U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

August 31, 2005

2005-20A
ERISA SEC.
3(40) & 514 (b)(6)(D)

Mr. Alden Bianchi
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Dear Mr. Bianchi:

This responds to your request for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Dunkin' Donuts Franchisee & Distribution Center Health Plan (Plan), a welfare benefits program to be sponsored by the Dunkin' Donuts Northeast Distribution Center, Inc. (Distribution Center) and Dunkin' Donuts franchisees. Specifically, you request an advisory opinion addressing whether the Plan is a "multiple employer welfare arrangement" (MEWA) as defined in section 3(40) of ERISA, and whether the Plan is "fully insured" within the meaning of ERISA section 514(b)(6)(D).

You provided the following facts and representations in support of your request. Dunkin' Donuts is an international coffee and baked goods chain. Dunkin' Brands, Inc. (Dunkin' Brands, formerly known as Allied Domecq Quick Service Restaurants) owns the Dunkin' Donuts, Baskin' Robins and Togo's brands, the products and services of which are sold through independent franchisees (Franchisees). In order to become a Franchisee, applicants must enter into a franchise agreement with Dunkin' Brands. The franchise agreements require the Franchisees to operate their franchises in accordance with certain prescribed standards and specifications and to purchase products, equipment and services from approved Dunkin' Brands suppliers.

In order to facilitate compliance with the franchise agreements, Dunkin' Brands established the Distribution Center. The Distribution Center is a Delaware non-stock corporation that currently services Franchisees located in New England and New York. The Distribution Center provides its members with access to raw materials (e.g., coffee, milk, sugar, flour, etc.), supplies (e.g., cups, napkins, utensils, and equipment), and related services (billing and collections, inventory tracking, information technology infrastructure, etc.) the Franchisees need to operate their Dunkin' Donuts franchises. The Franchisees may choose to become members of the Distribution Center. To become members of the Distribution Center, each Franchisee must enter into a purchase commitment agreement and pay a one-time membership fee. Franchisees that join the Distribution Center must also comply with the Distribution Center's by-laws, policies, procedures, and approved programs. The Distribution Center's sole purpose is providing Dunkin' Brands franchise related products, equipment and services to its members. Each Franchisee member of the Distribution

Center also owns a fractional interest in it. Together, the Franchisees wholly own the Distribution Center.

The Distribution Center proposes to establish the Plan to provide medical, surgical, or hospital benefits, or benefits in the event of sickness or accident to employees of Franchisees and of the Distribution Center and their dependents. Only the Distribution Center and its member Franchisees are eligible to adopt the Plan. The Distribution Center and Franchisees who adopt the Plan become members (Members) of the Plan. The Plan will provide benefits only to employees of Members and their dependents. The Plan will be funded by contributions from the Members and their employees held in the Plan's trust. The trust will be domiciled in the State of Vermont and organized as a voluntary employees' beneficiary association within the meaning of Internal Revenue Code section 501(c)(9). Neither the Franchisees nor the Distribution Center can become, or continue as, a Member unless they have common law employees. Under the Plan governing documents, employees of Franchisees engaged in operating a Dunkin' Brands franchise (Dunkin' Donuts, Togos, and Baskin Robbins) and employees of the Distribution Center will be eligible to be covered under the Plan. You, however, have indicated that the Plan will, in operation, cover only employees of Dunkin' Donuts franchisees operating Dunkin' Donuts franchises and employees of the Distribution Center. Accordingly, as used below, the terms Franchisee and Member refer only to Franchisees operating Dunkin' Donuts franchises.

The Members will appoint an administrative committee (Plan Administrative Committee) who will be trustees of the Plan trust. The Plan Administrative Committee will be comprised of seven individuals. Four of the individuals appointed to the Plan Administrative Committee will serve as the Plan's officers (President, Vice President, Secretary and Treasurer). The Plan Administrative Committee will make decisions by majority vote. The Plan Administrative Committee will have sole authority to control and manage the operation and administration of the Plan such as establishing contribution requirements, making eligibility determinations, paying claims, and interpreting the terms of the Plan. The Plan Administrative Committee also will choose the program of benefits available through the Plan within the types approved by the Members, and may select insurance contracts and service providers. The Members will elect the officers and the other three Plan Administrative Committee representatives annually (except the Committee President who will be elected biannually). Each Member will be able to nominate individuals to be officers or representatives on the Plan Administrative Committee. Each Member will have one vote and committee representatives must be elected by a majority vote of the Members. The Members may remove any officer or representative on the Plan Administrative Committee by majority vote of the Members with or without cause. Any vacancy on the Plan Administrative Committee will be filled by majority vote of the Members. In addition, the Members may terminate the Plan and its trust or amend the by-laws governing the Plan by majority vote.

The benefits under the Plan will be funded through an insurance contract. The trust under the Plan will wholly own an insurer licensed to do business in the State of Vermont as an association captive insurance company (Insurer). The Insurer will issue an insurance contract to the Plan. The Plan will pay insurance premiums to the Insurer from contributions from Members and covered employees in the trust. The contract will obligate the Insurer to pay participants and beneficiaries of the Plan, directly or through its agent, and in a timely manner, all of the benefits under the Plan. The Insurer's obligations will be backed by its general assets and will not be conditioned on whether the Insurer receives reimbursements for benefit payments from the Plan or the Members. The Insurer will be unconditionally liable to the participants and beneficiaries for payment of all claims for benefits incurred while the contract is in effect. The participants and beneficiaries will have direct contractual rights against the Insurer with respect to any benefit claims.

