Non-Traditional Generation: Franchise Systems Coming of Age with New Franchisees in New Venues

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Franchised businesses have operated in non-traditional venues,[1] such as military bases and airports, for decades.[2] Recently, as optimal street-side real estate locations have become more difficult to acquire and venues have considered the added value of a recognized brand, franchisors and franchisees alike have placed renewed focus on expansions in non-traditional venues.[3] The growing presence of franchised businesses in non-traditional venues has been identified by industry experts as a top trend in franchising for 2011.[4] Restaurants have been leading the way with over a half-dozen brands having announced plans to establish franchised locations in non-traditional venues over the past year.[5] Other types of franchise systems, such as spas, have also found success through expansion in non-traditional venues.[6] Some in franchising view franchised locations in non-traditional venues as a "predictable revenue stream that's only going to grow."[7]

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Although promising a captive audience and a potentially unparalleled branding opportunity, non-traditional venues can also present unique challenges. A franchisor must be willing to adapt its concept, such as changes to the premises design, hours of operation, or the products and services offered by a unit in a non-traditional venue.[8] Many of these changes are imposed by the unseen "elephant in the room," i.e., the non-traditional venue landlord or owner, which involves an important third-party business relationship that wields significant leverage because of its control over the premises. These changes often require a franchisor to provide its franchisees that operate units in non-traditional venues with greater flexibility. Similarly, a franchisee will also need to accommodate changes in the operation of its business, a skill set possessed by many franchisees that have been successful in non-traditional venues.[9] Franchisors are also sometimes willing to grant greater flexibility to a franchisee that has access to a venue to which they would not otherwise have access.

A franchisor must ensure that the host venue is suitable for its concept.[10] The franchisor will want to ensure that the public's perception of the brand will be positively influenced by the appearance of units in particular host venues. In addition, the cost of starting and doing business in a non-traditional venue is often higher than at other locations,[11] which impacts the viability of a particular brand and a particular franchise for a non-traditional venue.[12] Once a franchisor has determined that a particular host venue or particular set of host venues is suitable for its concept, it will need to carefully select franchisees that have an understanding of how to operate in non-traditional venues and to acquire the right to operate, for example by winning bids.[13]

NON-TRADITIONAL VERSUS TRADITIONAL FRANCHISEES

Development in non-traditional venues often involves single and multiunit franchisees with solid experience in their chosen industries. Franchisors often encounter franchisees with a large amount of specialized experience operating in non-traditional venues that differ from both the franchisor's traditional single and multiunit operators. Alternatively, a franchisor may not give adequate consideration to a potential franchisee's lack of experience operating in non-traditional venues, in which event the franchisor and franchisee alike will face a learning curve as each learns to adapt to such opportunities.

COMMON DIFFERENCES AND A CHANGED DYNAMIC

Franchisees that operate in non-traditional venues commonly have one or more of the following characteristics:

- Contractual relationships with the owners of non-traditional venues (facility contract)
- Ownership of the franchisee's own proprietary brands
- Multiple franchise agreements with several franchisors for one product or service category (portfolio of brands)

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- Specialized experience in operating in and serving the particular audience of a non-traditional venue; national account status; or satisfaction of a particular venue preference, such as certification as a disadvantaged business enterprise (DBE)
- As much as or more operating experience than the franchisor
- As many or more financial, operational, and advertising resources as the franchisor

Any one of the above characteristics could change the franchisor-franchisee negotiating dynamic and future relationship. As such, non-traditional franchisees will necessarily approach the franchisor-franchisee relationship with a different set of expectations. Strong franchised brands usually have their choice of prospective franchisees, but in the non-traditional setting a smaller number of franchisees have the appropriate relationships and experience to represent the franchisor's brand successfully in a non-traditional venue.[14]

For some franchisees that operate multiple franchised brands under facility contracts as a primary part of their overall business, expansion will depend on the franchisee's exclusive facility contract and the landlord's selection criteria. In such a case, a franchisee must emphasize, as a matter of priority, the preservation of its facility contract. A facility contract that provides the prospective franchisee with exclusivity within the venue greatly enhances the prospective franchisee's bargaining position with the franchisor. Even if a prospective franchisee does not have an exclusive facility contract, it may have experience operating in a particular type of non-traditional venue that would be valuable to a franchisor as it begins expansion into such venues.

IMPORTANCE OF DETERMINING VALUES

More and more, successful companies are starting negotiations with an understanding of the expectations and desired outcomes of each party. They are recognizing that "[a]s we grow . . . it has become more and more important to explicitly define the core values from which we develop our culture, our brand, and our business strategies."[15] Identifying core values is a means to build a foundation for a business and a lens through which to view an ever-changing marketplace and smooth the negotiation process. Counsel for franchisors or franchisees may not be accustomed to addressing core business values during negotiation of franchise agreements. Nevertheless, if a franchise system and a prospective franchisee have each identified core values prior to pursuing new opportunities, each will understand the appropriate facility and franchise partners they seek and will have a road map to enter into concise, meaningful agreements.

FRANCHISOR'S VALUES

Identifying the key tenets of the franchise system up front enables a franchisor to determine how much flexibility it can afford to give to a particular non-traditional venue or prospective franchisee. First, a franchisor must identify those aspects of its business that cannot be changed to ensure that it and its franchisees only seek opportunities in appropriate non-traditional venues. For example, a host venue may only offer a small space in which to operate the franchised business.[16] A transportation venue with heavy passenger traffic may require restaurants, for example, to serve all meals through the day even if such restaurants would only serve lunch and dinner in another type of venue. Or a captive audience may impose ceilings on retail prices.[17] In addition, a franchisor must also review its existing agreements to ensure that the establishment of franchised units in non-traditional locations would not result in a breach of any contract with an existing franchisee.

Following this analysis, the franchisor must determine the characteristics of the ideal non-traditional franchisee and what, if anything, it is willing to sacrifice to get such a prospective franchisee. For example, a franchisor may wish to consider the following questions:

- Will the franchisor partner with its existing franchisees, or does it prefer a franchisee with a different profile?[18]
- Will the franchisee need prior experience operating in the type of venue or certifications in connection with a request for proposal (RFP) process?
- Does the chosen venue have an exclusive or restrictive facility contract with an operator?
- Is the venue expensive to operate so that a well-funded franchisee is needed? Does the franchisor have a tested business model, or will the model need to be developed or modified?
- Will the franchisor offer exclusive development rights to any franchisee?
- Is the franchisor willing to forgo or reduce initial fees or ongoing royalties for the opportunity for its brand to be featured in a non-traditional venue? Will the franchisor or venue provide any construction, build-out, or operating capital?
- Will non-traditional outlets benefit from the franchisor's current advertising program and pay advertising fees?
- Will the non-traditional franchisee benefit from any training programs?
- Will it be difficult to protect the operational reputation of the brand for high-quality performance and valuable know-how?

