Food Trucks, Kiosks and other Alternative Venues: Structuring and Drafting Issues

Chris Egan
Dunkin’ Brands, Inc.
Canton, Massachusetts

and

Suzie Trigg
Haynes and Boone, LLP
Dallas, Texas

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I. INTRODUCTION

Much has been written through the years regarding franchise systems’ expansion into non-traditional or captive audience venues. While the topics covered by this paper in large part mirror those covered exhaustively in prior works, the authors hope to not only educate newer franchise practitioners on the basic tenets of expansion into alternative venues, but also to address the pressing questions posed by recent trends, such as the explosive growth of food trucks and similar mobile franchised outlets. In particular, this paper adds to the existing works regarding franchising in alternative venues by exploring the distinctive questions posed by the rise of food trucks and other mobile units and provides a practical guide to anticipating and negotiating terms common to the lease agreements and franchise or license agreements utilized by parties establishing franchised outlets in alternative venues.

A. Alternative Venues: Why the Distinction?

By definition, an “alternative” or “non-traditional” venue is a point of distribution where the primary purpose of the consumer’s visit is likely to be for other than to purchase goods from the franchised brand. Put another way, particularly with respect to food trucks, an alternative venue meets the consumer where he or she is. With the ever-increasing demand by consumers for the conveniences and known standards of quality offered by franchised brands, for a number of franchisors, rate of growth of outlets in alternative venues exceeds more traditional expansion.

Before embarking on a business plan that includes an expansion into non-traditional development, franchisors and franchisees should understand the array of potentially unusual requirements likely to be placed on them by the party that controls the physical space within which the franchised business is to operate. Depending on the venue, both franchisor and franchisee will also need to carefully consider how they will address the practical limitations (and opportunities) that expansion into these alternative venues may present. To fully embrace these opportunities, franchisors and franchisees alike will want to be prepared to identify their core values, plan for expansion into alternative venues in a way that honors those core values, and then negotiate agreements that address the unique needs of their brand.1

Those not as familiar with documenting the relationships to establish franchises in alternative venues will want to identify and think through the issues and obstacles to the development of franchised outlets in alternative venues. Without question, alternative venues offer franchisors a unique opportunity to introduce customers to their products. With that benefit, however, comes a burden: a poor representation of the brand or a bad first customer experience could well lead to the brand’s loss of that customer for life. It is, therefore, imperative that alternative venue locations positively impact consumer demand. First and foremost, the agreement governing the development, use and occupancy of the space must be drafted so as to provide the franchisor/franchisee with the ability to present the brand’s products in the most favorable light possible. Second, the franchisor/franchisee will encounter space constraints and/or characteristics related to the alternative venue that are likely unique when compared to traditional venues. As a result of physical space constraints, the franchisor

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1 See generally, Suzanne Trigg and Joyce Mazero, Non-Traditional Generation: Franchise Systems Coming of Age Within Non-Traditional Venues, 30 Franchise L.J. 227 (Spring 2011) (hereinafter “Non-Traditional Venues”).
may also need to limit product offerings, modify equipment packages, and prepare “alternative”
sets of design plans.

Another common hurdle that must be addressed is that of the franchisor’s/franchisee’s
ability to advertise and market its products and services within the larger alternative venue (e.g.,
throughout an airport). Given that traditional methods of advertising are typically prohibited or
limited in alternative venues, careful consideration must be given to how the brand will bring
customers into the franchised outlet. Training can also be an issue for the uninitiated. It is
important that modified training plans and manuals are developed so as to address the unique
nature of operating in these alternative locations. And last, but most certainly no least, the
franchisor/franchisee must consider the unique nature of the party with whom they will be
negotiating.

In many alternative venues, the negotiations will be directly with the host. However, in
other venues – airports for example – the opportunities may be controlled by a “concessionaire”
or “contract feeder” that has negotiated to gain exclusive control of the opportunity. Regardless,
negotiating with these non-traditional hosts will certainly result in the negotiation of new and
often unique concepts, many of which are unlikely to have been encountered during prior
traditional landlord-tenant negotiations (note, for purposes of this paper, we will sometimes refer
to the “third party lessor”, “landlord”, “concessionaire” or “contract feeder” as the “host”). The
above provides a glimpse of the myriad unique issues that counsel must consider when
negotiating agreements to document franchised outlets in alternative venues, issues which are
explored in detail in this paper.

B. Recent Trend: Increased Use of Food Trucks and Mobile Kiosks

A current discussion regarding franchising in alternative venues is incomplete without
note of the significant expansion over the past few years of food trucks and mobile kiosks of all
types – franchised and not franchised. Established franchise systems, such as Jack in the Box,
have found new growth and have appealed to a new customer base through the use of food
trucks. At the same time, franchisors utilizing food trucks or offering franchises for food trucks
have encountered difficulty, or even hostility and outrage, from franchisees operating nearby, as
food trucks have a unique appeal and can gain access to potential customers at specific times
of day, without incurring operating costs at other times, and at specific locations, which are often
closer to and more convenient for potential customers. Finally, the increased use of food trucks,
in particular, has led to increased concerns regarding the safety and quality of the products
prepared, and a host of localities have quickly scrambled to regulate food truck businesses by
requiring specific licenses to operate a food truck and by placing requirements on their activities.
While food trucks present an attractive way for a franchisor to roll out new products, or simply to
reach more customers, each of these factors will need due consideration. Mobile kiosks, while
perhaps more limited in their reach and therefore less offensive to existing franchisees, present
some of the same issues as food trucks.

C. Recent Legal Development: FTC FAQ 37 on Item 12

In late 2012, the Federal Trade Commission’s (FTC’s) answer to Frequently Asked
Question (FAQ) 37 clarified the disclosure that franchisors that distinguish franchised outlets in
alternative venues from other, traditional franchised outlets should provide in Item 12.² Often, a

² FTC Amended Franchise Rule FAQ’s, FAQ 37, available at: http://www.business.ftc.gov/documents/amended-
franchise-rule-faqs#37.
franchisor will exclude the right to develop franchised units in alternative venues from any territorial rights granted to a franchisee or multi-unit developer.\(^3\) Until recently, this ubiquitous carve out seemed to be given little attention. However, as multi-unit developers found themselves developing, or building out, large territories and then not having a right or option to open a unit in a lucrative alternative venue in spite of having helped the brand build recognition in the market in which the alternative venue is located, the ubiquity of the carve out has been questioned more and more. Perhaps in response to this tension, or simply as a matter of clarification, the FTC released the following FAQ 37:

> May a franchisor state in Item 12 that it grants an “exclusive territory” if it reserves the right to open franchised or company outlets in so-called “alternative venues” like airports, arenas, hospitals, hotels, malls, military installations, national parks, schools, stadiums and theme parks?

**Answer:** No. Pursuant to FAQ 25, a franchisor may state in Item 12 that it grants an “exclusive territory” only if the franchisor contractually promises not to establish either a company-owned or franchised outlet selling the same or similar goods or services under the same or similar trademarks or service marks within the geographic area or territory granted to a franchisee. A reservation of rights to open outlets selling the same goods or services under the same trademarks or service marks within a franchisee’s territory negates any such commitment and triggers the Item 12 requirement to include a disclaimer stating that franchisees will not receive an exclusive territory.

FAQ 25 notes that it is consistent with the disclosure scheme in Item 12 for a franchisor to grant an exclusive territory yet reserve the right to make sales in the territory through other channels of distribution or competitive brands because Item 12 elsewhere specifically requires detailed disclosures about such potential competition. The required disclosures about “other channels of distribution such as Internet, catalog sales, telemarketing or other direct marketing” are limited by the examples provided, however, to sales not requiring a franchised or company outlet physically located in a franchisee’s exclusive territory.\(^4\)

Notably, FAQ 37 has no impact on the tension referenced above, as it does not require any changes to franchisors’ usual practice of excluding alternative venues from exclusive geographic territories otherwise granted to franchisees and multi-unit developers. Moreover, FAQ 37 does not address the trends that are currently present with respect to franchising in alternative venues, such as food trucks, mobile kiosks and greatly reduced scale units. For example, a franchisor that reserves the right for it or a franchisee to operate a food truck or kiosk in an otherwise exclusive geographic area would be required to modify Item 12 of its FDD. However, such a franchisor would not be “establishing” a unit within the geographic area; instead, the unit could move in and out of the geographic area freely. In addition, the greatly reduced scale of many non-traditional units begs the question of whether the mandatory

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\(^3\) Michael Einbinder, *Just How Exclusive is an Exclusive Territory?*, available at: http://www.franchiseknowhow.com/legal_corner/territory.htm.

disclosure is relevant or helpful to a prospective franchisee if the franchise system is one in which units in alternative venues bear few similarities to streetside or brick and mortar units, whether due to fewer product offerings, limited hours or both. In such instance, a franchisor would want to add more explanation in Item 12 to explain the lack of exclusive territory and provide a fuller picture to prospective franchisees and developers of the role of non-traditional outlets within the franchise system.

D. Current Practice: Addenda, Short Form License Agreements and Hunting Licenses

Standard form franchise agreements drafted for use with traditional franchised outlets can be insufficient when addressing the needs of both the franchisor and the franchisee related to the alternative venue. Without tailoring, such agreements can create confusion and can often contain requirements that are simply not applicable or not suitable for the alternative venue under consideration. Therefore, increased tailoring of “template” forms of agreements is often needed. At times, modifications will be required by the host, while at other times as a result of the nature and location of the physical space. Often, franchisors with a significant number of franchisees operating units in alternative venues will opt to draft a form of addendum to their standard forms of franchise agreement, addressing the common issues that the franchisor knows will arise. Others opt for the use of a shorter, more concise and specific form of franchise or license agreement to be used for such purposes.

In addition to agreements tailored specifically for use with franchisees intending to open an outlet in an alternative venue, in recent years “hunting licenses” have become common to allow prospective franchisees to respond to requests for proposals issued by hosts. A hunting license is simply an authorization for a current or prospective franchisee to include the franchised brand in its proposal to a host. It may also provide for a limited amount of exclusivity and keep the franchisor and any other current or prospective franchisees from submitting a proposal for the same brand in the same venue for a limited period of time. Such hunting licenses typically take the form of a brief letter (such as the example attached as Attachment A) and may be accompanied by a term sheet or anticipated agreement. Often, franchisors are approached by experienced concessionaires and such concessionaires request a hunting license to allow them to include a particular concept in a proposal. Experienced concessionaires will often propose a letter agreement for the franchisor to sign, perhaps accompanied by the concessionaire’s form of agreement. As one familiar with franchising might imagine, the usual dichotomy of the franchisor/franchisee relationship is upended in this scenario. For franchisors thoughtfully considering expansion into alternative venues, having a form of authorization letter, or hunting license prepared in advance is a valuable exercise both in being prepared and in thinking through the terms applicable to relationships with franchisees operating in alternative venues.

A franchisor that does choose to utilize a hunting license or similar authorization, an addendum or a short form license agreement should take care to ensure that all such offers comport, and are made in accordance, with state and federal franchise disclosure laws. For example, in some states without franchise disclosure or registration laws, providing a hunting license to a large concessionaire to seek opportunities in alternative venues would be acceptable on the basis that the franchisor could reasonably expect an exemption from disclosure requirements to apply (e.g., the fractional franchise exemption) and also because the franchisor could reasonably expect that if it were to need to provide disclosure, there would be opportunity to do so at a later date. However, in a registration state, providing an authorization
letter could be deemed an offer of a franchise and even if the franchisor maintains registration in such state, such offering may not be consistent with the franchisor’s registered offering.

