of the assets of the Bank to be acquired by the Company.

5/ See, e.g., Citytrust (pub. avail. Dec. 19, 1990); Prudential-Bache Securities, Inc. (pub. avail. Aug. 19, 1985); Salomon Brothers, Inc. (pub. avail. June 17, 1985).

6/ See, e.g., Citytrust; La Quinta Motor Inns, Inc. (pub. avail. Jan. 4, 1989); United Bankers, Inc. (pub. avail. March 23, 1988).

7/ The staff has granted no-action relief under Section 3(c)(5)(C) with respect to investments in Government National Mortgage Association, Federal Home Loan Mortgage Corporation and/or Federal National Mortgage Association certificates comprising an undivided interest in the entire pool of mortgages backing the certificates (i.e., "whole pool" mortgage-backed securities). See, e.g., Home

(continued...)

loan included in the 55% will meet the following criteria ("Class I Real Estate Loans"):

(1) the loan will be secured by a mortgage or deed of trust on one or more tracts or parcels of real estate,

(2) 100% of the principal amount of the loan as indicated in the credit files of the originating bank was secured by real estate at the time of origination, and

(3) 100% of the fair market value of the loan will be secured by real estate at the time the Company receives the loan.

At least 25% in value of the Company's assets will consist of loans ("Class II Real Estate Loans") which do not qualify as Class I Real Estate Loans, but at least 55% of the fair market value of each such loan will be secured by real estate at the time the Company acquires the loan. 8/ Not more than 20% in value of the Company's total assets will consist of miscellaneous investments, including all other loans held by the Company ("Other Loans"), cash, government securities, and investments in partnerships or other businesses not qualifying as either a Class I or Class II Real Estate Loan.

The value of the real estate securing the loans to be acquired by the Company will be determined by recent independent third party appraisals. The fair market value of the real estate loans to be initially acquired by the Company will be determined at the book value thereof on the books of the Bank. 9/ The fair

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7/(...continued)
Investors Trust (pub. avail. Sept. 29, 1988); Landmark Funding Corporation (pub. avail. Sept. 20, 1984).

8/ The amount of the Company's investment in Class II Real Estate Loans is subject to reduction below 25% to the extent that the value of the assets invested in real estate, "whole pool" mortgage-backed securities, and Class I Real Estate Loans exceeds 55% of the value of the Company's total assets.

9/ The Bank's assets are primarily recorded on its books at the amounts that the Bank estimates in good faith it would receive if the assets were to be sold for or converted into cash within a twelve month period. Consequently, the Company believes that the book value of the Bank's loans represents the best estimate of the fair market value of the loans.

market value of the real estate loans to be acquired by the Company in the future will be based on the acquisition prices of such loans.

The Company may acquire loans either directly or by a wholly- or majority-owned subsidiary or through a general partnership with up to five other partners. 10/ To the extent that the Company holds any Class I Real Estate Loans or Class II Real Estate Loans through a general partnership in which it or a wholly-owned subsidiary acts as a general partner, the Company's interest in each loan will be determined based on a percentage of its or its subsidiary's capital contribution to the partnership. If, however, the Company or such subsidiary does not exercise the right to be active in the management and operation of the partnership and in all major decisions affecting the partnership and have the unilateral right to foreclose on the mortgage loan in the event of default, you represent that such loan will be considered an Other Loan. To the extent that a wholly-owned or majority-owned subsidiary of the Company holds any Class I Real Estate Loans or Class II Real Estate Loans, the Company's interest in each loan will be determined by the percentage ownership interest of the Company in the subsidiary. 11/

As with loans that are indirectly owned, the Company's interests in any real estate that is owned by a wholly-owned subsidiary or majority-owned subsidiary of the Company or by a general partnership in which the Company or a wholly-owned subsidiary owns an interest will be determined by the percentage ownership interest of the Company in the subsidiary or the general partnership. Real estate owned by a minority-owned subsidiary or by a general partnership in which the Company or a wholly-owned subsidiary is not actively involved in the management and operation of the general partnership or in which the agreement of the Company or such subsidiary is not required for all major decisions affecting the general partnership will be considered by the Company to be a miscellaneous investment.

On the basis of the facts and representations in your letter, we would not recommend any enforcement action to the Commission if the Company conducts its business and operations in

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10/ You state that the general partnership arrangements in which the Company and its subsidiaries may engage should be functional equivalents of direct ownership in the real estate and loans held by the partnerships and not be "securities" for securities law purposes.

11/ The Company will consider any Class I or Class II Real Estate Loan held by a minority-owned subsidiary to be an Other Loan.

the manner described in your letter without registering under the 1940 Act in reliance on Section 3(c)(5)(C). 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

Thomas S. Harman
Chief Counsel