

AGENDA DOCUMENT NO. 12-25



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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April 19, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KS*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Tony Buckley *TB*
Attorney

Subject: Draft AO 2012-12 (Dunkin' Brands, Inc.)

For Meeting of 4/26/12

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

1 ADVISORY OPINION 2012-12

2

3 William H. Minor, Esq.
4 DLA Piper LLP (US)
5 500 Eighth Street, NW
6 Washington, D.C. 20004

DRAFT

7 Dear Mr. Minor:

8 We are responding to your advisory opinion request on behalf of Dunkin' Brands,
9 Inc. ("Dunkin' Brands"), concerning the application of the Federal Election Campaign
10 Act of 1971, as amended (the "Act"), and Commission regulations to the ability of
11 Dunkin' Brands' separate segregated fund to solicit contributions from its non-corporate
12 franchisees/licensees, as well as from the executive and administrative personnel of
13 Dunkin' Brands' corporate franchisees/licensees. The Commission concludes that
14 Dunkin' Brands may solicit contributions from its non-corporate franchisees/licensees, as
15 well as from the executive and administrative personnel of its corporate
16 franchisees/licensees.

17 **Background**

18 The facts presented in this advisory opinion are based on your letter received on
19 February 15, 2012, and your email received on March 6, 2012.

20 Dunkin' Brands is a corporation that is a franchisor of two restaurant chains:
21 Dunkin' Donuts and Baskin-Robbins. Nearly 100 percent of Dunkin' Brands restaurants
22 are franchised units owned and operated by individual franchisees/licensees. Dunkin'
23 Brands enters into contractual arrangements using three standardized franchise
24 agreements: one for Dunkin' Donuts restaurants, one for Baskin-Robbins restaurants, and
25 one for restaurants that combine the two franchised concepts. The franchise agreements

1 require franchisees to follow systems devised by Dunkin' Donuts and Baskin-Robbins in
2 the operation of their restaurants.

3 Dunkin' Brands, Inc. Political Action Committee ("Dunkin' PAC") is the separate
4 segregated fund ("SSF") of Dunkin' Brands. Dunkin' PAC currently solicits and accepts
5 contributions only from the executive and administrative personnel of Dunkin' Brands.
6 Dunkin' PAC also wishes to solicit and accept contributions from its non-corporate
7 franchisees/licensees, as well as from the executive and administrative personnel of its
8 corporate franchisees/licensees.

9 ***Question Presented***

10 *May Dunkin' PAC solicit and accept contributions from Dunkin' Brands'*
11 *non-corporate franchisees/licensees, as well as from the executive and administrative*
12 *personnel of its corporate franchisees/licensee?*

13 ***Legal Analysis and Conclusions***

14 Yes, Dunkin' PAC may solicit and accept contributions from Dunkin' Brands'
15 non-corporate franchisees/licensees, as well as from the executive and administrative
16 personnel of its corporate franchisees/licensees, because Dunkin' Brands and its
17 franchisees/licensees are "affiliated" within the meaning of the Act and Commission
18 regulations.

19 The Act prohibits corporations from making contributions in connection with
20 Federal elections. 2 U.S.C. 441b(a). The definition of "contribution," however, does not
21 include expenses paid by a corporation for "the establishment, administration, and
22 solicitation of contributions to" the corporation's SSF. 2 U.S.C. 441b(b)(2)(C); 11 CFR
23 114.1(a)(2)(iii). A corporation or its SSF may solicit contributions to the SSF from a

1 restricted class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A
2 corporation's restricted class consists of its executive and administrative personnel and
3 stockholders, and the families of those persons. 11 CFR 114.5(g)(1), 114.1(j).

4 An SSF may also solicit contributions from the executive and administrative
5 personnel of the corporation's "subsidiaries, branches, divisions, and affiliates and their
6 families." 11 CFR 114.5(g)(1). The factors set forth at 11 CFR 100.5(g)(4) are used to
7 determine whether an organization is an affiliate of a corporation. 11 CFR 114.5(g)(2).
8 These factors include: (1) whether an organization has the authority or ability to direct or
9 participate in the governance of another organization through provisions of constitutions,
10 bylaws, contracts, or other rules, or through practices and procedures; (2) whether an
11 organization has the authority or ability to hire, appoint, demote, or otherwise control the
12 officers, or other decisionmaking employees or members of another organization; and
13 (3) whether an organization had an active or significant role in the formation of another
14 organization. 11 CFR 100.5(g)(4)(ii)(B), (C), (I). *See* 11 CFR 110.3(a)(3)(ii).

15 In previous advisory opinions addressing affiliation of franchisees or licensees to
16 the franchisor/licensor corporation, the Commission has found affiliation to exist on the
17 basis of the corporation's control over business policies, practices, and procedures of an
18 entity and the extent of the entity's contractual obligations to the corporation that is the
19 franchisor or licensor. *See, e.g.*, Advisory Opinion 1992-07 (H&R Block); Advisory
20 Opinion 1988-46 (Collins Foods); Advisory Opinion 1979-38 (Hardee's).

21 The materials submitted by you indicate significant continuing control and
22 direction by Dunkin' Brands over its franchisees/licensees. Under all three franchise

1 agreements, Dunkin' Brands allows the franchisee to use the relevant proprietary marks¹
2 only in a manner specified by Dunkin' Brands. Under all three agreements, the
3 franchisee may not compete with Dunkin' Brands in the sale of products that are the
4 same as, or substantially similar to, those sold by the Dunkin' Brands franchise.

5 Dunkin' Brands maintains the right to establish standards for their
6 franchisees/licensees, including the location, physical characteristics and quality of
7 operating systems of restaurants; products that are sold; qualifications of suppliers; and
8 qualifications, organization and training of franchisees and their personnel. Dunkin'
9 Brands has standards and specifications for a franchise's design, layout, construction,
10 furnishings and equipment. A franchise may sell only approved products and must
11 maintain a sufficient supply of all approved products to meet customer demands at all
12 times. Dunkin' Brands controls all advertising, marketing, and promotions programs of
13 its franchisees/licensees.

14 The control exercised by Dunkin' Brands over its franchisees/licensees is similar
15 to that described in Advisory Opinion 1979-38 (Hardee's) and Advisory Opinion
16 1988-46 (Collins Food). Accordingly, the Commission concludes that Dunkin' Brands'
17 franchisees and licensees are its "affiliates" within the meaning of the Act and
18 Commission regulations. And, as a consequence, Dunkin' Brands or Dunkin' PAC may
19 solicit voluntary contributions from its non-corporate franchisees/licensees, and from the
20 executive and administrative personnel of its corporate franchisees/licensees. *See*
21 Advisory Opinion 1988-46 (Collins Food).

¹ Proprietary marks include trademarks, service marks, logos, emblems, trade dress, trade names, and other indicia of origin.