Regardless of the form of addendum, short form agreement or authorization a franchisor chooses to utilize, most franchisors will find that in preparing documentation for alternative venues, a common set of considerations apply. Below are some of the more common terms contained in either an addendum to a franchise agreement covering alternative venues or in a short form of license agreement.

1. **Limited Offerings**

   It is essential that each franchisor, at the time it is first developing its non-traditional strategy, contemplate and plan for the likelihood that it will not be possible for it to offer its full range of products at these alternative locations. Whether it is food, clothing, electronics or books, the franchisor must carefully consider whether the venue under consideration will allow the brand to present itself to the consumer in a way that benefits the brand and drives customer loyalty. As such, it is imperative that the agreement with the host be tailored to provide the franchisor with as much flexibility as possible regarding its permitted use.

   In a simple franchisor/franchisee-host agreement, there may be little or no resistance on the part of the host regarding the franchisor’s/franchisee’s ability to offer a full range of products. However, in a more complex situation, such as that of an airport, the host will undoubtedly want to place certain limits on which items may be sold from the location. Take, for example, a quick service restaurant (QSR) in an airport. It is likely that the host has either already negotiated or will be negotiating with other QSRs. As such, the host (or the contract feeder, if such party is seeking the franchised outlet) may attempt to not only limit the menu items that the QSR will be permitted to offer for sale, but the host will also likely attempt to limit the flexibility of the QSR to alter or modify its menu in the future. As such, the franchisor must carefully consider which of its product offerings are vital to its loyal consumers; which product offerings are most profitable to the franchisee; and which product offerings are vital to the franchisor’s/brand’s presence in the location.

2. **Physical Layout of Unit**

   The fact that a franchisor/franchisee may not be able to offer its full line of products may very well be the result of the fact that the venue itself – the physical space – is very limited in size. In addition, prior to entering into any negotiations, franchisors/franchisees must understand that the host, due to its exclusive control over the venue, will very likely have significantly greater leverage than a traditional landlord. As such, the franchisor/franchisee may be required by the host to perform certain unusual tasks, give up traditional rights, and/or otherwise comply with requirements not normally encountered in negotiations for traditional locations. For example, the host may require the franchisor/franchisee to operate during certain host-prescribed hours, to offer only a limited menu, to modify its signage, and/or to deal with limitations on how the space is used (e.g., require certain percentages of the space to be used for sales of products or provision of services, thereby limiting space available for storage or preparation).

   With that in mind, experienced franchisors often develop a “portfolio” of design options from which it and its franchisee can choose depending on the space limitations present at the location and any other unusual requirements imposed by the host. By way of example, a QSR franchisor will want to have readily available operational and development plans that address,
among other things, the possibility that it may not be able to secure its own food preparation or freezer space in its location. Continuing to use a QSR franchisor as an example, to address that issue without abandoning its core values, the franchisor would be wise to have contingency plans readily available, which provide for the use of alternative methods of food production and storage. For example, a plan that provides for a commissary or off-site prep kitchen in which food can be prepared prior to being delivered to the location would provide the franchisor with the ability to quickly and effortlessly gain entrance to a venue that, without proper advance planning, may have been off limits to development for the brand.

Essentially, franchisors and franchisees must plan to be flexible if they intend successfully operate in these unique locations, while always maintaining that honoring the franchisor’s core values remains paramount. All of these issues must be addressed in the negotiated agreement with the host such that the franchisor and the franchisee clearly understand the limitations under which they will be developing and operating their business.

3. Specialized Training

In addition to modified product offering and space modification plans, franchisors will want to ensure that a properly modified employee training program that addresses the nature of operating in a alternative venue is readily available. The training plan will certainly incorporate much of the content from the franchisor’s traditional training program, but it also much be modified to address the various venues in which the stores operate. These stores may be serving customers who are unfamiliar with the brand and/or who come in at odd times. Product offerings, equipment, and store layout may not match that offered in the franchisor’s traditional locations. There may be times during the day (and night) during which there is a “rush” on the store and other times during which there is virtually no customer traffic. Franchisors will be well served to ensure that all of these issues are addressed in a modified training program that is focused on the unique needs of a non-traditional store. To the extent that a franchisor’s system includes the use of trainers to support pre- and post-opening activities, the franchisor will want to consider how security measures and limited space at alternative venues will impact the franchisor’s personnel's ability to enter the venue and provide training.

4. Specialized Marketing

While it is true that if a franchised outlet is tucked away in a low traffic alternative venue, prohibitions on advertising can make it difficult to bring customers into the outlet, possibly one of the most significant benefits that operating in alternative venues provides is that of brand marketing. Airport locations, for example, provide the franchisor with the ability to advertise its brand and its products to tens of thousands of potential new customers every day, which, if implemented properly, provides the franchisor with the ability to showcase its products or services to customers who otherwise might never have experienced the brand. But, and as noted above, this potential marketing windfall comes with a significant burden for the franchisor: the presentation of the brand and the products offered must be to brand standards or the franchisor risks losing that customer for life. A bad experience, after all, and all that marketing benefit goes out the window because the customer is less likely to return.

E. Small Format Branding

Right alongside the trend of food trucks and mobile units has come a trend for franchised brands to create “mini” versions of their brands suitable for alternative venues. For
example, a casual dining concept may develop a “Grill” or “To-Go” version of its restaurant with a limited menu and smaller format. We refer to these efforts in this paper as “small format branding.”

Small format branding has several benefits for the franchisor, but can also bring significant additional work, both as to developing the business and appropriate legal documentation. Small format branding can benefit a franchisor that is struggling to conform an existing brand to the demands of alternative venues and their landlords. For example, brand specifications that require certain square footage and décor and signage often cannot be readily tailored to suit the small, and largely unchangeable spaces available in many alternative venues. In addition, customers may be confused by the distinctly different product offerings and service format of units in alternative venues. That is, if a customer is accustomed to a leisurely experience with full, table service, he or she might be surprised to find a “seat yourself” format, a limited menu, and no wait staff. In that sense, having franchised units in alternative venues operate under a small format brand provides a way to set expectations with customers.

In addition to establishing customer expectations for units in alternative venues, the use of small format branding also provides leverage to franchisors that are negotiating with franchisees and their landlords for unit requirements for such alternative venues. For example, if the small format brand is largely accepted by alternative venue lessors, a franchisee may be hard pressed to ask for atypical concessions, and may work harder to obtain consent from a landlord to implement specific décor, menu items or other brand features.

As discussed further below, however, small format branding does have its downsides. In particular, depending upon how different the brand is, a franchisor may find it difficult to use a single franchise disclosure document (FDD) to describe the offerings. In addition, as further discussed below, even if a separate FDD is not used, the brand’s FDD must describe the distinctive brand, including through a second Item 7 initial investment disclosure, identification of principal trademarks used and similar disclosures.

II. OVERVIEW OF CONSIDERATIONS FOR ALTERNATIVE VENUES

As detailed above, the franchising game for alternative venues differs significantly from traditional unit franchising with smaller franchisees and developers. This section provides information regarding key considerations for alternative venues, with particular emphasis on the distinct roles of the parties involved in placing a franchised outlet in an alternative venue.

A. Typical Franchisees in Alternative Venues

1. Who Are They

Franchisees that are successful developers and operators of franchised outlets in alternative venues are typically more sophisticated and larger than the rest of the franchisees in a franchise system. Even if such franchisees are not necessarily larger, they possess attributes or skill sets that have enabled them to effectively pursue and obtain leases for alternative venues and to navigate the lengthy RFP processes that are a part of establishing a business in such venues.

While this discussion focuses largely on franchisees that are operating many units in alternative venues, operators of food trucks and kiosks may be on the opposite end of the
franchising spectrum. That is, such franchisees may actually be smaller or less experienced than a traditional franchisee operator, and the operation of a food truck or kiosk may be their first foray into franchising. As to such franchisees, this section is largely inapplicable, and the considerations detailed in section II.c. below are more on point. The range of franchisees does, however, serve to demonstrate the difficulty that a franchisor may face when attempting to develop a true “one size fits all” non-traditional expansion program.

2. Their Operations

Franchisees that operate franchised outlets in alternative venues often specialize in operations in a particular type of venue. For example, a franchisee that is Airport Concessions Disadvantaged Business Enterprise (“ACDBE”) certified may have multiple franchised outlets, under multiple brands, in multiple airports. However, such franchisee would be ill-equipped to seek a lease to operate concessions for a stadium or to operate a food court in a shopping mall or university. Or, a contract operator with extensive university operations may find itself similarly unprepared to meet the socioeconomic and other legal standards imposed by governmental agencies or quasi-governmental agencies (such as publicly funded airports), and therefore will tend to keep its operations focused upon a particular segment. Therefore, a franchisor that anticipates having a wide range of alternative venue franchised units may find that it needs a “portfolio” of qualified alternative venue franchisee operators.

3. Their Expectations

As mentioned above, the typical franchisor/franchisee relationship can be upended by a franchisee that has significant experience operating outlets in alternative venues. Such franchisees may own a significant number of franchised outlets operating under a variety of brands and may also own their own, proprietary brands. If a franchisor elects to develop its own form of agreement for use in its alternative venue franchise program or elects to negotiate from its standard form of franchise agreement, it may reasonably anticipate that an experienced concessionaire or similar alternative venue franchisee may seek changes regarding the following:

- **Term and Renewal** – Typically, franchise agreements are long term arrangements that permit the franchisor great latitude with respect to termination and renewal, while affording the franchisee little choice but cooperation. Franchisees operating outlets in alternative venues are often unable to agree to such terms. First, the host may only offer a short lease of five years or less. In addition, because the rental fees and other economic terms may differ from a traditional location, the franchisee may be unable to sign a “then-current” form of agreement upon renewal and instead, may seek the option to extend the negotiated agreement.

- **Termination** – Franchisees operating in alternative venues often negotiate a right to terminate the franchise agreement upon notice to the franchisor if the underlying lease for the outlet is terminated by the host or, to a more limited degree, if the outlet does not perform as anticipated.

- **Opening Timelines, Remodeling and Updates** – Franchisees operating in alternative venues may have a limited ability to push back on the standards or expectations of the host venue and therefore may seek to negotiate opening timelines and similar requirements. In addition, given the capital investment
required to open an outlet for a potentially shorter time period and other requirements imposed by host venues, a franchisee operating an outlet in an alternative venue may be reluctant to agree to remodeling or updating requirements that may apply to the rest of the system.

- **Transfer Restrictions** – Similar to other large franchisees and multi-unit developers, franchisees that operate outlets in alternative venues are often reticent to agree to transfer restrictions that could leave them without means of an exit strategy to sell or make similar conveyances of their key assets, including franchise agreements.

- **Territorial Rights** – Even if a franchise system does not typically grant exclusive territories to franchisees, a franchisee operating an outlet will typically request to have the exclusive right to operate in such venue and a right to develop any additional franchised outlets which might be added to the venue in the future.

- **Covenants Not to Compete** – The strongest operators of franchised outlets in alternative venues are typically those with experience. Such franchisees will have a development strategy including multiple brands and therefore commonly seek the exclusion or narrow tailoring of any non-competition covenants.

**B. Fixed Locations – Venue and Lease Requirements**

1. **Role of Third Party Lessor or Host in Franchisor/Franchisee Relationship**

   In alternative venues, two distinct types of host parties exist. First, the owner of the alternative venue may be the landlord and may lease spaces to various operators of franchised outlets. Alternatively, there may be a third party that leases space from the landlord and then such third party either operates multiple brands of outlets within the space or itself recruits various operators of franchised outlets. Writings regarding alternative venues can be confusing as various authors have referred to a “host facility” while others have referred to a “host franchisee”. For the sake of clarity, in this paper references to a host refer to the facility itself, rather than an intermediary lessee or franchisee.

   The agreement between the host and the lessee for alternative venues often contains terms that restrict the lessee’s ability to adhere to certain traditionally required terms in the franchisor’s standard form franchise agreement. As noted above, the host of an alternative venue often has significant leverage to affect the terms of the agreement and, as a result, may place significant constraints on the lessee. By way of example, such constraints may:

   - limit or require minimum operating hours that differ from those set forth in the franchise agreement;
   - restrict space available for storage and removal of trash;

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5 See, e.g., Jeffrey A. Brimer, *Franchising in Unique Venues* Chapter of *Collateral Issues in Franchising* (ABA Forum on Franchising 2013) (Kenneth Costello, Ed.), distinguishing between the host of a facility and the host franchisee (hereinafter “Franchising in Unique Venues”).
• limit “back room” space for inventory storage or, in the case of a QSR, for freezer storage and food preparation;

• limit or eliminate the franchisor’s/franchisee’s “exclusive use” protections that may be traditionally required by the brand so that no other business is operated in conjunction with the franchised outlet; or

• generally address other aspects designed to adapt to and protect the venue’s needs.6

Therefore, the provisions of the franchise agreement and the training and operations manual designed to address the franchisee's compliance with the franchisor’s standards may need to be modified to accommodate the requirements of the landlord or host.7 Often, a provision such as the following is helpful, given the need to have flexibility over time:

Licensee acknowledges that the System has a valuable international reputation that must be protected and preserved. Licensor acknowledges that Licensee has expertise in the restaurant market in the Designated Area. Licensee may request, and Licensor’s consent shall not be unreasonably withheld to reasonable System modifications that are intended to facilitate the operation of the Restaurant in the Designated Area or that are required by the owner of the Designated Area.

2. Potential Impact of Regulations (e.g., ACDBE) on Ability to Obtain Lease

It is not unusual for governmental or quasi-governmental hosts to require franchisors and/or their franchisees to have specialized experience or qualifications as a condition to being permitted to operate in the venue. Two primary examples are the Disadvantaged Business Enterprise (DBE) certification, and the ACDBE certification.

A DBE is a small business that is majority owned and controlled by one or more socially or economically disadvantaged individuals.8 A DBE is a for-profit small business concern:

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

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6 See generally, Non-Traditional Venues, supra note 1.


Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.9

A “socially and economically disadvantaged individual” is a United States citizen or permanent resident who is:

1. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

2. Any individual in the following groups, members of which are reputedly presumed to be socially and economically disadvantaged:
   a. “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
   b. “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
   c. “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
   d. “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
   e. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
   f. Women;
   g. Any additional groups whose members are designated as socially and economically disadvantaged by

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9 49 CFR §26.5.
the SBA, at such time as the SBA designation becomes effective.\textsuperscript{10}

Individuals who are not a member of one of these ethnic groups must prove social disadvantage.\textsuperscript{11} As noted above, in addition to proving social disadvantage, an individual must also show “economic disadvantage”, which includes providing financial information and documentation regarding the individual’s income, assets, and personal net worth.\textsuperscript{12}

Major U.S. airports operate in accordance with the ACDBE program pursuant to the U.S. Department of Transportation’s rule on Participation by Disadvantaged Business Enterprises in Airport Concessions.\textsuperscript{13} The purpose of an ACDBE program is, among others, to “ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance.”\textsuperscript{14} Companies that operate shops or restaurants in airports are often referred to as “concessionaires.” An airport concession is a for profit small business, including businesses that are engaged in the sale of consumer goods or services, management contracts, advertisers and suppliers of good and services to airport concessions. The ACDBE program requirements generally provide that, to qualify as a DBE, a firm and its majority owners/control person(s) must satisfy the following:

- The firm is owned/controlled by a socially and economically disadvantaged individual who is a U.S. citizen or permanent resident;\textsuperscript{15}
- Such individual’s personal net worth does not exceed $1.32 million, with certain exclusions;\textsuperscript{16} and
- The firm is a small business with gross annual receipts, averaged over the firm’s previous three fiscal years, not exceeding $56.42 million.\textsuperscript{17}

3. Lease Terms and Deal Economics

Given that an alternative venue itself as well as the customers that it serves are quite often very different from those encountered by the franchisor with its traditional locations, it naturally makes sense that the terms of the lease and the related economic considerations will also vary significantly. The following considerations are a few of the more significant

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} 49 CFR Part 23.
\textsuperscript{14} Id. at § 23.1.
\textsuperscript{15} Id.
\textsuperscript{16} Id. at § 23.35.
\textsuperscript{17} Id. at § 23.33(a) (Note that the current size standard for certain other companies is different. For car rental companies, which are also commonly franchised, the size standard is $75.23 million average annual gross receipts over the firm’s three previous fiscal years. Id. at § 23.33(a)(2)).
considerations that a franchise operator for an alternative venue will encounter: (a) length of lease term; (b) limited square footage; (c) different rent structures; (d) additional charges; (e) plan approval and development; and (f) early termination rights. Each is addressed in turn below.

a. **Length of Lease Term**

As noted above, generally speaking, the term of the agreement will be significantly shorter than that for a traditional location, with five to seven years not being unusual. It is vital that this potentially short term be kept in mind by the franchisor/franchisee when developing construction and operational plans as the shorter term will allow for less time to achieve an acceptable return on investment. For the airports and other non-traditional hosts, the shorter terms provide them with the flexibility to adapt to current popular concepts and keep the alternative venue’s product offerings fresh and appealing to the consumer.

b. **Limited Square Footage**

Specialty retailers generally lease much smaller sized locations in alternative venues. Often, and as noted above, there is limited space in the host environment so franchisors and franchisees must have plans in place to adapt. Typically, these locations range from 100-200 square foot kiosks, to inline locations that may range from 500 to 1500 square feet, to larger sit down style restaurants that may occupy between 2,500 to 3,500 square feet.

c. **Different Rent Structures**

Rent structures can vary greatly depending on the particular type of alternative venue in which the franchisor is operating. Hosts may charge a traditional “dollar per square foot” fixed rent, while others may seek to charge a “percent rent” or even a “greater of” fixed v. percent rent. In airports, for example, it is not uncommon for the host to demand a Minimum Annual Guarantee (MAG). MAG rents are generally higher per square foot in airports than in traditional shopping centers and street and office building locations and they tend to increase proportionately based on increases in enplanements or by paying a specified percentage (85% to 90%) of the prior year’s “effective rent” (MAG plus Percentage Rent) as the new MAG. Most of these rent structures do not provide for adjustments below the initial year’s annual MAG, even in the event of a decline in enplanements, as most deals are approved by public boards and compliance with the board approved total term MAG revenues is required. That said, franchisors should try to negotiate some equitable relief in the event of substantial enplanement declines and/or the loss of one or more airlines from a particular terminal. Like MAGs, percentage rent rates in alternative venues are also generally higher than that charged in traditional venues.

d. **Additional Charges**

Additional charges vary between alternative venues, but typically include the following:

- **Storage** - Some venues charge rent while others provide storage at no charge. Size is small and limited in airports in most venues.

- **Utilities** - Charges for utilities varies depending on the host. Some hosts charge all tenants a pro rata share, others charge only food and beverage tenants, while
others provide the utilities at little or no cost. Clearly, the franchisor/franchisee should pay particularly close attention to the issue of utilities as there is potential for significant savings if negotiated properly.

- **Common Area Maintenance Expenses** - As is the case in traditional leasing, tenants in alternative venues are generally required to pay for their proportionate share of expenses incurred by the host to clean and maintain the public areas of the venue.

- **Taxes** - In some, but not all alternative venues, the host will charge the tenant for its proportionate share of real estate taxes. The tenant will, of course, be required to pay its own personal property taxes. That said, in some alternative venues such as airports, taxes may not be an expense that is passed through to tenants. As with utilities, the franchisor/franchisee should carefully take into account the potential expense associated with taxes and the potential savings if negotiated out of the agreement.

d. **Plan Approval and Development**

In certain alternative venues, such as airports, the plan approval and construction process is more complex than in others, such as malls with existing spaces simply needing to be finished out. This is due, in part, to the fact that certain limiting design criteria must be met and that criteria may very well impact a franchisor’s prototypical model. In addition, in certain alternative venues such as airports or other governmental locations, approvals are required from both the airline/airport authority, in the case of an airport, and government agencies, in the case of government building locations and military bases. These approvals are, of course, over and above those required to be obtained from local building inspectors and code officials in many instances.

e. **Early Termination Rights**

Almost all hosts, whether they are the host themselves or a concessionaire will require the agreement to provide the host with the right to terminate the lease under certain circumstances. For example, if a coffee retailer is located within a gas/convenience chain, the host will likely demand that, should the gas/convenience store be relocated or closed, the agreement may be terminated without consequence to the host. In other locations in which a contract feeder has negotiated with the landlord (e.g., a university), the contract feeder will likely insist that the agreement be terminable should the contract feeder’s agreement expire or be terminated by the master landlord. In instances in which the host insists on these rights, franchisors should, at a minimum, seek to negotiate provisions into the agreement that allow for reimbursement of the franchisor’s/franchisee’s unamortized investment in the original leasehold improvements.18

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C. Mobile Units – Food Trucks, Kiosks, Etc.

The operation of food trucks, kiosks and other mobile franchised units is an area quite distinct from the operation of a more typical alternative venue franchised outlet, such as a restaurant in a food court or a coffee shop in a hotel. A “food truck” is a “mobile, miniature commercial kitchen that must meet the same state sanitation requirements as a brick-and-mortar restaurant, as well as be in compliance with additional local ordinances.”

Food trucks are subject to unique regulatory requirements and because of their mobility, have the potential to disrupt a franchisor’s relationship with its other, traditional unit franchisees. Kiosks are often a spinoff of a franchisee’s existing brick and mortar location or may be for a limited period of time only.

“Street vending is one of the world’s oldest professions,” there being documented selling of food via carts on city streets in ancient China. In the United States, large cities such as New York have been steadily served by a variety of mobile food carts and trucks since at least 1691, such as the ubiquitous hot dog carts and ice cream trucks of many American cities. Traditionally, such operations have been started with minimal investment and not associated with a brand or connected to a chain of traditional restaurants.

Recent years have seen resurgence in the use of food trucks and mobile kiosks and carts. As for street vending generally, in the United States alone there are over three quarters of a million street vendors generating upwards of $40 billion annually. The public’s view seems to be shifting away from a view of food trucks as the underdog of the food industry, making food trucks a force to be reckoned with in many respects. While mobile vending remains a relatively low cost startup and food trucks have given many would be but underfunded restaurateurs an entry point into the restaurant business, the food industry as a whole has picked up on the trend and established brands are seeking their share of the market for food trucks. One American city is now home to nearly 2,000 mobile food vendors and a collection of “food trailer parks” where locals and tourists alike dine on the latest food trends.
1. Regulation of Food Trucks in The United States

Even though food trucks are popular with consumers and a boon to entrepreneurism and many cities’ economies, like any popular trend, the recent growth of food trucks and other mobile food vending has had its share of critics and cities have been scrambling to respond with appropriate regulations. In some cities, decades old regulations intended to regulate the activities of ice cream trucks have been applied to achieve odd outcomes, such as the inability of food trucks to gather in an area and wait for customers. In other cities, the concerns of brick-and-mortar restaurants regarding competitive advantages that food trucks are perceived to enjoy have influenced city leaders to place burdensome restrictions on the activities of food trucks.

