FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 6, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-16

Mary C. Rich, Esquire
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Dear Ms. Rich:

This responds to your letters dated July 14, 1989, and August 23, 1989, requesting an advisory opinion on behalf of Kevin McClendon, treasurer of MBank Political Action Committee ("MBank PAC"), and Bobby L. Doxey, treasurer of Deposit Insurance Bridge Bank Political Action Committee ("DIBB PAC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed transfer of funds from MBank PAC to DIBB PAC.

You state that MBank PAC, a multicandidate committee, is the separate segregated fund of MCorp, an incorporated bank holding company. After the close of business on March 28, 1989, the Office of the Comptroller of the Currency declared 20 of MCorp's 25 subsidiary banks insolvent, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for the closed banks. At the same time, the FDIC announced the transfer of deposits and certain assets and liabilities of the closed banks, to The Deposit Insurance Bridge Bank, National Association ("DIBB"), a newly chartered institution organized and wholly owned by the FDIC. The FDIC also announced the transfer to DIBB of the closed bank's management and other personnel. All remaining assets and liabilities of the closed banks are retained by the FDIC for the purposes of winding up the business of and liquidating those banks.

When the closed banks were seized, MBank PAC held approximately $200,000 in contributions. You state that "approximately half" of this amount was made up of payroll deductions and other contributions from individuals who, on March 28, ceased being employees of MCorp or its subsidiaries and became employees of DIBB.

On May 4, 1989, MCorp and DIBB entered into a letter agreement setting forth the terms upon which they agreed to proceed concerning MBank PAC. The agreement provided for the formal removal of DIBB personnel from the management of MBank PAC and the appointment of MCorp personnel in their place. DIBB agreed to proceed with the formation of DIBB PAC.

The agreement also included DIBB's representation that it had taken all necessary action to "terminate all pledges of contributions by DIBB personnel to the MBank PAC" and to ensure that all payroll deductions made on May 15, 1989, or thereafter, and "attributable to MBank PAC pledges
previously made by DIBB personnel" would be deposited directly into a DIBB PAC bank account. DIBB agreed that, prior to that date, it would inform all of its personnel that they may not contribute to MBank PAC, and that any contributions made thereafter by such personnel shall be returned or distributed by MBank PAC within its sole discretion. In addition, the two companies agreed to allocate contributions currently held by MBank PAC between MBank PAC and DIBB PAC on a mutually agreed upon basis. MCorp would transfer the amount agreed upon to DIBB PAC. The transfer would occur upon the receipt of a favorable advisory opinion from the Commission.

The agreement contained a clause asserting that "DIBB PAC will not be affiliated with MCorp or the MBank PAC under federal or Texas state law." DIBB also agreed to hold MCorp and MBank PAC free from costs and liabilities resulting from the formation and operations of DIBB PAC, including the transfer of funds from MBank PAC to DIBB PAC, the administration and operations of MBank PAC since the close of business on March 28, 1989, and the "consummation of the transactions described" in the agreement. DIBB further agreed to pay or reimburse MCorp for costs that MCorp incurred in connection with the described transactions.

You state that DIBB PAC was organized in May, 1989, with the consent of the FDIC. Such approval was given on condition that DIBB PAC not make any contributions before the disposition of DIBB by the FDIC. DIBB has reached an agreement in principle with Banc One Corporation, an Ohio corporation and a bank holding company, for Banc One's acquisition of DIBB. Banc One has also agreed to manage DIBB's operations until the consummation or termination of the acquisition agreement. You state that, like DIBB, Banc One has no affiliation with MCorp or its subsidiaries or with MBank PAC through common management, personnel or otherwise, and no such affiliation is anticipated after the proposed acquisition.

Since May 15, 1989, MBank PAC has continued to hold all funds contributed to it by former employees of MCorp and MCorp subsidiaries prior to that date. You assert that there are no employees, officers, directors or members common to MCorp and its subsidiaries and to DIBB, or to MBank PAC and DIBB PAC.