FRANCHISEE'S VALUES

If the prospective franchisee does not stop to consider its current and future business plans, it may acquiesce to franchise agreement terms that restrict its ability to effectively operate its current business or to expand in the future. In particular, if a non-traditional franchisee has or intends to locate more than one franchised business within non-traditional venues, it must plan carefully to develop its portfolio. Non-traditional franchisees will want to consider the following issues:

- Does an existing or planned facility contract or particular non-traditional venue require substantial operational modifications?
- If the franchisee has a facility contract, are its facility partners seeking a particular type of business for the venue?
- If the franchisee wants to operate a franchise within an existing franchise or within the protected territory of the existing franchise, what restrictions has its current franchisor placed on such activity?
- Will the franchisee agree to in-term or post-term covenants restricting its ability to operate competitive brands?
- Will the franchisee seek territorial rights within or outside of the non-traditional venues?
- When can the franchisee exit the franchise and under what circumstances?

Once the franchisee has carefully developed its core values, it will have a solid basis upon which to compare different franchise offerings.

KEY CONSIDERATIONS

One can imagine from the discussion of values above that a franchisor and franchisee may reach significantly different conclusions on their core values. 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 non-traditional venues.

EXCLUSIVITY AND ENCROACHMENT

A franchisor expanding its franchise program by offering franchises for the establishment of outlets in non-traditional venues may be faced with the limitations on its authority to expand the system in areas where existing franchisees have traditional locations. The franchisor should first review the existing franchise agreements. If existing franchise agreements reserve the right for the franchisor to operate in the specific type of non-traditional venue in the franchisee's territory, the franchisor can likely proceed but will want to assess whether the new units would be likely to cannibalize an existing franchisee's sales. If the franchise agreement does not expressly reserve this right, the franchisor will have to consider whether such rights have been implicitly reserved. The franchisor may also choose to offer the franchisee a right of first refusal to operate outlets in non-traditional venues or may offer the existing franchisee a reverse royalty to persuade it to accept the new outlets without objection.

If an existing franchisee has the benefit of the implied covenant of good faith and fair dealing under applicable state law, the franchisor's right to establish outlets in non-traditional venues could be limited unless the franchise agreement explicitly reserves the franchisor's rights. The implied covenant of good faith and fair dealing is a commonly recognized basis for claims by franchisees against franchisors.[19] The implied covenant of good faith and fair dealing requires parties to a contract to act honestly in carrying out the terms of a contract and to observe reasonable commercial standards.[20]

There is little guidance on encroachment of existing franchised businesses by locations in non-traditional venues. In fact, by their very nature, non-traditional venues are, in large number (with notable exceptions), captive audience facilities that may not draw the same customers as traditional locations. Based on encroachment case law,[21] the outcome of a court's or arbitration panel's review of an encroachment case based on the establishment of franchised outlets in non-traditional venues would likely depend on the impact, if any, to an existing franchisee's sales, as well as the express terms of the controlling franchise agreement.

NON-COMPETITION COVENANTS

A franchisor will want to consider whether its typical non-competition covenant for freestanding or traditional locations is suitable for franchisees that will only operate outlets in non-traditional venues. Franchisors commonly seek to impose traditional covenants against competition upon franchisees that operate in non-traditional venues because the franchisor has the same interest in protecting its proprietary and confidential information and business regardless of the venue. But, as discussed above, many of the franchisees that are best suited to establish units in non-traditional venues operate a portfolio of similar businesses. Such franchisees will be reluctant to agree to a non-competition covenant, particularly post-term non-competition covenants. Further, some non-traditional franchisees either own or wish to retain the right to develop and operate their own proprietary brands in a facility and therefore will not agree to non-competition covenants that may hinder their ability to do so. Such franchisees will commonly agree to a limited non-competition covenant that is a substantial departure from the franchisor's standard non-competition covenant.

One approach to reconciling the franchisee's and franchisor's interests with respect to non-competition covenants may be to restrict the franchisee's activities to a more limited and defined group of concepts. For example, if the franchise is for a pizza restaurant, the non-competition agreement may be limited to concepts that derive a certain percentage of their revenues from pizza or similar products, instead of a broad covenant restricting the franchisee from operating any other casual dining restaurant. The agreement will often limit the geographic scope of the non-competition agreement to inside the particular facility with a carve-out for preexisting deals. Finally, the non-competition covenant may be limited to the term of the franchise agreement with no post-term covenants. The franchisor may also require the franchisee to take precautions to prevent confidential information from being shared among the brands, such as requiring certain employees to enter into confidentiality agreements. Likewise, the franchisor may require the franchisee to prohibit its managers from working for both the franchisor's brand and a similar brand.[22]

FINANCIAL REQUIREMENTS AND FEES

INITIAL FEES

The initial fees paid by a franchisee operating in a non-traditional venue may differ depending upon the rights granted to the franchisee. The authors' review of a sampling of franchise agreements for non-traditional venue locations reveals that if the right to develop non-traditional locations is granted in conjunction with a traditional franchise location, the fee is often less than the normal franchise fee. A franchisor will likely place a great deal of importance on recovering additional expenses that it will incur in developing a non-traditional franchise, unless it considers non-traditional franchises akin to a "loss leader," which is desirable for brand building and market penetration.[23]

ROYALTIES

Royalties may range from the standard royalty for the franchisor's system to a reduced royalty negotiated between the franchisor and the franchisee, sometimes as an incentive to the franchisee to develop non-traditional locations. Such royalty reductions may be limited over time. A franchisor may also agree to reduce a royalty rate initially in recognition of the increased costs to enter into a non-traditional venue. It is important to note, however, that a non-traditional venue often has higher customer traffic and higher prices leading to higher revenues, so a reduced royalty rate may not necessarily result in reduced income for the franchisor.

ADVERTISING FEES

Marketing often has reduced significance for a franchised business operating in a non-traditional venue because the location is ancillary to the host's primary facility. Therefore, a franchisee may negotiate to eliminate or decrease the standard marketing fee if the franchisee does not believe that such advertising would be of particular benefit to the location. Most franchisors will want the franchisee to pay all or most of the national or image advertising fee, and most franchisors believe that a non-traditional franchisee should contribute to a marketing fund whose purpose is to increase image recognition and the goodwill of the concept. Nevertheless, a franchisor may not require franchisees operating in non-traditional venues to participate in local or regional advertising cooperatives where the non-traditional location may receive fewer direct benefits.