Whether food trucks or other mobile units are even a viable concept for a particular franchise system will depend to an extent upon the local laws in effect in the areas in which the mobile units would seek to operate. For example, can mobile units park close enough to office buildings in a central business district that the company can reasonably expect customers to seek out such units? Or, as some cities have done, are food trucks relegated to specific parks or set aside areas, in which case a franchised mobile unit may perform poorly as compared to the local or novelty brands with which it must compete. Food safety and licensure requirements are also unique as applied to mobile food trucks, and a franchisor should approach cautiously with some oversight as to such requirements. Regulations concerning food trucks tend to fall into the following categories: (a) restricted zones; (b) duration restrictions; (c) proximity bans’ and (d) food safety and sanitary permits and regulations. Each is discussed in turn below.

a. Restricted Zones

As implied by “restricted zones”, some cities’ regulation of food trucks includes restriction of the areas in which food trucks operate, including in some instances, barring food trucks entirely from lucrative commercial districts. Nearly three dozen cities are reported to have such restrictions. Some restrictions are so stringent as to require “intimate knowledge of


27 At least 19 major American cities have duration restrictions limiting the ability of food trucks to stay in one place. Rolling Regulations, supra [note 13] at 708 (citing Robert Frommer, et al., Streets of Dreams: How Cities Can Create Economic Opportunity By Knocking Down Protectionist Barriers to Street Vending, Inst. for Just. 7 (July 2011), at 8.

28 Annie Lowrey, A Political Stalemate Ends in Washington, With Food Truck Rules, New York Times June 18, 2013 (“Some restaurateurs pushed for strict new rules, arguing that the food trucks did not pay their share of taxes, and that they remained unfairly free of regulations. The truck owners, in some cases, argued that the restaurants were merely trying to quash their competition.”).

29 Food Truck Regulations, supra note [17] at 1.

30 Id.

31 Rolling Regulations, supra note [13] at 708 (citation omitted).
where vendors can lawfully operate.” Other restrictions, such as a restriction to prohibit selling food at night in the public right of way, are intended to assist with traffic flow and traffic safety.

b. Duration Restrictions

Some cities restrict the amount of time that food trucks are allowed to stop and wait for customers or are allowed to operate from one location. In other cities, food trucks are not allowed to stop and wait for customers and must be flagged down by a customer before they can park and serve a customer, regulations which harken back to the days of ice cream trucks. For example, even though it has modernized its food truck regulations in response to a difficult start for food truck operators under prior regulations, in Chicago, a food truck may not sell food on the same block for more than two hours. In Dallas, a food truck cannot occupy a location for more than two consecutive hours (and must move at least 50 feet upon relocation) or for more than four hours total on a given day in the Arts District and Warehouse District. While only a handful of cities fall into this latter category of preventing food trucks from stopping and waiting, such inconsistent regulations demonstrate the difficulty of planning a uniform food truck franchise program.

c. Proximity Bans

In some cities, brick-and-mortar restaurants have successfully lobbied for ordinances that limit how close food trucks (and in some instances, also other street vendors) can park from certain types of businesses. In addition, some areas have attempted to food trucks’ proximity to schools. For example, Indianapolis prohibits food trucks from selling between the hours of 7:00 a.m. and 4:00 p.m. on school days within 1,000 feet of an elementary or junior high school.

Proximity bans have not been implemented without hot debate, and even dispute. In 2011, four food truck vendors sued the city of El Paso, Texas, because of a regulation that banned food trucks from operating within 1,000 feet of restaurants, grocers, and other

32 Id. at 710 (discussing regulations requiring that food trucks not operate within 200 feet of a brick-and-mortar restaurant and requiring food trucks to mount GPS devices in each truck to monitor their locations).

33 Id. at 711 (discussing Indianapolis regulation; citation omitted).

34 Food Truck Regulations, supra note [17] at 1.

35 Id.


37 Id. at 710 (citation omitted).


40 Id. (discussing proposed California bill to prohibit food trucks from operating within 1,500 feet of a school in order to not undermine nutritious school food programs).

41 Rolling Regulations, supra note [13] at 711 (citation omitted).
foodservice establishments. The regulation so severely restricted the ability to operate food trucks in El Paso that food truck vendors claimed that they were unable to operate profitably. The vendors argued that El Paso’s only purpose in enacting the regulations was to protect established businesses, which would not be a legitimate government interest permitting regulation. In response, the city agreed to repeal the regulations.

d. Food Safety and Sanitary Permits and Regulations

Anecdotal evidence suggests that many consumers do not understand that food trucks are often regulated in the same or perhaps in a more stringent manner than other commercial kitchens and may still believe food trucks are unsanitary. On the contrary, however, reports published on the topic of food safety and food trucks in the United States suggest that perhaps due to closer scrutiny, food trucks are in many instances just as clean as, or cleaner than, their traditional restaurant counterparts. Moreover, the use of food trucks has encouraged innovation in food preparation and equipment due to the limited space available and limitations on the weight that a typical truck is equipped to transport.

The impact of restrictive regulation of food trucks has been the limited success of food trucks in some cities. While cities like Austin, Texas, or New York, New York, are welcome havens for food truck operators, others, like Chicago, Illinois, have at times enacted regulations that made operating a food truck unprofitable. At first, Chicago went so far as to ban mobile food preparation and only allowed the sale of already prepared and packaged foods. However, even in cities with such restrictions, the food truck industry has continued to grow and in many cases, thrive. In addition, some cities, such as Portland, Oregon, have embraced the unique characteristics of the new mobile food industry and have enacted regulations narrowly tailored to food truck regulations.

In determining whether and how to implement a new food truck or similar mobile unit initiative, a franchisor or franchisee must carefully review applicable regulations to ensure that

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42 Food Truck Regulations, supra note [17] at 1 (citing Castaneda v. City of El Paso, No. 3:11-CV-0035-KC (W.D. Tex.) (Filed Jan. 26, 2011)).

43 Id.

44 Id.

45 Id.


49 Rolling Regulations, supra note [13] at 709 (citation omitted).

50 Id. at 715 (“...here the city seems to encourage the proliferation of food carts”) (citing Dana Bowen, Food of the People: Portland’s Food Cart Revolution, Saveur.com (Aug. 5, 2012), http://www.saveur.com/article/Travels/Portland-Food-Trucks).
sufficient flexibility exists to effectively carry out planned operations at a level that achieves sufficient profitability. A franchisor establishing a food truck program must also realize that its typical standards of uniformity of operations, such as requiring particular days and hours of operation, may be limited by regulation.

2. **Food Trucks in Franchise Systems – The Use of Social Media**

Often, franchisors strictly regulate the use of their trademarks on social media and carefully restrict franchisees’ social media activities. While such brand protection strategies certainly have their time and their place in protecting the franchisor’s brand and trademark rights, they may be inconsistent with a successful food truck strategy because social media is a key part of food truck vendors letting their prospective customer base know where they will be operating for the day. Therefore, in implementing a successful franchised food truck program, a franchisor must consider what level of social media participation it will permit food trucks to have. The franchisor may also consider what controls to place on such activities, such as monitoring social media accounts and requiring the assignment of social media handles, account access and similar intellectual property upon the expiration or termination of the franchise agreement. Once a franchisor makes such decisions, the best practice is for such franchisor to implement a comprehensive social media policy that accounts for the unique needs of food trucks (and similar mobile units). The franchisor should be wary, however, of the potential for franchisees with traditional units to be unhappy if franchisees with mobile units are afforded greater social media privileges.

3. **Food Trucks in Franchise Systems – Potential for Territorial Encroachment**

In the 1990s and early 2000s, several franchisors faced lawsuits from franchisees when such franchisors attempted to establish e-commerce. The franchisees had never before faced a real possibility that potential customers could order products directly from a franchisor, and franchise agreements drafted decades earlier failed to contemplate the “new frontier” of the internet. In many ways, today’s franchisor efforts to grapple with the exploding popularity of food trucks bears striking similarities as many franchise agreements that are currently in use predate the food truck trend.

The lawsuits that franchisors faced in the dawn of e-commerce are an instructive lesson in how courts’ interpret territorial rights under franchise agreements. For example, in *Emporium Drug Mart, Inc. v. Drug Emporium Inc.*, an arbitration panel issued an order preliminarily enjoining a drugstore franchisor and its e-commerce subsidiary from selling products over the Internet. Although the opinion did not cite express contractual language, the arbitrators determined that the franchisor’s Internet sales likely violated exclusivity provisions of the

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53 *Id.*

franchise agreements and diluted the franchisees’ trademark licenses. The arbitration panel’s order prohibited Internet sales to customers within the franchisees’ territories and required the franchisor to place a notice on its website that it was unable to ship to the identified territories. About a year after the Drug Emporium decision, a flower shop franchisor in California had a better outcome in a similar action, but the arbitrator found that the parties at least appreciated the possibility of Internet marketing and sales, which distinguishes the case from the Drug Emporium decision. Similarly, in that case, which is Hales v. Conroy’s, Inc., an arbitrator determined that a franchisor’s development and marketing of extensive Internet and telephone sales did not breach the terms of a franchise agreement or breach an implied covenant of good faith and fair dealing.55

Like the internet, food trucks can reach potential customers where traditional franchised outlets cannot. And, if a franchise agreement promises a franchisee only that the franchisor will not, and will not permit another franchisee to, establish another similar outlet within a specified geographic area, a franchisee may be surprised, angry or even litigious when it learns that a franchisor does not necessarily consider a food truck to be a similar outlet. Or, worse, if a franchisor specifically prohibits a food truck from operating within an existing franchisee’s protected geographic area or near existing streetside locations, but the responsible franchisee takes such actions regardless of the franchisor’s instructions, the franchisor may find itself facing a problem that it took pains to avoid. Therefore, the franchise agreement for a food truck or other mobile unit needs to carefully address potential territorial encroachment issues. Before embarking on a food truck program or similar mobile units, a franchisor will need to consider the territorial rights of existing franchisees and their expectations.56

Even if a franchisor finds that its agreements with existing franchisees could make the implementation of a food truck program difficult or impossible, the analysis should not stop there, as a carrot (rather than stick) approach might help the franchisor to convince existing franchisees that food trucks can coexist peacefully within, and even complement, an established franchise system. For example, in another case involving franchise agreements that did not contemplate the Internet, Pro Golf of Florida, Inc. v. Pro Golf of America, Inc., the franchisor’s efforts to convince existing franchisees to participate in Internet sales were summarized.57 Pro Golf sought input from its franchisees before establishing an Internet sales program and solicited their participation through an Internet participation agreement. Pursuant to the agreement, Pro Golf was to pay franchisees a commission for sales in the franchisees’ territories. The agreement also asked franchisees to waive any territorial rights their franchise agreements may have afforded them as to Internet sales. While not all franchisees chose to participate (thus, the lawsuit), the franchisor’s effort demonstrates an alternative approach for a willing franchisor.

As a means of expanding via food trucks, a franchisor may similarly consider offering existing franchisees in the same area where the food truck will operate a reverse royalty. That is, if the franchisor is able to document or have the franchisee that owns the food truck document the locations where sales were made, the franchisor could then agree to remit a portion of the royalty payments to franchisees in such area. Such strategy, when paired with an


56 Legal Implications of Food Trucks, supra [note 46].

amendment to the franchise agreement permitting the relevant activity, can help a franchisor avoid disgruntlement and possibly, litigation from other franchisees. Alternatively, and again similar to what some franchisors have done in response to territorial encroachment concerns in the context of e-commerce, a franchisor may develop a territory policy that provides for clear communication and dispute resolution procedures in the event of territory disputes. Such policies may reduce the likelihood of litigation by permitting a franchisor an opportunity to weigh in on a territory dispute at an early date.