You request an advisory opinion approving the proposed transfer of as much as $100,000 from MBank PAC to DIBB PAC and the approval of other transactions described in the letter agreement. You also wish to know whether "the consummation of such funds transfer and other transactions" will cause the two committees to be deemed as affiliated, whether DIBB PAC may compute its contribution limitations under 11 CFR 110.3 without regard to contributions made

by MBank PAC before the creation of DIBB PAC, whether each committee may determine its contribution limits under 11 CFR 110.3 without regard to the contributions made by the other after the creation of DIBB PAC, and whether the proposed transfer will be considered a contribution by MBank PAC subject to the contribution limitations.

One of the principal issues raised in your request is whether MBank PAC and DIBB PAC are affiliated. The Act and regulations provide that political committees established, financed, maintained or controlled by the same corporation, person, or group of persons including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. Contributions made to or by such committees shall be considered to have been made to or by a single committee. 2 U.S.C. 441a(a)(5), 11 CFR 100.5(g)(2) and 110.3(a)(1)(i). Accordingly, transfers may be made between affiliated committees without a limit on the amount. 11 CFR 102.6(a)(1). Advisory Opinions 1983-19, 1982-36, 1980-40 and 1977-21. Commission regulations explain that indicia of establishing, financing, maintaining, or controlling include: (1) ownership of a controlling interest in voting shares or securities; (2) provisions of by-laws, constitutions, or other documents by which one entity has the authority, power, or ability to direct another entity; (3) the authority, power, or ability to hire, appoint, discipline, discharge, demote, or remove or influence the decision of the officers of an entity; (4) similar patterns of contributions; and (5) the transfer of funds between committees which represent a substantial portion of the funds of either the transferor or transferee committee, other than transfers between committees jointly raising the funds. 11 CFR 110.3(a)(1)(iii)(A)-(E).

In past advisory opinions, the Commission has determined the effects on the affiliation of separate segregated funds as a result of corporate restructuring. One situation involved the spin-off of the stock of a wholly-owned subsidiary ("Corporation A") to the shareholders of the parent company ("Corporation B") so that Corporation A was no longer a subsidiary of Corporation B. Despite the fact that B no longer owned any stock in A, that B asserted that it did not establish A in such a manner as to perpetuate B's control, that the two companies would be in different segments of the oil and gas industry, and that fewer than half of the directors of A also serve on B's board, the Commission considered other factors in determining that there was still enough of a relationship between the two entities for their committees to be deemed as affiliated. The Commission looked at such factors as identical stockholder bases, appointment by B of A's Board of Directors and company documents ensuring the continuance of the present board's control, and significant overlap in the personnel and organizational structures of both companies. Advisory Opinion 1987-21. See Advisory Opinion 1986-42.

You state that DIBB PAC is administered by DIBB and its employees, and DIBB is wholly owned by the FDIC. There are no employees, officers, directors, or members in common with MCorp, and its subsidiaries, and DIBB. The creation of DIBB resulted from the involuntary seizure of MCorp subsidiaries by the FDIC and "[was] not desired by, or within the control of, MCorp or the MBank PAC." In addition, MCorp and DIBB have no assets in common, the FDIC having retained the assets of MCorp's subsidiaries that were not transferred to DIBB. Although, according to Statements of Organization filed with the Commission, Mr. Doxey was treasurer of both MBank PAC and DIBB PAC during late April and May, 1989, you assert that the committees now have no personnel in common. The Commission concludes, therefore, that MBank PAC and DIBB PAC are not affiliated committees. Cf. Advisory Opinion 1982-36

(Where one trade association was transferring assets to another and merging into that association, the separate segregated funds of those associations were held to be affiliated.)

Because the committees are not affiliated, the Commission concludes that the proposed funds transfer would be a contribution subject to the limits of 2 U.S.C. 441a(a)(2)(C) and 11 CFR 110.2(d)(1). Therefore, MBank PAC may transfer only an amount which, when combined with other contributions by it to DIBB PAC, does not exceed $5,000 during the calendar year.

Although the committees shared a treasurer during the early, formative weeks of DIBB's existence, the letter agreement entered into on May 4, 1989, called for and anticipated the expeditious severance of any ties between MBank PAC and the employees newly associated with DIBB. Given the facts and circumstances as presented in this request, the Commission concludes that each committee may make contributions to the same recipient committees without regard to contributions made by the other, irrespective of when those contributions are made.

With respect to the other transactions in the letter agreement, the Commission takes note of two provisions. These provisions relate to: (1) the deposit into the DIBB PAC bank account of all payroll deduction contributions made on or after May 15, 1989, that are attributable to MBank pledges previously made by DIBB personnel; and (2) the agreement by DIBB to exempt MCorp and MBank PAC from any costs and liabilities for implementation of the agreement and for other activities.

As an exception to the general prohibition on corporate contributions, the Act and Commission regulations permit a corporation to solicit at any time a restricted class of persons for voluntary contributions to its separate segregated fund. This class consists of executive and administrative personnel, stockholders, and the families of both groups. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(b)(1) and 114.5(g)(1). Included in this class are also the executive and administrative personnel of the corporation's subsidiaries. 11 CFR 114.5(g)(1). As part of the solicitation of such contributions from its subsidiaries' personnel to MBank PAC, MCorp instituted a payroll deduction plan, presumably whereby executive or administrative employees authorized the company to deduct a certain amount from their paychecks. See Advisory Opinion 1985-18. Because the employees in question are no longer employees of MCorp subsidiaries, any continuation of payroll deductions for contributions by them to MBank PAC, past the date of their departure from the MCorp subsidiaries, would result in a prohibited contribution by the employer. In addition, because the authorizations of contributions by payroll deduction were made by MCorp subsidiary employees to MBank PAC and were not part of a solicitation by DIBB to its employees for contributions to DIBB PAC, DIBB needs to obtain a separate authorization for payroll deduction from each solicitable DIBB employee who wishes to contribute to DIBB PAC. All such authorizations must be voluntary and must otherwise comply with the Act and regulations. See 11 CFR 114.5(a)(1) through (a)(5). Cf. Advisory Opinions 1981-21 and 1981-14.

Another exception to the general prohibition on corporate contributions is the use of general treasury monies for administration of the corporation's separate segregated fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). DIBB agreed to assume the costs of the administration

and operations of MBank PAC since the close of business on March 28, 1989. In addition, DIBB agreed to assume the costs for implementing the transactions described in the agreement.

Some of these costs, including the costs for the return or distribution by MBank PAC of contributions made by DIBB employees and costs that may be incurred by MBank or its PAC in the transfer of funds (i.e., $5,000 or less) to DIBB, are costs for the administration of MBank PAC. A corporation that is neither the connected organization of the separate segregated fund, nor an entity affiliated with the connected organization, may not pay for such costs. See Advisory Opinions 1987-34 and 1983-19. The Commission concludes therefore that the provisions in the agreement calling for DIBB to exempt MCorp and MBank PAC from MBank PAC's administrative costs, or for DIBB to reimburse them for such costs, are contrary to the Act and regulations and may not be implemented.

Because the Commission has already concluded that the proposed transfer of funds may not be made, it declines to state whether the proposed transfer and the efforts to implement the transfer would cause a subsequent affiliation of the committees. See Advisory Opinion 1982-21. But cf. Advisory Opinion 1976-104.

The Commission notes from materials submitted by you that, on July 12, 1989, DIBB's name was changed to Bank One, Texas, National Association. Under the Act and regulations, the name of any separate segregated fund established by a corporation must include the full name of the connected organization. 2 U.S.C. 432(e)(5); 11 CFR 102.14(c). The name of the company's separate segregated fund should be changed to conform with the requirements and an amended Statement of Organization should be filed with the Commission immediately. 2 U.S.C. 433(c); 11 CFR 102.2(a)(2).[1]

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1987-34, 1987-21, 1986-42, 1985-18, 1983-19, 1982-36, 1982-21, 1981-21, 1981-14,1980-40,1977-21, and 1976-104)

1/ It appears from the information presented and DIBB's change of name that the Banc One Corporation has assumed management of DIBB. The Banc One Corporation has a separate segregated fund, Banc One PAC, which has been registered with the Commission since 1980. DIBB PAC, therefore, should also amend its Statement of Organization to include Banc One PAC as an affiliated committee. 2 U.S.C. 433(b)(2); 11 CFR 102.2(a)(1)(i) and 102.2(b)(1).