LEASE RIDER

Franchisors commonly require franchisees to execute a rider to the lease of the premises. Lease riders may include provisions that obtain the landlord's consent to a possible assignment of the lease to the franchisor or give the franchisor the right, but not the obligation, to cure any default of the franchisee arising under the lease, among other things. If a franchisor typically requires a lease rider, it may not be able to do so for non-traditional venues. Few non-traditional venues, particularly those that contract with large facility managers, would permit the franchisor to operate the location if the franchisee were unable to do so or fails to comply with the franchise agreement.

TERMINATION, RELOCATION, AND TRANSFER

A host venue may reserve the right to relocate an outlet within the venue or to terminate the facility contract. In such a situation, the franchisee should have the option to terminate the franchise agreement or to relocate if the new location is acceptable to the franchisor. Alternatively, the franchisor should have the option to terminate the franchise agreement if the relocation is not acceptable. The franchisee should also have this right without incurring a penalty or any liability for damages if the reason for the relocation or termination of the franchised unit is not due to any default by the franchisee. Therefore, the termination provisions in the franchise agreement should be modified to take into consideration potential relocation or closing of the franchised unit due to the actions of the host venue. This includes possible modification to the notice required for the franchisee to terminate, which should be consistent with the notice required under the facility contract.

As noted in the introduction of this article, franchisees with access to venues where a franchisor would not otherwise be able to place a unit can have significant leverage. With respect to the termination of an agreement with a franchisor, such a franchisee may request the right to unilaterally terminate the franchise agreement without cause and without liability to the franchisor.

CURING DEFAULTS AND CROSS-DEFAULTS

Traditional franchise and development agreements often include a cross-default provision. Cross-defaults provide that, in a situation where a franchisee has the right to operate multiple franchised units, a default under one franchise agreement may be grounds to terminate other franchise agreements between the franchisee and franchisor. A large institutional franchisee may have the bargaining power to demand that the franchisor remove cross-default and similar provisions. Such a franchisee may also be permitted the opportunity to cure most defaults.

MUTUALITY OF OBLIGATIONS

Finally, the franchisor and franchisee should each consider whether, and to what extent, an agreement with increased collaboration and mutuality of obligations is appropriate. Although a standard form of franchise agreement may contain indemnification, limitation of damages, and other provisions that favor the franchisor, making such provisions mutual for a franchisee that will operate in non-traditional venues may be requested by the franchisee. Moreover, a franchisee with a significant portfolio and a facility contract may request mutual confidentiality obligations. Because such a franchisee must satisfy multiple parties (the franchisor and a facility with which it has an agreement), the presence of a third party in the franchisor-franchisee relationship may require the franchisor to permit a less one-sided approach in its agreement with the franchisee.

CHALLENGES AND OPPORTUNITIES OF SELECTED VENUES

There are significant laws, regulations, and host venue rules that must be accounted for and addressed in specific types of non-traditional venues. In many cases, expansion into such venues will be a franchisor's first experience with a host of new legal requirements, acronyms (AAFES, NAFI, ACDBE), and customs, particularly those related to governmental and quasi-governmental entities with extensive RFP processes.[24]

Although an exhaustive listing and analysis of potential requirements stemming from contracts with the government is well beyond the scope of this article, it is useful to explore a few commonly encountered programs and regulations as examples of how doing business with the government or a government-influenced entity can, quite simply, change the way that a franchisor and its franchisees do business.

AIRPORTS

In 2000, there were over 400 primary airports in the United States.[25] It is commonplace in such primary airports for waiting passengers to be able to access a wide variety of products and services, from fast food to clothing to a haircut. Longer passenger wait times have also resulted in increased restaurant and retail opportunities.[26] To effectively pursue opportunities at an airport, franchisors and their prospective franchisees must understand how to effectively navigate an airport's RFP process.[27]

Companies that operate shops or restaurants in airports are often referred to as concessionaires. To obtain the right to operate an airport concession, a prospective concessionaire must prepare a lengthy response to an RFP. A well-prepared response to an RFP is a significant undertaking, and an RFP and concession agreement must be carefully reviewed by the franchisee (and perhaps also the franchisor) to determine the burdens placed on the operation of a business in the airport.

An airport may offer preproposal conferences and site visits to prospective concessionaires.[28] If an airport accepts written questions regarding the RFP process, it is likely to share its responses with other prospective concessionaires. It is imperative that a prospective airport concessionaire take advantage of opportunities to attend conferences and site visits and to submit questions. It may not have further opportunity to do so after the proposal is submitted.[29] Further, taking advantage of opportunities to attend site visits and have specific questions answered will assist a prospective concessionaire in tailoring its proposal to a specific airport, such as satisfying an airport's planned theme for concessions.[30]

Airports recently have recognized that the RFP process often focuses on the needs of the airport rather than its customers and how businesses will perform commercially once they are selected as airport concessionaires.[31] Having recognized these facts, airports are likely to place increased emphasis during the RFP process on evaluating customer preferences such as budget and health consciousness and the performance of prospective concessionaires and their brands.[32]

As discussed further below with respect to airport programs, a prospective concessionaire may also need to consider, at the outset of preparing to respond to an RFP, the partnerships or subcontractors that may be required to position a proposal to suit an airport's needs.[33] For example, the Federal Aviation Administration (FAA) has placed increased emphasis on the participation of disadvantaged business owners in airport concessions, resulting in increased consideration of such participation by airport authorities.[34]

DBE UTILIZATION AND ACDBE PROGRAMS

The U.S. government promotes and enforces various socioeconomic policies by imposing contractual obligations on those who do business with it.[35] FAA has enacted regulations that require U.S. airports to comply with, promote, and enforce such policies in order for the airport to receive certain benefits, which, in turn, leads airports to impose obligations on concessionaires and other contractors that do business with the airport. DBE and airport concessionaire disadvantaged business enterprise (ACDBE) programs play a significant role in many airport concessionaires' businesses.

Many airports encourage or require their concessionaires to purchase goods and services that are used in the operation of the concession from businesses that hold certification as a DBE. A franchisor that permits a franchisee to establish an outlet in an airport should consider modifying certain of its requirements with respect to the approval of suppliers to permit the franchisee to fulfill its obligations under its lease with the airport or to improve the franchisee's odds of submitting a successful proposal in response to an RFP.

In addition, many airports are subject to the U.S. Department of Transportation's requirements for participation of DBEs in airport concessions.[36] ACDBE programs actively seek to achieve the participation of ACDBEs with the goal of developing them so that they can compete for future contracts on an equal basis with successful non-DBE firms.[37] As to franchisors, the participation of an ACDBE-certified entity as a franchisee in an airport, or as a joint venture partner with either the franchisor or a more experienced franchisee, can provide a unique opportunity to develop a relationship with and train a valuable franchise partner or an opportunity for an existing franchise partner to expand its business in a new way.

The ACDBE program requirements generally provide that to qualify as a DBE, a firm and its majority owners / control person(s) satisfy the following:

1. The firm is owned/controlled by a socially and economically disadvantaged individual who is a U.S. citizen or permanent resident.[38]
2. Such individual's net worth does not exceed $750,000, with certain exclusions.[39]
3. The firm is a small business, and its gross receipts, averaged over the firm's previous three fiscal years, do not exceed $52.47 million.[40]

Federal regulations limit contracts under the ACDBE program to a five-year term under most circumstances.[41] At the end of a term, to retain ACDBE status, an ACDBE must submit materials (such as personal net worth statements, certificate of disadvantage, and affidavit of no change) to prove such status still exists prior to renewal.

Although a franchisor may offer qualified DBEs the opportunity to become franchisees and to establish units in airports through the airports' ACDBE programs, another option exists. That is, the ACDBE regulations and certain FAA guidance permit the establishment of joint ventures consisting of one or more DBE entities and one or more non-DBE entities to participate in an airport's ACDBE program. A franchisor may choose to participate in or permit the formation of such a joint venture to operate a franchised outlet, and then permit the joint venture to become a franchisee. Alternatively, a franchisor may wish to permit the pairing of an experienced, well-funded franchisee or institutional franchisee with an ACDBE-certified entity for the formation of a joint venture to serve as a franchisee and airport operator. Joint ventures that participate in ACDBE programs must be carefully structured so that the DBE entity has real and meaningful control of the overall business that is commensurate with its ownership interest.[42]

A joint venture for purposes of ACDBE programs is an

> association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks and profits of the joint venture are commensurate with its ownership interest.[43]

An airport considering accepting the proposal of an ACDBE joint venture for participation as a concessionaire will evaluate each independent element of the above definition. Each element must be satisfied for the firm to be eligible for participation in the ACDBE program.

For many businesses, the most significant aspect of ACDBE participation via a joint venture is the requirement that the ACDBE partner or partners of the joint venture be "responsible for a distinct, clearly defined portion of the work of the contract."[44] If a franchisor grants a franchise to an experienced franchisee, such as a management company franchisee with a portfolio of franchises for operation in airports, the franchisor can be reasonably assured of the franchisee's operational experience and financial capability. On the other hand, if a franchisor grants a franchise to a joint venture, as afranchisee, it will need to ensure that the ACDBE partner of such joint venture is also qualified, or capable of being trained and qualified, both in terms of experience and financial security, to participate as a franchisee in the system. Because the purpose of the ACDBE program is to permit less experienced businesses an opportunity to participate in airport concessions, in some circumstances the more experienced joint venture partners may be involved in training, coaching, and guiding the ACDBE partners—an activity that may require increased involvement by the franchisor as well.[45]

Military and other government installations may have significantly more and different regulations than [have been] previously encountered.

MILITARY BASES AND OTHER GOVERNMENT PROPERTY

Although similar to an airport in that it is subject to government regulations and requirements, military and other government locations may have significantly more and different regulations than a franchisor or franchisee has previously encountered.[46] By entering into a contract with the U.S. government, a private company subjects itself to a variety of federal statutes, regulations, and policies.[47]

Army and Air Force Exchange Service (AAFES) and the Naval Exchange Service Command (NEXCOM) offer rights to operate food service and other retail operations on military bases.[48] The goal of AAFES is to generate earnings to be used for support of U.S. Army and Air Force morale, welfare, and recreation programs.[49] Quick-service restaurants on U.S. Navy, Marine, and Coast Guard bases are privately owned and operated as concessions usually by a franchisee but occasionally by a franchisor. On the other hand, AAFES owns and operates some franchises on its bases. AAFES publishes RFPs to operate retail businesses at Army and Air Force bases, both domestic and overseas. The Navy Exchange System, through its command headquarters, NEXCOM, does the same for Navy military bases. Both are under the jurisdiction of the Department of Defense. Both agencies maintain websites to facilitate the exchange of information and submission of applications. AAFES is one of the three largest restaurant franchisees in the United States with annual revenues of $10.8 billion.[50]

Among other laws and regulations, an employer entering into government contracts potentially subjects all or some of its operations to a variety of federal laws, regulations, and executive orders that relate to employment matters.[51] These laws may require the development and implementation of comprehensive affirmative action programs and may also require a business to pay its employees at rates equal to or above wages suggested by the government.

WAGE LAWS

An agreement with a non-appropriated fund instrumentality (NAFI) may require compliance with the Davis-Bacon Act. The Davis-Bacon Act and related laws require a contractor and its subcontractors to pay employees the "locally prevailing wages and fringe benefits."[52] The Davis-Bacon Act has two practical consequences for franchised businesses. First, a franchised business may operate on slim margins that make the payment of prevailing wages impracticable and a financial burden. Second, a franchisor should note that the payment of locally prevailing wages by a franchisee will impact operating costs, and therefore the franchisee's costs could differ from the franchisor's disclosed estimate of initial investment and, potentially, the franchisor's financial performance representation.

EXECUTIVE ORDER 11246

The Office of Federal Contract Compliance Programs (OFCCP), a division of the U.S. Department of Labor, is the regulatory body charged with the enforcement of certain federal laws that require equal employment opportunity.[53] Franchisors contracting with the government or permitting franchisees to contract with the government are often particularly concerned about the implications of Executive Order 11246 (EO 11246), which imposes non-discrimination and affirmative action obligations on covered holders of federal government contracts and subcontracts. The requirements of EO 11246 apply not only to the contractor that has a direct agreement with the government but also to certain subcontractors and to entities that are deemed to be a single entity with the contractor for purposes of EO 11246.[54] OFCCP uses a five-factor test to determine whether multiple businesses or organizations are so closely related as to be deemed a single entity.[55]

Courts' examinations of whether a franchisor is a "single employer" with a franchisee are instructive as to whether a franchisor is a single entity. As under a "single employer" test, courts analyze whether there is centralized control over labor relations. Courts have found that "broad general policy statements regarding employment matters are not enough to make the required showing of centralized control over labor relations."[56]

Other laws and regulations may apply, the most extensive of which may be found in the general provisions published by NEXCOM and terms and conditions published by AAFES. Selected examples appear below.

Most-Favored Customer Clause

The general provisions require certifications from the contractor that "prices, terms and conditions . . . do not exceed prices then being charged the Contractor's most favored customer or another military exchange for like items," and that the contractor will extend reductions, promotional offers, or other special terms to NEXCOM.[57] These certifications may cap selling prices to those of the lowest franchised outlet in the geographic market area surrounding the subject outlet.

Business Codes of Ethics

Both NEXCOM and AAFES have adopted standards of conduct relating to ethical rules for conducting business and personal activities.[58] To show how seriously bribery is treated, an article in *Stars & Stripes*, the military newspaper, reported on a three-year prison sentence given to a former AAFES officer "for taking bribes to help [a] Korean telecom firm . . . keep a lucrative contract selling Internet and phone service to U.S. troops in South Korea."[59] The South Korean official received a corresponding five-year term in his home country.

Randolph-Sheppard Act for the Blind (RSA)

The Randolph-Sheppard Act for the Blind (RSA)[60] gives blind vendors priority on federal property for vending facilities, which are broadly defined and would include retail food vendors. Under the RSA, the Department of Defense must seek the approval of the Secretary of Education when it solicits for nationally franchised fast-food restaurants. In disputes involving Burger King and McDonald's franchise agreements for military installations, an arbitration panel held that the franchise agreements violated the RSA because AAFES and NEXCOM failed to provide for the RSA. The remedy was for AAFES and NEXCOM to contact the state licensing agency in each state with a Burger King or McDonald's facility to establish an acceptable procedure for identifying, training, and installing blind vendors as managers of all current and future Burger King or McDonald's operations. The licensing agency must receive 120 days' written notice of any new Burger King or McDonald's operations.[61]

RFPS AND TIMING

An RFP and accompanying or incorporated documents reflect most of the requirements applicable to an operator of a business on government property. In addition, during the RFP process, AAFES and NEXCOM are likely to disclose a significant amount of demographic information about a particular base on which the franchised business is to be operated. However, the process of completing an application, the length of time of the selection process, the competition for a base location, and the ultimate opening of an outlet may take years.[62]

HOTELS

Hotels, of all non-traditional venues, often feature the most creative ownership structures and may subject a franchisor to a variety of changed relationships. Options for franchised businesses in hotels include the following:

- Traditional Franchisee: A franchisor offers a franchise to a franchisee to open a non-traditional restaurant that will be established within a hotel.
- Hotel as Franchisee: A franchisor directly licenses a hotel (or chain of hotels) to operate franchised businesses.
- Partnerships / Hybrid Options: A franchisor partners with a chain of hotels to operate franchised businesses in multiple hotels. Each is expected to contribute to the establishment and operation of the franchised locations.
- Management Company: A large, experienced management company operates franchised businesses within hotels.

HOTEL AS FRANCHISEE

Where the hotel facility is the franchisee, the parties only need to enter into the franchise agreement. This can either be between the brand and the hotel or between the brand and an approved subsidiary of the hotel created for the purpose of operating the franchised unit. Generally, a chain of facilities would pair with a restaurant or similar franchise brand in a cobranding arrangement to develop multiple units in multiple facilities.

HYBRID OPTIONS

A franchisor and a chain of hotels may enter into a partnership for the establishment and operation of the brand's restaurants within such hotels. If a partnership is undertaken, the brand and hotel may choose to

- Split the costs of developing plans and converting space for use as the franchised business
- Forgo rent for lease of the space for the franchised business in exchange for the franchisor covering the cost of converting the space
- Forgo a franchise agreement in favor of a joint venture or other hybrid arrangement set forth in an agreement that defines the terms of the relationship, including roles, responsibilities, and the splitting of expenses
- Eliminate license fees (i.e., royalties), assuming that each will benefit by a portion of profits, increased brand recognition, or both
- Divide responsibilities for some personnel, e.g., a hotel could provide back-of-house staff, waiters, etc., and the franchisor could provide a general manager, chef, or both.

MANAGEMENT COMPANY

Where the transaction is structured so that the outlet is to be operated by a management company, several agreements are involved, including the following: (1) the management agreement between the hotel facility and the management company, under which the management company agrees to operate the hotel's restaurants; (2) the franchise agreement between the brand and the hotel; and (3) the management company acknowledgment in situations where the brand agrees that the management company will operate the restaurant within the hotel in accordance with the license agreement requirements and will pay fees on behalf of the hotel.

In this type of transaction, the hotel facility and the management company typically share employees as set forth in the management agreement. The brand imposes necessary restrictions (e.g., such employees may not wear a uniform unless working at the branded restaurant). The brand also will require that all employees attend its training or meet its training requirements and may require that management employees sign confidentiality agreements. The management company will be responsible for reporting sales to the brand and paying fees based on a percentage of sales. The management company must have the capability to track sales from the restaurant separately from other sales at the hotel.

DUAL-BRAND FRANCHISEE

Dual-brand issues can arise when the particular hotel venue is also franchised, creating a franchised unit of one brand within a franchised unit of another. This situation may present significant challenges for a franchisor. If the hotel is franchised, there is the potential that the franchisee will lose its rights to operate under the current brand. If the franchisor's consent to the operation of the franchised outlet within the hotel is contingent upon the hotel not changing brands, the agreement between the franchisor and franchisee should reflect such circumstance.

Conversely, the hotel franchisor or operator may want to restrict the brand from entering into licenses with other hotel brands if the hotel franchisor sees the partnership with the brand as a way to distinguish itself from its competitors. This situation typically does not arise with coffee outlets or gift shops but can occur with a more specialized outlet such as a restaurant or a spa.[63]

AMUSEMENT PARKS, CASINOS, AND TRIBAL VENUES

AMUSEMENT PARKS

Amusement parks have some of the same characteristics as other non-traditional venues. Like military bases, they tend to be large captive audience facilities, the largest of which operate much like municipalities. Many amusement parks are experienced operators with strong proprietary brands. Because of the potential for brand reinforcement through affiliation with these amusement parks, franchisors may encounter difficulties in entering these venues due to increased competition with other brands. Amusement parks will often put out RFPs and take bids from several of the top brands in the industry. Additionally, some amusement parks have relatively significant bargaining power. Therefore, franchisors may have to make modifications to their menu offerings, trade dress, training and personnel requirements, and use of suppliers to fit in with the park's theme.

CASINOS

Many franchisors are seeking the opportunity to open franchised businesses in casinos due to the captive audience of "diverse clientele with winnings to spend."[64] To the extent that they are associated with hotels, casinos also present some of the same concerns discussed in the hotel section earlier, including complex organizational structures.

Non-traditional franchise agreements for outlets in gaming locations need to be in compliance with state gaming regulations. Depending on the state, franchisors 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 non-traditional venues in gaming outlets.

TRIBAL VENUES

Non-traditional franchising in tribal venues involves several challenges due to issues of sovereign immunity, tribal corporations, and tribal gaming regulations, among others.

Tribal entities within the United States are considered sovereign nations and, as such, are immune from suit without their consent.[65] A tribe may only be sued if the suit is authorized by Congress or if the tribe has expressly waived its sovereign immunity.[66] Tribal sovereign immunity applies to both governmental and commercial contracts with tribes that are made both on and off the reservation.[67] Sovereign immunity, however, applies only to the tribal entity itself and not to individual members of the tribe. Therefore, 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 either tribal, state, or federal law. If a tribe is organized under § 17 of the Indian Reorganization Act of 1934 (IRA),[68] the Secretary of the Interior issues a charter to the tribe, which separates its governmental and business functions.[69] 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.[70] 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.

MOBILE FRANCHISE UNITS

The growth of mobile restaurant franchises has been identified as a top franchise industry trend in 2011.[71] Mobile units are a rapidly growing segment of the restaurant industry that are attracting substantial media and consumer attention, and many franchisors are adapting their concepts to include mobile units. "Many brick-and-mortar eateries have added mobile units in recent years, and more are expected to do the same, including national brands."[72] In August 2009, approximately one of eight consumers (13 percent) reported visiting a mobile food truck in the preceding six months. Nearly a year later, twice as many—slightly more than one in four consumers (25 percent)—reported having visited a mobile food truck in the past six months.[73] Although many non-traditional franchise locations can be as expensive as traditional locations because of high rental and other costs, mobile units are less costly than traditional franchise units, making them an attractive option for franchisors looking to achieve brand recognition while providing franchisees with a lower-cost option to obtain a franchise.[74]

As discussed earlier with respect to encroachment upon existing franchisees' exclusive territories (or existing businesses without an exclusive territory), franchised outlets that are operated from mobile units present unique concerns. A mobile unit requires the franchisor to structure the program in a way that protects its existing franchisees' sales but also permits the new franchisee with a mobile unit enough latitude to conduct its business. Further, the franchisor should consider whether it will reserve for itself certain rights with respect to mobile units, such as the double non-traditional venue scenario of a mobile unit operating at or near a stadium.

COLLEGES, UNIVERSITIES, AND OTHER EDUCATIONAL FACILITIES

Colleges, universities, and other educational facilities present significant opportunities for food service franchises to expand. Food service sales at primary, secondary, and post-secondary schools were projected to reach $41.15 billion in 2010, an increase of 2.5 percent over 2009.[75] As to colleges and universities, nearly half of all student meals are purchased on campus, whether at a food service facility or at a convenience store or other retail outlet.[76] Franchised businesses have long played a role in educational food service, with branded restaurants appearing on college campuses and other offerings appearing in schools.

Management companies often have an exclusive facility contract to provide educational food service.[77] Therefore, as discussed earlier, franchisors must be prepared to provide the management company with the necessary flexibility to satisfy the requirements of the educational institution for the significant bargaining power of a management company.

CONCLUSION

Franchising has long been about more than single-unit operators opening up a roadside stand with a small investment. In many ways, the recent expansion of and attention to franchised outlets in non-traditional venues is the latest chapter of an industry that grows, regroups, and reinvents as needed to keep pace with modern trends. To fully embrace this trend, franchisors and franchisees alike will want to be prepared to identify their core values, plan for expansion into non-traditional venues in a way that honors those core values, and then reach agreement on terms for operation that give deference to the ever-changing environment that non-traditional venues present.

ENDNOTES

1. The term *non-traditional venue* refers to a wide variety of captive audience facilities, such as airports, train stations, and other transportation hubs; hotels; casinos; theme parks; stadiums; government property, such as a military bases; and mobile locations, such as food trucks. *See, e.g.*, Eddy Goldberg, *Offbeat Sites Provide Newfound Opportunities for Franchisees and Franchisor*, How-To Franchise Guide: Non-traditional Locations, www.franchising.com/howtofranchiseguide/nontraditional_locations.html (last visited Jan. 30, 2011).

2. *See, e.g.*, *Military, Chains Join Forces: Fast Food Boosts Troop Morale*, Nat'l Rest. News, Dec. 14, 1987.

3. *See* David Bowie & Francis Buttle, Hospitality Marketing: An Introduction 112 (2004) ("The principle of linking well-known brands in marketing activities has been well established in hospitality. The benefits to both brands include greater exposure to a wider market, and a proportionately greater impact than a single brand's activities. Examples of co-branding include serving branded coffee in restaurants . . . providing quick service food kiosks in hotel lobbies . . . and leasing hotel restaurant space to branded restaurants. . . ."); *see also* John Lofstock, *Cornering the Non-Traditional Market*, Convenience Store Decisions, May 1, 2010, www.csdecisions.com/article 9654/cornering-the-nontraditional-market.htm.

4. Joel Libava, *The Top Franchise Trends for 2011*, Small Bus. Trends (Dec. 22, 2010), http://smallbiztrends.com/2010/12/top-franchise-trends-2011.html.

5. *See* Jamie Hartford, *Outside the Box*, QSR Mag., www.qsrmagazine.com/articles/features/135/nontraditional_venues-1.phtml (last visited Jan. 30, 2011).

6. *See, e.g.*, Spa Capsule, www.spacapsule.com/home.php?page=Retail_Market (last visited Jan. 30, 2011) (information about Spa Capsule franchise opportunities).

7. *See* Hartford, *supra* note 5.

8. *Id.*; *see also* Stuart Mathis, *Requirements and Specifications for Non-Traditional Locations Will Alter from Franchise to Franchise and Location to Location*, Franchising World, July 2010.

9. *Id.*

10. *Id.*

11. Increased costs in non-traditional locations can include, among others, increased rent for a space in a non-traditional venue, increased recruiting and labor costs (including costs associated with unions, background checks, and security clearance), and increased marketing fees for the venue. Hartford, *supra* note 5.