4. **Beyond Food – Other Mobile Franchises**

In addition to the wildly popular food truck trend, other types of service providers and vendors have noticed the clear advantages of being able to bring their services and wares directly to customers, with mobile startups quickly spreading beyond the food industry. In addition, franchise systems consisting only of mobile units, such as mobile pet grooming, have gained popularity. While the regulations aimed at food trucks and similar mobile food vending have been the focus of this section, similar considerations apply to franchisors considering other mobile franchised units. For example, a mobile pet groomer or veterinarian may find it useful to utilize Twitter to let its prospective customers know of a promotional event. In addition to the considerations discussed in this Section, when it comes to other types of mobile franchised units, a franchisor will often find itself mired in tailoring a national account program, referral program or similar system and in resolving debates among franchisees regarding territorial issues.

### III. DEVELOPING THE FRANCHISOR’S APPROACH FOR EXPANSION IN ALTERNATIVE VENUES

#### A. Choosing the Right Alternative Venues

1. **Brand Considerations**

Why are alternative venues so desirable to franchisors? Essentially, expansion into alternative venues not only provides the franchisor with an opportunity to grow its brand in terms of number of units, but it also provides the franchisor with a unique way to build brand awareness and brand loyalty. Of course, and as has been stated above, before embarking on this expansion, the franchisor must identify those aspects of its business that cannot be changed to ensure that it and its franchisees only seek to develop and operate in alternative venues that are appropriate for the brand. The questions that must be addressed are numerous. For example, is there enough space for us to properly operate; does our product offering appeal to the consumers who will be frequenting the venue; and would entering the venue be a violation of any of agreements that we may already have in place? In addition to determining whether or not the venue works for the franchisor and its brand, the franchisor must also identify whether or not it has an existing franchisee who has the capability and who meets the requirements to be a non-traditional franchisee.

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Several considerations apply to a franchisor’s assessment of whether alternative venues are a favorable expansion strategy. First, a franchisor should consider the potential benefits that may accrue from furthering the brand’s presence in venues that are convenient to consumers.61 The demands on our time are growing. If franchisors intend to remain relevant with today’s consumers, it is imperative that they keep pace with the needs of those consumers. One of the ways to address those needs is to be located in venues in which the consumer is already present for another purpose. Ultimately, with little or no time to spare, consumers now expect and demand that the products they want are available in convenient and often common locations.

Second, alternative venues provide a unique marketing opportunity. As stated previously, a brand’s presence in an airport, stadium, amusement park or university may well expose the brand and its products to a large and diverse set of consumers, many of whom may have never before experienced the brand. Dunkin’ Donuts, for example, has more than 10,000 units worldwide but, until recently, was not well known in the western portions of the US. When the chain announced in 2012 that it would begin opening units in Colorado, it began the launch with a restaurant in a concourse inside Denver International Airport and another at a waiting area outside the airport.62 Similarly, when Dunkin’ Donuts announced it would be opening units in California, it began that launch by opening a restaurant at Camp Pendleton and followed that up by opening another restaurant in the lobby of an Embassy Suites Hotel in San Diego. By giving those consumers the ability to sample its products in advance of any traditional restaurants being opened in those markets, the brand opened the door to winning over those consumers for the long term.

Third, alternative venues offer partnerships with new, distinctive franchisees.63 A franchisee’s cost of entry for a traditional location can often be quite high. That, coupled with the fact that many franchisees hold territorial rights, can, at times, place the franchisor in a position of not being able to bring new franchisees on board. Enter the non-traditional location, which quite often have significantly lower costs of entry. Whether it be reduced franchise fees or reduced development costs, it is often true that opportunities exist to sell franchises to certain parties who otherwise may be locked out of the franchised system.

Most importantly, however, successful franchisors must seek opportunities that are consistent with their brand’s core values. Those core values should include furthering the business of not only the franchisor, but also the franchisee. By first identifying those core values and aligning with a franchisee who shares those values, efforts to enter into non-traditional development will be far more likely to succeed. The process may well require flexibility on the part of the franchisor and the franchisee, but that flexibility should not require any compromise in core brand values.


62 See Small Locations, Big Picture, Franchise Focus, Nation’s Restaurant News; April 7, 2014.

63 See id.
2. **Consideration of Existing Franchisees’ Rights v. Brand’s Need to Expand**

As noted previously, the franchisor and the franchisee must share a common core group of values as well as the willingness to be flexible if the non-traditional business is to succeed. If the prospective franchisee does not stop to consider its current competencies and future business plans, it may quickly find out that it lacks the ability to effectively operate in these unique venues. Depending on the nature and structure of the franchisee (e.g., “mom and pop” or sophisticated multi-brand operator), considerations such as non-compete clauses, regulatory requirements (e.g., DBE) and operational procedures must be addressed prior to entry.

Whether or not these new alternative venue opportunities are made available to existing franchisees is a matter for franchisors to carefully consider. Many franchisors retain all rights to non-traditional development regardless of whether the surrounding territory is controlled by a particular franchisee. While that opens up opportunities for the franchisor to grow its brand with new franchisees, any such growth certainly risks alienating those local franchisees. As discussed above with respect to food trucks, a franchisor may consider offering incentives to existing franchisees to encourage them to accept or even promote growth of the brand through alternative venues.

Through proper and careful drafting of the franchise agreement, the franchisor may expressly reserve for itself the right to offer franchises for the establishment of franchised locations in alternative venues despite the fact that the non-traditional location in question is within a previously sold development area. Without a clear reservation of such rights, however, the franchisor will be left to determine whether or not the existing franchisee’s exclusive rights have been implicitly reserved. In all situations, whether clearly stated in the franchise agreement or not, the franchisor should assess whether the new non-traditional location would impact or cannibalize the existing franchisee’s sales at his/her traditional locations that are near the proposed new location.

B. **Disclosing the Franchised Concept for Alternative Venues**

With limited exception, federal and state franchise disclosure requirements apply to alternative venues. Franchisors that offer multiple, related concepts under a common set of trademarks (i.e., common brand identity) may utilize a single FDD. To do so, however, they must include all distinguishing information relevant to each concept. For franchisors that are establishing an alternative venue franchise program, this typically means modifying the following items in the FDD: (a) FTC Cover Page (to describe the distinct concepts and for initial fees/investment totals); (b) Item 1 (in describing the franchise offered); (c) Items 5 and 6 (fee differences); (d) Item 7 (to provide an initial investment table for the alternative venue concept); (e) Item 12 (to describe differences in territory granted); (f) Item 13 (to describe principal trademarks used in alternative venues, if different); (g) Items 9 and 17 (to describe an additional form of agreement, if utilized); (h) Item 19 (to provide a separate financial performance

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64 Military bases are a notable exception to the standard rule that the usual disclosure requirements will apply. For example, a franchisee operating on a United States military base in Japan would not be subject to Japan’s law governing the sale of franchises since technically, the U.S. military base is not part of Japan but instead, U.S. property.

65 Franchising in Unique Venues, *supra* note 4 at 85.
representation, if utilized); and Item 20 (to describe alternative venue operations and development).

In addition, the franchisor may find it necessary to modify the following items in the FDD: Item 8 (if the franchisee must acquire supplies from different sources per host requirements); Item 10 (if the franchisor provides different or does not provide any financing for operations in alternative venues); Item 11 (often, franchisors will have different training and advertising requirements for alternative venues, which may result in distinctions in Item 11); Item 15 (the large franchisees attracted to and able to secure contracts in alternative venues may not need to participate in the operation of the business); Item 16 (as discussed, franchisees may sell a different menu or other offering in alternative venues); and Item 22 (if the franchisee will sign a different form of franchise agreement for an alternative venue).

While the list of additional or different disclosures may seem long, in most cases, the additional information will not be so extensive that a separate FDD is needed. Most franchisors prefer to avoid a second FDD for alternative venues since having a separate FDD requires additional work at the outset and for annual updates and would also require separate state registrations if the offer is not exempt. Nevertheless, where the franchisor wishes to keep certain matters less open, a separate FDD may be preferable. For example, if a franchisor charges lower initial fees to its alternative venue franchisees or does not require small format brand franchisees to support a system wide advertising fund due to the lesser benefit such franchisees might receive, it may be best for such franchisor to have a separate FDD to avoid giving other franchisees opening brick-and-mortar units fodder for negotiation.

C. Utilizing Exemptions in Alternative Venues

It is very common for franchisors to expand into alternative venues on the basis of transactions that are exempt from federal franchise disclosure and state franchise registration and disclosure requirements. Franchisors seek to use an exemption based means of expanding into alternative venues for many reasons. First, such franchisors often strike starkly different deal terms with franchisees that will operate in alternative venues. Such terms may differ from franchisee to franchisee, making uniform disclosure difficult. In addition, franchisors are somewhat reticent to inform typical or smaller franchisees about the deals that larger franchisees capable of operating in alternative venues receive, as such larger franchisees often get sharply reduced initial and ongoing fees and may also receive other perks, such as rights of first refusal or rights of early termination. The most commonly utilized federal exemption for alternative venues is the fractional franchise exemption. While a full discussion of the application of exemptions to franchising in alternative venues is beyond the scope of this paper, franchisors should keep this option in mind when planning alternative venue expansion (or when they receive a request for a hunting license) and a chart of commonly utilized exemptions is attached to this paper as Attachment B.

66 Id. at 91.
67 Id.
68 Id. at 92.
69 Id. at 92.
D. Changes to Standard Franchise Agreement Terms

As one can imagine, a franchisor and a franchisee may reach significantly different conclusions as to what is and what is not a core value. In addition to each party’s values, certain key considerations will guide the franchisor’s program changes when it expands its franchise program to include alternative venues.\(^\text{70}\) As such, prior to entering the non-traditional world of franchising, the franchisor should carefully consider a number of factors that will affect its business not only in the short term, but also in the long term. Important considerations include: (1) whether to use an addendum or a new form of license or franchise agreement; (2) fees; (3) transfers; (4) covenants not to compete; (5) territorial rights; and (6) brand standards. Such considerations often overlap with the requirements imposed by a host venue via the lease of space in an alternative venue.

1. Addendum v. New Form of Franchise Agreement

Due to the nuances of developing and operating in alternative venues, a franchisor will often create a new form of development and/or franchise agreement which is to be used only for non-traditional locations. Other franchisors simply amend their standard form franchise agreement via an addendum. If the choice of using an addendum is made, it will often contain a number of “standard” amended terms (i.e., amendments to specific provisions of the franchise agreement that virtually always require modification if they are to properly apply to operations in an alternative venue). However, depending on the venue, the host, and the franchisee, franchisor’s will undoubtedly also need to be prepared to consider including a few venue-specific or franchisee-specific modifications in the addendum.

Franchisors should keep in mind that, if a choice is made to develop a new form franchise agreement, it is likely that the form will be a required component of the franchisor’s future FDD and may, in fact, require an amended FDD to be filed if the new form of agreement is not being implemented during the year at a time other than that at which the brand’s FDD is being updated. Using an edited form adds clarity to the relationship and shortens negotiations. However, by including such modified form in the brand’s FDD, it will provide traditional franchisees with the opportunity to review it and thereafter suggest that certain of the modifications should apply to their traditional franchised businesses. Of course, the use of an alternate form of franchise agreement has the potential to cause confusion for the franchisor given that it would be likely that the franchisor would have certain franchisees operating under two different forms of agreement. All of these are considerations that the franchisor must evaluate when contemplating how it will approach its non-traditional business.

\(^\text{70}\) See generally, Non-Traditional Venues, supra note 1.
2. **Fees**

Initial franchise fees, ongoing franchise fees (e.g., royalties), and/or continuing advertising fees vary tremendously depending on the franchisor and the venue in question. Other fee-related considerations include whether or not the franchisee is being granted only the non-traditional site or whether the franchisee is “purchasing” a larger territory that includes the non-traditional site (see also Paragraph 5 below). Franchisees will take the position that, especially for “captive audiences” (e.g., a franchised business located in a terminal in an airport behind the security checkpoints), the customers are not influenced by advertising or promotions, but are already “captive” to the brands located in the venue and, as such, should not be required to contribute to any advertising fund, and/or honor any marketing promotion(s). Franchisors, on the other hand, will want non-traditional franchisees to pay the same continuing advertising fees given that the fees contribute to the national advertising fund which, in turn, increases image recognition and the goodwill of the brand. Often, franchisees are able to negotiate significantly reduced fees and as mentioned above, some brands do eliminate advertising fees that do not directly benefit alternative venue franchisees.

3. **Transfers**

Depending on the nature, sophistication, and structure of the franchisee, transfer provisions are one of the more regularly negotiated provisions in the non-traditional franchise agreement. If, for example, the franchisee is a publicly-held company, the franchisee will seek to ensure that it can transfer shares in its business without running afoul of any of the transfer provisions contained in the franchise agreement and/or causing itself to be subject to paying transfer fees. The franchisor, on the other hand, will want to ensure that the franchisee – especially the key financial, development, and operational individuals – with whom it has contracted and each of which it has “approved”, remains in place and sound – operationally and financially.

4. **Covenants not to Compete**

Once again, depending on the nature of the franchisee, a franchisor’s traditional requirement that the franchisee not own or operate “competing” brands may need to be modified. If the franchisee is a large public company or an experienced franchisee that operates multiple brands in alternative venues as a primary part of its overall business (e.g., ARAMARK, Sodexho), the franchisee will very likely seek to negotiate out the provisions contained in the franchise agreement that limit its ability to operate other brands. At the time the franchisor and franchisee begin negotiating their franchise agreement, the franchisee may already own or operate a franchised business with a brand that is a direct competitor of the franchisor. In addition, the franchisee may have plans to expand its business to include such other brands. In instances such as this, the franchisor will need to consider the benefits of partnering with such a franchisee (e.g., the franchisee may be the concessionaire who was awarded the exclusive rights to run the airport concession in a particular terminal) in light of the potential risks (e.g., trade secrets and other proprietary materials being shared or disclosed to competitors).
5. Territorial Rights

As noted previously, depending on the nature of the alternative venue, it may very well not draw from the same customer base as traditional units of the same brand. Additionally, depending on the franchisor and the opportunity purchased by the franchisee, exclusivity may or may not have been granted. On the one hand, if the opportunity purchased by the franchisee includes an “exclusive” territory, the franchisee is very likely to insist that the exclusivity apply to traditional and non-traditional development. One of the primary concerns expressed by franchisees presented with the possibility of another franchisee opening a non-traditional store in the original franchisee’s exclusive territory is that there will be a negative sales impact on the original franchisee’s business as a result. Franchisors, on the other hand, will often refuse to give up their right to develop (or grant other franchisees the right to develop) in alternative venues.

The key to alleviating the franchisee’s concerns is to ensure that proper analysis of the franchisee, the venue, the opportunity and, importantly, any potential “impact” the non-traditional location will have on the franchisee’s traditional locations is either minimal or non-existent. For example, if a QSR is located behind the security checkpoint at an airport, there is little or no benefit to the franchisor in granting the franchisee exclusivity to the entire airport since the franchisor may be benefited by leaving open the option to establish another outlet in a different terminal or part of the airport that is accessible via a different security checkpoint. In such instances, there is no reason to believe that the non-traditional location will have any impact whatsoever on any traditional locations situated outside the airport.

6. Brand Standards

It is not uncommon for sophisticated multi-brand franchisees to attempt to negotiate the franchise agreement that they are required to adhere to only the franchisor’s “reasonable standards” as opposed to (all of) the brand’s standards. These franchisees are already, to their credit, operating successful brands in multiple locations and as such, may have developed their own methods of operating and/or maintaining their businesses. Although the franchisor can certainly take into account the franchisee’s sophistication, it remains paramount that the franchisor insist its standards be applied uniformly across all brand expressions. That includes uniformity in development, image, and operations. While there is certainly some room to be flexible, the franchisor should make any concessions regarding compliance with brand standards very carefully.

IV. CONSIDERATIONS FOR PARTICULAR ALTERNATIVE VENUES

A. Gas/Convenience Stores

The opportunities presented by a well-executed partnership with a gas/convenience store chain can be significant. It goes without saying that this type of a partnership would benefit only certain franchised brands. A high end clothing retailer, for example, would not consider setting up a satellite location within a convenience store based on its core values and brand image. On the other hand, a food concept, whether it be “submarine” style sandwiches or coffee, may offer both the host and the franchisor/franchisee a perfect opportunity that will benefit both brands. After all, consumers are looking for convenience and what could be more convenient than filling up with gas while grabbing a hot breakfast and cup of coffee or a sandwich for lunch. With the right partnership in place, the potential for growth via development in gas/convenience stores is significant.
B. **Stadiums and Arenas**

Stadiums and arenas present an interesting opportunity for franchised brands. First and foremost, the franchisor will want to understand fully how often the venue is open to the public. The fact is that many stadiums are single-use stadiums meaning that they are open to the public only on those dates that the sports team has a scheduled game. For example, an NFL stadium, assuming it is used only for NFL football, is open to the public approximately ten times per year and Major League Baseball stadium is open to the public 81 days per year. In addition, some arenas such as unenclosed outdoor concert venues may be used only during the summer months if located in a cold climate and others are used only during particular times of the day. Each of these factors should be carefully considered by the franchisor prior to entering into any relationship with the host.

Additionally, franchisors and franchisees should understand very early in the deal discussions whether or not the stadium or arena is publicly-owned or privately-held. If publicly owned, it is likely that there will be significantly more regulatory issues to address during the negotiation than if it were privately-held and it is far more likely that the public entity will have less flexibility when it comes to the negotiation of deal terms.71

C. **Grocery Stores**

Unlike customers within a “captive” venue such as an airport or military base, consumers often have the choice of shopping at any number of local grocery stores. Grocery stores have realized that, to drive additional customer traffic and compete effectively, they must make the consumers’ visits more convenient by offering amenities – such as a coffee shop or a video kiosk – that their competitors may not offer. Not only can this approach generate non-grocery revenues for the grocery chain, it may well add new customers who may have shopped elsewhere if not for the convenience of completing their shopping in one place. Although not universally true, it is not uncommon for the franchisee operating in the grocery store settings to be the grocery store itself. In those other instances in which independent franchisees have been permitted to develop and operate their franchised businesses from within the grocery store, the franchisor/franchisee and the grocery store commonly enter into a lease or a form of operating agreement that governs the use of the space, the employees, the products available to be sold, etc. In those situations in which a brand is intending to develop multiple stores within the grocery chain’s various locations, it is typical for the franchisor and the grocery store to enter into a form of “master agreement” to which the franchisee is bound once he or she opens the retail outlet. In that way, the grocery store and the franchisor are relieved of the burden of negotiating agreements with each individual franchisee, which is certainly a benefit to both. That, along with the possibility of creating a long-term relationship in which future growth is a possibility, certainly makes these types of opportunities attractive should the values of the brand match up well with the values of the grocery store chain.

D. **Airports**

According to the 2011-2015 National Plan of Integrated Airport Systems (NPIAS), released by the U.S. Department of Transportation and the Federal Aviation Administration (FAA), there are over 19,700 airports in the U.S. Of these airports, 503 offer commercial airline

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71 See generally, Franchising in Unique Venues, supra note 5.
service and in virtually all of those 503 airports, departing and arriving passengers as well as those who have come to meet them have a wide variety of products and services, from fast food to clothing to electronics, available to them. Retail locations in these venues can be extremely successful, but development and operating them certainly presents a unique set of challenges to the franchisor/franchisee.

Most frequently, airports and airport authorities grant exclusive concession rights to one entity via an RFP process. To obtain the right to operate the airport concession, a prospective concessionaire must prepare a lengthy response to an RFP. Once awarded the opportunity, the concessionaire becomes the sole party with whom the franchisor/franchisee must negotiate. In certain circumstances, the concessionaire is to be the franchisee, while in others the concessionaire contracts with the franchisee to operate the franchised business. Operationally, security regulations and requirements of the airport will impact not only access to the location by customers and employees but also restrict how and when deliveries of products will be made. In addition, franchisors and franchisees must be prepared to deal with individual airports’ needs and demands as well as any state and federal regulations. For example, many airports have “street side pricing” requirements which restrict the price at which the franchisee sells his or her products (i.e., prices charged at the airport location cannot be more than those charged at traditional locations outside the airport) and, as noted above, concessionaries, franchisors, and franchisees may also be required to adhere to rules places on the airports by the Federal Aviation Administration (FAA) such as those placing an increased emphasis on the participation of disadvantaged business owners in airport concessions.

E. Casinos

Franchisors and other retailers have long sought out the opportunity to open their businesses in casinos. This is in great part due to the captive audience of “diverse clientele with winnings to spend” that a casino location offers. To the extent that they are associated with hotels, casinos present some of the same concerns discussed in the hotel section of this paper, including those related to negotiating with complex organizational structures.72

Due to the increased level of regulation inherent in gaming venues, franchise agreements for outlets in gaming locations will require modification so as to be in compliance with state gaming regulations. For example, depending on the state in which the casino is located, a franchisor could be subject to regulations that require them to provide disclosure, register, and pay fees even though they are considered non-gaming suppliers or vendors. As the required compliance with the particular state regulations could be a lengthy process, franchisors are encouraged to verify whether they are in compliance early on in their discussions with potential alternative venues in gaming outlets.

Additionally, if the casino in question is situated in a casino owned and operated by a Native American tribe, franchisors should be prepared to address several challenges related to issues of sovereign immunity, tribal corporations, and tribal gaming regulations, among others. Most frequently, the tribe will be the franchisee. Tribal entities within the United States are considered sovereign nations and, as such, are immune from suit without their consent. A tribe may only be sued if the suit is authorized by Congress or if the tribe has expressly waived its sovereign immunity. Tribal sovereign immunity applies to both governmental and commercial contracts with tribes that are made both on and off the reservation. Sovereign immunity,

72 See generally, Non-Traditional Venues, supra note 1.
however, applies only to the tribal entity itself and not to individual members of the tribe. Therefore, if the tribe is to be the franchisee, franchisors need to be certain of the people and entities with whom they are contracting. The appropriate names should appear in the contract with signatures for people who have authority to bind the tribe. Further, the franchise agreement should reflect that sovereign immunity has been waived.