The question of whether the Distribution Center would be sponsoring or operating a MEWA within the meaning of section 3(40) of ERISA depends on whether the Plan is an arrangement that “offers or provides” welfare benefits to the employees of two or more employers. Specifically, section 3(40)(A) of ERISA defines the term “MEWA,” in pertinent part, to include:

> [A]n employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained -- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, (ii) by a rural electric cooperative, or (iii) by a rural telephone cooperative association.

Based on the information we reviewed, it is the view of the Department that the Distribution Center and its Members would be sponsoring or operating a MEWA within the meaning of section 3(40) of ERISA. The Plan would be an arrangement that has been established and is maintained for the purpose of providing welfare benefits to employees of two or more separate, independent employers and does not fall within any of the exceptions listed in section 3(40).

The issue of whether a MEWA is “fully insured” arises for purposes of ERISA preemption provisions only if the arrangement constitutes an “employee welfare benefit plan” within the meaning of ERISA section 3(1) covered by Title I because, under section 514(b)(6)(A) of ERISA, the extent to which state insurance laws may be

applied to an ERISA-covered employee benefit plan that is a MEWA is dependent on whether or not the plan is fully insured.[1]

Although it appears that the Plan is intended to provide benefits described in section 3(1), to be an employee welfare benefit plan, the Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization. You advise that the Plan will not be established or maintained by an employee organization within the meaning of section 3(4) of ERISA. Therefore, this letter will only address whether the Plan would be established or maintained by an "employer" within the meaning of ERISA section 3(5).

Section 3(5) of ERISA defines employer as: " . . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." The definitions under ERISA thus recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits for their employees.

Whether there is a bona fide employer group or association with respect to a benefit program depends on all of the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the group; the process by which the group was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and, who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and substance, in order to act as a bona fide employer group with respect to the program.

The definition of an "employee welfare benefit plan" in ERISA is grounded on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representation interest or genuine organizational relationship unrelated to the provision of benefits. *See, e.g.,* Advisory Opinion 94-07A; Advisory Opinion 2001-04A.

In this case, the Franchisees and Distribution Center will establish and maintain the Plan, and appear, based on your representations, to be a group consisting solely of employers of common law employees who will be covered by the Plan. The

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[1] Under the general preemption clause of ERISA section 514(a), ERISA generally preempts any and all State laws that "relate to" any employee benefit plan subject to Title I of ERISA. However, there are a number of exceptions set forth in section 514(b) of ERISA to section 514(a)'s broad preemption provision.

Franchisees and the Distribution Center have a commonality of economic interests and a genuine organizational relationship unrelated to the provision of benefits under the Plan. Each Franchisee owns a fractional interest in the Distribution Center. The Distribution Center facilitates access to the raw materials, supplies and services that facilitate Dunkin' Donuts franchise business operations. In addition, the employees of Franchisees, and of the Distribution Center, covered by the Plan will be engaged in activities that support Franchisee operation of Dunkin' Donuts franchises. Further, the Franchisees and the Distribution Center, and, therefore only employers of common law employees covered by the Plan, will have the power to control the Plan, for example, by reason of their authority to appoint and remove the Administrative Plan Committee constituting the Plan's governing body.

Thus, based on the information submitted, it is the view of the Department that the Members of the Plan (the Franchisees and Distribution Center) would, at least in form, constitute a bona fide employer group or association in relation to the Plan, and the Plan would, at least in form, constitute an employee welfare benefit plan for purposes of Title I of ERISA. Whether the Members exercise control in substance over the benefit program is an inherently factual issue on which the Department generally will not rule in an advisory opinion.

With respect to an ERISA-covered plan, section 514(b)(6)(D) provides that, for purposes of section 514(b)(6)(A) of ERISA:

> a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary [of Labor] determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

In order to consider whether a particular MEWA is "fully insured" within the meaning of ERISA section 514(b)(6)(D), the contract between the insurance company and the insured must be examined. *See* Advisory Opinion 94-07A. In light of the prospective nature of the benefit program, you do not have an insurance contract in place. Accordingly, the Department is unable to conclude that the Plan would be fully insured within the meaning of section 514(b)(6)(D). There is nothing in your submission, however, that would lead us to conclude that the Plan would not be fully insured if an insurance policy consistent with your representations were secured to guarantee all the benefits under the plan. *See* Advisory Opinion 93-11A.

You raised a number of issues in your submission concerning the application of the fiduciary responsibility provisions of Part 4 of Title I of ERISA. For your information, prohibited transaction issues similar to those you raise are addressed in, and we would

refer you to, Advisory Opinion 97-23A, a copy of which is enclosed. We note that the general standards of fiduciary conduct contained in ERISA sections 403 and 404 would apply to those fiduciary issues with respect to prudence, acting solely in the interests of participants and beneficiaries, and diversification. Accordingly, the respective fiduciaries of the Plan must act prudently and solely in the interests of the participants and beneficiaries of the Plan and must carry out their ongoing fiduciary responsibilities under ERISA in connection with the Plan, including monitoring of Plan investments. Whether the actions of the Plan fiduciaries satisfy these requirements is an inherently factual question, and the Department generally will not issue advisory opinions on such questions. The appropriate Plan fiduciaries must make such determinations based on all the facts and circumstances of the individual situation.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations