

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-12 is now available for comment. It was requested by William H. Minor, Esq., on behalf of Dunkin' Brands, Inc., and is scheduled to be considered by the Commission at its public meeting on April 26, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-12, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on April 25, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fee.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-12, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-25



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2012 APR 19 P 4:53

April 19, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
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.

1 **This response constitutes an advisory opinion concerning the application of the**
2 **Act and Commission regulations to the specific transaction or activity set forth in your**
3 **request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any**
4 **of the facts or assumptions presented, and such facts or assumptions are material to a**
5 **conclusion presented in this advisory opinion, then the requestor may not rely on that**
6 **conclusion as support for its proposed activity. Any person involved in any specific**
7 **transaction or activity which is indistinguishable in all its material aspects from the**
8 **transaction or activity with respect to which this advisory opinion is rendered may rely on**
9 **this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or**
10 **conclusions in this advisory opinion may be affected by subsequent developments in the**
11 **law, including, but not limited to, statutes, regulations, advisory opinions, and case law.**
12 **The cited advisory opinions are available on the Commission's website, www.fec.gov, or**
13 **directly from the Commission's Advisory Opinion searchable database at**
14 **<http://www.fec.gov/searchao>.**

15

On behalf of the Commission,

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Caroline C. Hunter
Chair