It is important for a franchisor to note the prospective franchisee’s particular type of tribal organization. Tribes can be organized under tribal, state, or federal law. If a tribe is organized under § 17 of the Indian Reorganization Act of 1934 (IRA), the Secretary of the Interior issues a charter to the tribe, which separates its governmental and business functions. A § 17 tribal corporation is similar to most corporations in that it is a separate legal entity with articles of incorporation and bylaws. An important difference for franchisors to note between a § 17 corporation and a tribal corporation formed under the laws of the particular states is that the state-formed entity will not enjoy the privilege of sovereign immunity. Under the Indian Gaming Regulatory Act, a tribe may conduct gaming activities within a state if there is a valid compact between the tribe and the state where the gaming activity is to take place. As such, tribal gaming venues are subject to both state and tribal gaming regulations. If a franchised business is to be opened within a tribal gaming venue, franchisors should ensure that their agreement complies with both the state and tribal regulations.73

F. Universities

Typically, a university will enter into a contract with a single foodservice operator (e.g., ARAMARK) to operate multiple units within the same alternative venue. Such a foodservice operator will need to meet a host of requirements set by the university, which bear similarities to agreements with governmental entities, such as requirements to try and utilize diverse suppliers. The foodservice operator may also have little flexibility to design or substantially remodel the space that is offered for lease, thus necessitating changes to the typical physical layout, or a very small layout. In addition, the foodservice operator is often required to offer specified meal products or serve specific day parts, such as breakfast, regardless of whether the franchised concept restaurants would typically offer breakfast. Finally, a foodservice operator, by choice or by necessity, will often combine certain aspects of operation, such as by having a common drink station, and share employees between units.

These factors all mean that a franchisor must be willing to permit the franchisee to substantially depart from its standards, and even to permit the franchisee to propose new standards. If the franchisee proposes new standards or methods of operation, it may also prefer to own any intellectual property associated with such developments, rather than ceding such rights to the franchisor, as would be common in a traditional franchise relationship. The franchisor’s rights must also be subordinate to the university’s rights and standards. For example, a franchisor’s perhaps typical request that it be permitted to assume a franchisee’s lease upon early termination of the franchise agreement is likely to be met with rejection from a university, which either may value its relationship with the franchisee over any potential relationship with a franchisor for any particular brand or may

73 Id.
G. Smaller Audience Venues

A number of smaller audience venues – such as hospitals, churches and even schools – are also more and more hosts to franchised businesses. For example, a hospital may choose to have one or more franchised restaurants to normalize the surroundings for patients and so that it does not have additional foodservice responsibilities. Or, a church may have a sandwich shop. The size and rather limited hours of smaller venues' mean that such venues are an ideal place for a franchisor to try out a kiosk, rather than a more fulsome brick and mortar alternative venue unit. In addition, such small venues, particularly schools, may have certain standards, such as nutritional requirements, that necessitate changes to a typical franchised unit. Often, franchises located in smaller audience alternative venues are the result of a franchisee’s relationship with the venue. For example, a franchisee may be connected to a local church or school that is willing to add the concept. Smaller audience venues are far less likely than other types of alternative venues to conduct formal requests for proposals or formal bidding processes for space to operate a franchised unit. In fact, some such venues may also have little, if anything, in the way of a formal lease prepared. The uncertain relationship may, again, be motivation for a franchisor and franchisee to consider a kiosk for these locations.

V. CONCLUSION

The relatively recent growth of franchised businesses in alternative venues has provided both the franchisor and the host with an opportunity to better meet consumer demand and, as a result, grow their businesses. Franchisors have been able to build brand awareness and increase consumer demand while at the same time addressing the need for continued growth. Hosts, by offering consumers the conveniences available through partnerships with franchised brands, have been able to drive customer traffic to their host business thereby increasing revenues and positively differentiating themselves from the competition.

Most importantly, the franchisor must ensure that its plan for non-traditional development is consistent with its core values. To fully embrace this trend, the franchisor must be prepared plan for non-traditional expansion in a way that honors those core values, provides the consumer with a great and then reach agreement on terms for operation that give deference to the ever changing environment that alternative venues present.

Without question, non-traditional development requires careful balancing of the needs of the host, the franchisor, and the franchisee and negotiating a deal for a non-traditional location, developing that location, and then successfully operating that location presents challenges that will most certainly differ significantly from those involved in traditional franchising. For those who understand the benefits and burdens of non-traditional franchise development, the possibilities are significant.
Attachment A

Form of Authorization for Inclusion of Franchised Concept in Response to Request for Proposal

To Whom It May Concern:

Thank you contacting us concerning the potential opportunity that Prospective Franchisee, Inc. (“Prospective Franchisee”) is interested in seeking for the operation of a restaurant in the alternative venue (“Venue”).

While we are interested in pursuing this opportunity, given the rapidly approaching deadline for Prospective Franchisee’s submission of a proposal to Venue and the number of unknown factors regarding the proposed development, we believe it would be most efficient for Prospective Franchisee to agree to proceed in the manner set forth in this letter.

We require prospective licensees to obtain our written authorization before submitting a proposal to develop a franchised outlet using our brand. We would like to accept your offer to include outlets of the brand (each an “Outlet”) in Prospective Franchisee’s proposal to Venue in response to Venue’s request for proposals for food and beverage concession opportunities in Venue (the “RFP”) if you accept the terms and conditions stated in this letter. We would permit Prospective Franchisee to submit a proposal for the operation of one or more Outlets at Venue based on the following terms:

1. You must sign and return our form of nondisclosure agreement to us immediately upon receipt.

2. You may use only the name [Brand] in your proposal, with no alterations, to identify the business that Prospective Franchisee will establish in Venue, and for no other purpose. You must identify Prospective Franchisee in the proposal as the potential owner of such business, and you must not state or otherwise represent that you or Prospective Franchisee or any of its affiliates is affiliated with us or that the proposal is submitted by, on behalf of or in affiliation with us (by joint venture or otherwise). If you desire to use any other name or trademark in your proposal, including any of our logos, you must obtain our written consent prior to such use and use only any logo, artwork or other trademark in the format we provide.

3. Your proposal may only include the spaces the Venue identified in the table set forth on Attachment A of this letter. You may not pursue a lease with Venue in any other spaces without our prior written consent.

4. You acknowledge and agree that if Venue accepts your proposal for the operation of an Outlet at Venue, we will not provide any financing or funding whatsoever in support of such activities. You must reimburse us for our out-of-pocket expenses associated with the development of the Outlet and any assistance that we provide to you in support of such development. You and we will remain independent contractors, as to each other, and will not form any joint venture or other partnership related to the development of any Outlet.
5. If Venue accepts your proposal for the operation of a Outlet at Venue and Prospective Franchisee is awarded one or more leases by Venue, you and we will attempt, in good faith, to negotiate a definitive license agreement for the development and operation of one or more Outlets at Venue, using the terms set forth on the Term Sheet attached to this letter as Attachment B as a baseline for negotiations. We will have no obligation to agree to any particular terms with Prospective Franchisee. You understand that a definitive license agreement with us depends upon, among other factors, your agreement to be bound by the terms and conditions of the license agreement, as reflected on Attachment B and as such terms may be supplemented or modified by us. You must sign and return the Term Sheet with this letter.

6. If Venue rejects your proposal in response to the RFP, or you withdraw your proposal for any reason, our authorization would have no further force or effect and we would be free to take any and all action we deem appropriate, including pursuing ourselves or permitting a third party to pursue the opportunity to develop an Outlet in Venue.

7. You and we signing a definitive license agreement would be contingent upon our determination that the licensee under such agreement satisfies the criteria for an exemption from the disclosure requirements of the Federal Trade Commission Rule on Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. part 436. We will not be able to enter into a license agreement with Prospective Franchisee if the licensee under such agreement does not meet the criteria for an exemption.

8. If you accept the terms of this letter by no later than [expiration date], we will not authorize any other party to submit a similar proposal to Venue in response to the RFP. Our authorization provides Prospective Franchisee and its affiliates with no exclusivity with respect to any Venue or other request for proposals other than the RFP.

If authorization to submit a proposal for the establishment of a Outlet at Venue is of interest to you based on the foregoing terms, please return this letter, countersigned by you or another authorized representative of Prospective Franchisee.

Many thanks and best regards,

Franchisor

Agreed to and accepted on [Date]:

Prospective Franchisee

By: ________________________________
Name: ______________________________
Title: ______________________________
Date: ______________________________
### Attachment B

**Federal Franchise Disclosure and State Franchise Registration**  
and Disclosure Exemptions Commonly Utilized in Alternative Venues

<table>
<thead>
<tr>
<th>Exemption / Exclusion</th>
<th>Section</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sophisticated Investor Exemption</td>
<td>436.8 (a)(5)(ii)</td>
<td>Applies to a franchisee “entity” if it (or its parents or affiliates) has been in business for at least 5 years and has a net worth of at least $5,000,000. Expressly applies only to legal “entities.” However, the Statement of Basis and Purpose indicates that an individual may also be a qualifying “entity.”</td>
</tr>
<tr>
<td>Fractional Franchise Exemption</td>
<td>436.8 (a)(2)</td>
<td>This exemption requires that the prospect, or an officer or director of the prospect, has been in the type of business represented by the franchise relationship for more than two years and that the prospect anticipates that sales arising from the franchise relationship will represent no more than 20% of the franchisee’s total sales in dollar volume during the first year of operation. Franchisee can count sales of affiliates in the same business.</td>
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</tbody>
</table>

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74 These tables represent the most commonly utilized exemptions for franchising in alternative venues, in the authors’ experience. Additional exemptions and exclusions exist under state, federal and international law that may be applied to franchise offerings for franchises to be operated in alternative venues.
<table>
<thead>
<tr>
<th>State</th>
<th>Potential Exemptions</th>
<th>Applicability of Exemptions</th>
<th>Disclosure/Registration Required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Cal. Corp. Code:</td>
<td>The experienced franchisee exemption applies if one or more owners of a 50% interest in the franchise (provided that the 50% interest holder is not controlled by the franchisor) and has had within the prior 7 years at least 24 months’ experience for a business similar to the franchise offered.</td>
<td>Experienced franchisee – Registration not required. Disclosure not required, but the franchisor must file a notice of exemption and pay a fee prior to any offer or sale of a franchise.</td>
</tr>
<tr>
<td></td>
<td>§ 31106 (a)(1) and (b) – Experienced franchisee</td>
<td>The large franchisee exemption applies if: (a) the franchisee (1) is an entity with assets of $5M according to its financial statements and was not formed specifically to acquire the franchise; or (2) the franchisee is a natural person with a net worth that exceeds $1,000,000 at the time of the purchase of the franchise (excluding residence, retirement accounts, home furnishings and automobiles); or (3) the franchisee is a natural person with an income over $300,000 per year in the 2 most recent years or whose joint income with spouse is $500,000 per year in the 2 most recent years; or (4) is a partner, executive officer or director of the franchisor, or any executive officer of its corporate general partner if the franchisor is a partnership, or any manager if the franchisor is a limited liability company; or (5) an entity in which each equity owner satisfies (1), (2), (3) or (4) above. (b) Each and every purchaser has knowledge and experience in financial and business matters and the franchisor believes the purchasers can evaluate the merits and risks of the franchise; (c) Each and every purchaser purchases the franchise for their own account and not with a view to sell the franchise; (d) The initial payment does not exceed 10% of the net worth any purchaser who is a natural person; and (e) Franchisor annually files a notice of exemption and pays a filing fee.</td>
<td>Large franchisee – Registration not required. Disclosure not required, but the franchisor must file a notice of exemption and pay a fee prior to the offer or sale of the franchise.</td>
</tr>
<tr>
<td></td>
<td>§ 31109 – Large franchisee</td>
<td></td>
<td>Fractional franchise – Registration not required. Disclosure not required, but the franchisor must file a notice of exemption and pay a fee prior to the offer or sale of the franchise.</td>
</tr>
<tr>
<td></td>
<td>§ 31108 – Fractional franchise</td>
<td></td>
<td>Out of State Franchisee – No registration or disclosure required.</td>
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Out of State Franchisee – No registration or disclosure required.
<table>
<thead>
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<th>Disclosure/Registration Required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>Section 705/3(1)(ii) – Fractional Franchise</td>
<td>The <strong>fractional franchise</strong> exemption applies if the franchise involves adding a new product or service to the prospective franchisee’s existing business, provided the following requirements are met: &lt;br&gt; (a) the franchisee, or one of its existing officers, directors or managing agents, has been engaged in a business offering substantially similar products or services for the last 24 months prior to the sale of the franchise; &lt;br&gt; (b) the new product or service is substantially similar to what is offered by the franchisee’s existing business; &lt;br&gt; (c) the franchised business is to be operated from the same business location as the franchisee’s existing business; &lt;br&gt; (d) the parties anticipate that sales resulting from the franchised business will not represent more than 20% of the total sales in dollar volume of the franchisee on an annual basis; &lt;br&gt; (e) the franchisee is not controlled by the franchisor; and &lt;br&gt; (f) the franchisor files a notice of exemption and pays a fee prior to an offer or sale of such a franchise.</td>
<td>Fractional franchise – As the arrangement is not considered a franchise, no registration or disclosure is required.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Ind. Code Ann. § 23-2-2.5-1 – Fractional franchise</td>
<td>A <strong>fractional franchise</strong> is excluded from the definition of a franchise. It applies if the franchisee has been in the same type of business for more than 2 years and the parties anticipate that the sales arising from the arrangement will represent no more than 20% of the sales in dollar volume of the franchisee for a period of at least one year after the franchisee begins selling the goods or services.</td>
<td>Fractional franchise - As the arrangement is not considered a franchise, no registration or disclosure is required.</td>
</tr>
<tr>
<td><strong>STATE</strong></td>
<td><strong>POTENTIAL EXEMPTIONS</strong></td>
<td><strong>APPLICABILITY OF EXEMPTIONS</strong></td>
<td><strong>DISCLOSURE/REGISTRATION REQUIRED?</strong></td>
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<tr>
<td>Maryland</td>
<td>Md. Regs. Code tit 2 § 02.08.10(G), (H) – Exemption by order</td>
<td><strong>Exemptions by order</strong> are discretionary on the part of the state.</td>
<td>The Maryland examiner has generally been reasonable in granting requests for exemptions by order.</td>
</tr>
</tbody>
</table>
| Michigan  | Mich. Comp. L. § 445.1506(h) – Fractional franchise | The **fractional franchise** exemption applies if:  
(a) The franchisee is engaged in an established business of which the franchise will become a component;  
(b) An individual directly responsible for the operation of the franchise, or a person involved in the management of the prospective franchise, has been directly or indirectly engaged in the type of business represented by the franchise relationship for at least 2 years; and  
(c) The parties have reasonable grounds to believe that the franchisee’s gross sales in dollar volume from the franchise will not represent more than 20% of the franchisee’s gross sales in dollar volume from all of the franchisee’s combined business operations. | A notice filing is not required. If the franchisor has an FDD in compliance with the laws of any state or the FTC, the franchisor must provide disclosure to the prospect. |
| Minnesota | Minn. Admin. R. §§ 2860.8100-8300 – Large investment exemption  
Minn. Stat. §80C.03(e) – Single sale  
Minn. Stat. § 80C.03(f) – Fractional franchise | The **large investment exemption** applies if the franchisee’s initial unfinanced investment exceeds $200,000. The franchisor must provide only limited disclosures in compliance with the regulations and submit filings as required by regulations.  
The **single offer / sale exemption** applies if:  
(a) The franchisor does not make more than one sale of a franchise pursuant to the exemption in a 12 month period;  
(b) The franchisor has not advertised the franchise for sale to the general public;  
(c) The franchisor deposits franchise fees in escrow until all obligations of the franchisor to the franchisee which are required to be performed prior to the opening of the franchise have been performed (upon good showing the commissioner may waive the escrow of franchise fees); and  
(d) The franchisor has provided, at least 10 business days prior to the sale, a written notice of its intention to offer or sell a franchise pursuant to the exemption. | **Large investment exemption** - Limited disclosures required; filings required.  
**Single offer / sale exemption** – Registration not required, but franchisor must submit notice to the commissioner. Disclosure not required.  
**Fractional franchise** - Registration not required. Disclosure not required. |
<table>
<thead>
<tr>
<th>State</th>
<th>Potential Exemptions</th>
<th>Applicability of Exemptions</th>
<th>Disclosure/Registration Required?</th>
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<tr>
<td>New York</td>
<td>New York Gen. Bus. Law&lt;br&gt;Disclosure not required if registration is not required - §683(8)&lt;br&gt;N.Y. Code R. &amp; Regs. §200.10(2) – fractional franchise</td>
<td>A <strong>fractional franchise</strong> includes any franchise relationship in which the franchisee or any of its principal officers or directors has been in the same type of business for more than 2 years and the parties anticipate that the sales arising from the relationship will represent no more than 20% of the dollar sales volume of the franchisee. The <strong>fractional franchise</strong> exemption applies if: (a) For at least 24 months, the franchisee or its officer, director or managing agent that has held that position, has been engaged in a substantially similar business; (b) The new product or service is substantially similar to that offered by the franchisee’s existing business; (c) The franchised business is to be operated from the same business location as the franchisee’s existing business; (d) Sales are not anticipated to be more than 20% of the total sales in dollar volume of the franchisee on an annual basis; (e) The franchisee is not controlled by the franchisor; and (f) The franchisor provides notice to the state and pays a fee.</td>
<td>Fractional franchise – Registration not required, but the franchisor must provide notice to the state and pay a fee. Disclosure not required.</td>
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<td>Oregon</td>
<td>Or. Admin. R. §441-325-0030(1) – Federal Exemptions</td>
<td>The sale of a franchise is exempt from OAR 441-325-0020 (pre-sale disclosure requirements) if it is exempt or excluded from the delivery of a disclosure document under 16 C.F.R. § 436.8(a). (see Federal Franchisor/Franchisee Exemption/Exclusions, above).</td>
<td>Disclosure is not required if one of the federal franchisor/franchisee exemptions or exclusions is applicable.</td>
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<td>South Dakota</td>
<td>S.D. Codified Laws §37-5B-13(2) – Sophisticated franchisee&lt;br&gt;S.D. Codified Laws §37-5B-12(3) – Fractional franchise</td>
<td>The franchise sale to a <strong>sophisticated franchisee</strong> is exempt from disclosure/registration requirements if the franchisee has been in business 5 years and has a net worth of $5M. &lt;br&gt;A <strong>fractional franchise</strong> includes any franchise if: (a) The franchisee or any of its current directors or officers, or any current directors or officers of a parent or affiliate, has more than 2 years experience in the same type of business; and (b) The parties have a reasonable basis to anticipate that sales arising from the relationship will not exceed 20% of the franchisee’s total dollar volume in sales during the first year of operation.</td>
<td>Registration and disclosure are not required.</td>
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<td>Virginia</td>
<td>Va. Admin. Code tit. 21 § 5-110-75(3) – Seasoned franchisor</td>
<td>The fractional franchise exclusion applies to a contract or agreement by which a retailer of goods or services is granted the right either (i) to utilize a marketing plan or system to promote the sale or distribution of goods or services which are incidental and ancillary to the principal business of the retailer (sales under such a plan or system accounting for less than 20 percent of the retailer's gross sales being deemed incidental and ancillary); or (ii) to sell goods or services within, or appurtenant to, a retail business establishment as a department or division thereof provided such retailer is not required to purchase such goods or services from the operator of such establishment.</td>
<td>Fractional franchises are excluded from the definition of a franchise. No registration or disclosure required.</td>
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<td>Washington</td>
<td>Wash. Rev. Code § 19.100.030(5) &amp; W.A.C. 460-80-108 – Accredited investor</td>
<td>The offer or sale of a franchise to an accredited investor is exempt from registration. An accredited investor includes:</td>
<td>Exemptions apply to registration and disclosure</td>
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<td>Wash. Rev. Code § 19.100.080 – Disclosure not required</td>
<td>(a) an institutional investor, such as a bank, savings and loan association, broker or dealer, insurance or investment company, the government or an employee benefit plan; (b) a private business development company as defined by the Investment Advisers Act; (c) any organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the franchise offered, with total assets in excess of $5M; (d) any director, executive officer or general partner of the franchisor; (e) any natural person with a net worth (or joint net worth with spouse) that exceeds $1M; (f) any natural person with an income of $200,000 in the 2 most recent years or joint income with spouse of $300,000 in the two most recent years who has a reasonable expectation of the same income in the current year; (g) any trust with assets of greater than $5M not formed to acquire the franchise; or any entity in which all of the equity owners are accredited investors; or (h) any entity in which all of the equity owners are accredited investors.</td>
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| Wisconsin | Wis. Stat. § 553.235 – Sophisticated franchisee                                       | The **sophisticated franchisee** exemption applies if:  
- (a) the initial payment is at least $100,000 and does not exceed 20% of the franchisee’s net worth (excluding residence, etc.); and  
- (b) franchisor reasonably believes that prospective franchisee has sufficient knowledge and experience to evaluate the risks and merits of the franchise. | No disclosure or registration required. |
|           | Wis. Stat. § 553.22 – Fractional franchise                                            | The **fractional franchise** exemption applies if the franchisee, or any of its current directors or executive officers, has been in the same type of business for more than 2 years and the parties anticipate that the sales arising from the arrangement will account for no more than 20% of the gross sales revenue of the franchisee for a period of at least one year after the franchisee begins selling goods or services involved in the franchise. |
CHRISTOPHER J. EGAN

Chris serves as Director & Legal Counsel for Dunkin' Brands, Inc., one of the world's leading franchisors of quick service restaurants under the “Dunkin' Donuts” and “Baskin-Robbins” brand names. At the end of 2013, Dunkin' Brands' nearly 100 percent franchised business model included nearly 11,000 Dunkin' Donuts restaurants and 7,300 Baskin-Robbins restaurants. Dunkin' Brands Group, Inc. (NASDAQ: DNKN) is headquartered in Canton, Massachusetts.

Chris has worked for Dunkin' Brands' Legal Department in various roles since 2005. His current responsibilities include providing legal support to Dunkin' Brands' Corporate Real Estate, Construction and Development, Financial Communications, Travel and Meetings, and Facilities Departments as well as to the Dunkin' Donuts and Baskin-Robbins Operations teams for the State of California.

Chris received his B.S. in 1987 from Boston College and his J.D. from New England School of Law in 1995.

SUZANNE TRIGG

Suzie Trigg focuses her legal practice on franchising, product distribution and other supply chain issues. She has represented franchisors, restaurant systems, consumer product manufacturers and distributors, medical device manufacturers and other companies expanding through franchising or conducting supply chain initiatives.

Suzie's experience includes domestic and international franchise disclosures and agreements, structuring agreements with vendors and logistics providers, and addressing issues specific to the food industry, including food safety, labeling and similar issues. Suzie frequently drafts and negotiates franchise, license, product distribution and logistics agreements and counsels clients on regulatory compliance issues.

Suzie also draws upon her background in public policy to represent the interests of businesses contracting with or under inspection by government agencies. In her franchise practice, she utilizes this experience to assist franchisors expanding to military bases.

Suzie is a member of the ABA Forum on Franchising, has authored several articles on franchise issues, and has given presentations at conferences held by the International Franchise Association (IFA) Legal Symposium, National Cooperative Business Association and Food and Drug Law Institute.