12. Mathis, *supra* note 8.

13. *Id.*

14. *See, e.g.*, John Lofstock, Cornering the Non-Traditional Market, Convenience Store Decisions (May 1, 2010), www.csdecisions.com/2010/05/01/cornering-the-nontraditional-market/ (giving examples of how, due to their contracts with non-traditional venues, management companies such as ARAMARK and Sodexo allow brands to gain entry into different retail environments); *see also* Dallas/Fort Worth International Airport Concession Workshop 23 (June 22, 2010), *available at* www.dfwairport.com/pv_obj_cache/pv_obj_id_21F7B35ED0F0BEEBE8ED076F9FA83D4E18211300/filename/How-to%20Write-a-Proposal-Workshop.pdf (regarding airport concessionaire disadvantaged business enterprise (ACDBE) expectations and certification requirements).

15. Zappos Family Core Values, http://about.zappos.com/our-unique-culture/zappos-core-values (last visited Jan. 30, 2011).

16. *See, e.g.*, Ron Ruggles, *Beef 'O' Brady's Explores Non-Traditional Spaces*, Nation's Rest. News, July 16, 2010 (discussing the development of a new set of criteria allowing for flexibility, including smaller units for non-traditional spaces with a more limited menu and more dayparts).

17. *See, e.g.*, Request for Proposal for DFW Airport Terminal A, *available at* www.dfwairport.com/trip/concessions/rfp/index.php (last visited Jan. 30, 2011).

18. *See, e.g.*, Giampapa v. Carvel Corp., Bus. Franchise Guide (CCH) ¶ 11,442 (D.N.J. 1998) (discussing whether the franchisor had an obligation to offer a satellite/cobranded location to an existing franchisee that was not considered by the franchisor to be in good standing and concluding that the franchisor's requirement that the franchisee release all claims against the franchisor did not violate the New Jersey Franchise Practices Act and that the franchisor's requirement that the franchisee be in good standing was not bad faith).

19. In addition to the common law issues discussed in this article, at least two states' franchise relationship laws contain provisions designed to protect franchisees from encroachment. In Hawaii, it is an unfair or deceptive practice for a franchisor to grant a franchise within any franchisee's exclusive territory. In Iowa, a franchisor may not establish a franchise within an "unreasonable proximity" of an existing franchisee unless the franchisee is given a right of first refusal or is given the right to compensation for sales that the new outlet diverts. *See* Encroachment, Bus. Franchise Guide (CCH) ¶ 830 .

20. *See, e.g.*, Sons of Thunder, Inc. v. Borden, 690 A.2d 575, 588 (N.J. Super. 1997).

21. *See, e.g.*, Emporium Drug Mart, Inc. v. Drug Emporium, Inc., Bus. Franchise Guide (CCH) ¶ 11,966 (Sept. 2, 2000) (Am. Arbitration Ass'n, Tex., Case No. 711140012600).

22. Some states disfavor non-competition covenants for employees so as not to unduly restrict future employment and thus may be skeptical of a franchisor and franchisee's agreement if it carries implications for employees. *See, e.g.,* Clear Channel Broad. Inc. v. Brown, 901 So. 2d 553 (4th Cir. 2005) (discussing that Louisiana disfavors non-competition covenants for employees). Thus, the franchisor must ensure that applicable state law does not prohibit restrictions on employees' activities.

23. Some of these costs include developing special plans to fit each non-traditional venue; developing special training classes for non-traditional venues; drafting changes to the operating manual or creating a new manual for non-traditional venues; creating special marketing materials, graphics, and signage; and revising a menu or inventory to fit the venue.

24. *See* discussion below regarding Army and Air Force Exchange Service (AAFES), DBE, and ACDBE programs.

25. U.S. Centennial Flight Comm'n, The Growth of Airports, www.centennialofflight.gov/essay/Government_Role/airports-growth/POL10.htm (last visited Jan. 30, 2011).

26. Ken Delve, *Maximising Retail Revenue: 'Milking the Captive Audience' or 'Providing the Public with a Dynamic and Visually Appealing Retail Offer'?*, Airports Int'l (Mar. 1, 2004), *available at* www.thefreelibrary.com/_/print/PrintArticle.aspx?id=114603509.

27. An airport RFP will often consist of multiple parts that the prospective concessionaire must review and respond to appropriately, such as the following: (1) a statement of the available concessions opportunities; (2) a schedule for submission of questions, submission of a response to RFP, selection of the winning proposal, and other key dates (note that deadlines are strict, and an airport will often refuse to consider late proposals); (3) a glossary of key terms; (4) specifications regarding the desired type of concession; (5) minimum qualification requirements of the concessionaire (such as ownership/management, existing gross sales and past experience, and financial ability); and (6) evaluation criteria, such as product offerings, references of the prospective concessionaire, and the potential success of the concessions business at the airport. *See, e.g.*, Dallas/Fort Worth International Airport Concession Workshop 5 (June 22, 2010), *available at* www.dfwairport.com/pv_obj_cache/pv_obj_id_21F7B35ED0F0BEEBE8ED076F9FA83D4E18211300/filename/How-to%20Write-a-Proposal-Workshop.pdf.

28. *Id.* at 8.

29. *Id.* at 10.

30. *See id.* at 8.

31. John F. Infanger, *Concessions Update—Meeting in Orlando, Airports Discuss RFPs, Fees, Trends and Wireless*, AirportBusiness (July 8, 2008), www.airportbusiness.com; *see also* Chris Cheek, *Above and Beyond the Strip Mall: Non-Traditional Options for Franchise Development*, Franchise Update, Oct. 2, 2009, www.franchising.com/articles/above_and_beyond_the_strip_mall_nontraditional_options_for_franchise_develo.html.

32. *Id.*

33. *Id.*

34. Demetrius Carney, Joseph McCoy & Sid Bale, Perkins Coie, *Structuring a Joint Venture*, AirportBusiness (May 11, 2010), http://airportbusiness.com/print/Airport-Business-Magazine/Structuring-a-Joint-Venture/1$36410.

35. As to government contracts, "[g]overnment statutes and regulations predominate over commercial law in nearly every respect." Judge Advocate General's Sch., U.S. Army, Government Contracts Law: The Deskbook for Procurement Professionals 3 (ABA Section of Public Contract Law, 3d ed. 2007) (citation omitted) [hereinafter Government Contracts Law].

36. 49 C.F.R. pt. 23.

37. *See, e.g.*, L.A. World Airports, Administrative Requirements—Airport Concessions Disadvantaged Business Enterprises Program, www.lawa.org/welcome_LAWA.aspx?id=568 (last visited Jan. 30, 2011).

38. Socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration. 49 C.F.R. § 23.4.

39. Exclusions include the individual's ownership interest in an ACDBE firm; home equity; and other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his ACDBE firm (or that have been encumbered to support the business, to a maximum of $3 million). 49 C.F.R. § 23.35.

40. Banks, car rental companies, pay telephones, and automobile dealers are subject to different size standards.

41. 23 C.F.R. § 23.75.

42. The ACDBE program regulations themselves provide little guidance regarding the formation of joint ventures. At the time that such regulations were revised, FAA, recognizing that joint ventures had been an area of concern in the past because ACDBE partners were not consistently performing an independent portion of the work, determined it best to create additional guidance for airports and concessionaires regarding ACDBE joint ventures. In 2008, FAA released its Joint Venture Guidance (JV Guidance). FAA, via the JV Guidance, has directed airports to evaluate proposals for ACDBE participation via a joint venture or other structure on a case-by-case basis. *See* FAA Joint Venture Guidance (July 17, 2008), *available at* www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/dbe_program_adm/media/JVGuideFinal508.doc.

43. *Id.*

44. *Id.*

45. A franchisor may also partner with an operator or group of operators to participate as an airport concessionaire. In such case, the franchisor will want to consider how best to structure the relationship so that its marks and system are protected; that is, the franchisor will likely want to grant a franchise to the joint venture or a limited license to the ACDBE partners so that such partners can participate in the work of the joint venture.

46. This article focuses on the majority of operated franchises in commonly encountered government venues. That is, the focus of this article is on franchises operated in venues controlled by nonappropriated fund instrumentalities such as the Naval Exchange. However, franchisors should note that if a franchisor itself provides, or permits its franchisees to provide, services to the government through a government contract that is derived from appropriated funds, additional guidance is needed and additional laws will apply. *See* Jeffrey A. Brimer, Adam Ekberg & Scott P. Webwer, Franchising in Unique Venues 29 (ABA Forum on Franchising 2008).

47. As to government contracts, "[g]overnment statutes and regulations predominate over commercial law in nearly every respect." *See* Government Contracts Law, *supra* note 35.

48. Marine and Coast Guard bases also have exchanges on which franchisees may operate. Marine bases number five times fewer than Navy bases, and Coast Guard bases number even less. The Department of Homeland Security oversees Coast Guard bases, whereas the Department of the Navy oversees Marine bases.

49. Approximately 67 percent of AAFES earnings support these efforts. AAFES Fact Sheet (Jan. 2007), http://web.archive.org/web/20070422174222/http://www.aafes.com/pa/factsheet-9.pdf (last visited Mar. 24, 2011).

50. Jason Daley, *The Big Time: Multiple-Unit Ownership Has Taken over the Franchise World*, Entrepreneur (July 2010), *available at* www.entrepreneur.com/magazine/entrepreneur/2010/july/207192.html.

51. By entering into qualifying government contracts, an employer potentially subjects all or some of its operations to the following federal laws, regulations, and executive orders: Executive Order 11246 (nondiscrimination and affirmative action and applicable regulations); Vietnam Era Veterans' Readjustment Assistance Act of 1974 (nondiscrimination and affirmative action and applicable regulations); Rehabilitation Act of 1973 (non-discrimination and affirmative action and applicable regulations); Service Contract Act (prevailing wage of service workers

and applicable regulations); Contract Work Hours and Safety Standards Act (overtime compensation and applicable regulations); Copeland Act (anti-kickbacks); Davis-Bacon Act (construction prevailing wage and applicable regulations); Executive Order 13496 (2009) (notification of employee federal labor law (union organizing) rights); Executive Order 13495 (2009) (requirement of successor federal contractors of same services and location to offer employment, i.e., first right of refusal, to employees of predecessor contractor, other than managers and supervisors); and Executive Order 13494 (2009) (disallowing the action of passing on to the government of costs associated with persuading employees in the exercise of their rights to organize and bargain collectively).

52. U.S. Dep't of Labor, Wage and Hour Division (WHD)—Davis-Bacon and Related Acts, www.dol.gov/whd/contracts/dbra.htm (last visited Jan. 30, 2010).

53. OFCCP administers and enforces Executive Order 11246, § 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. *See* U.S. Dep't of Labor, Office of Federal Contract Compliance Programs (OFCCP)—About OFCCP, www.dol.gov/ofccp/aboutof.html (last visited Jan. 30, 2011).

54. According to EO 11246, the Secretary of Labor has the responsibility to establish guidelines to determine whether multiple entities are considered a single entity. Beverly Enters., Inc. v. Herman, 130 F. Supp. 1, 22 (D.D.C. 2000) (citing EO 11246, § 201, 30 Fed. Reg. 12319 (1965)).

55. The five factors are as follows: "1. the entities have common ownership; 2. the entities have common directors and/or officers; 3. one entity has de facto day-to-day control over the other through policies, management or supervision of the entity's operations; 4. the personnel policies of the entities emanate from a common or centralized source; and 5. the operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices or other services." U.S. Dep't of Labor, OFCCP—Frequently Asked Questions for the Employer, www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm (last visited Jan. 30, 2011).

56. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1069 (10th Cir. 1998) (citation omitted).

57. General Provisions NEXCOM 19 (Apr. 1, 2009), *available at* www.mynavyexchange.com/command/contractor_vendor/PUBS/general_provisions/section_c.html.

58. For NEXCOM, *see id.* at 14; for AAFES, *see* AAFES, Terms and Conditions 2 (Jan. 2010), *available at* www.shopmyexchange.com/vendors/pdf/termscon6.pdf.

59. Franklin Fisher, *Ex-AAFES Official Gets Three Years in Prison for Taking Bribes in South Korea*, Stars and Stripes, Jan. 10, 2010, *available at* www.stripes.com/news/ex-aafes-official-gets-three-years-in-prison-for-taking-bribes-in-south-korea-1.97851.

60. 20 U.S.C. §§ 107–107f.

61. 60 Fed. Reg. 4406 (Jan. 23, 1995).

62. "This is the culmination of many years of work and negotiation," says Chuck deNicolo, national account manager for non-traditional development at Subway, " regarding its unit at the Air Force Academy." *Subway Launches a Store at the U.S. Air Force Academy*, QSR Mag. (Nov. 30, 2001).

63. As a non-franchise example, when Starwoood Hotels & Resorts Worldwide, Inc. sold the Bliss spa and product company to Steiner Leisure Limited, Starwood ensured that the W Hotels and St. Regis Hotels would have the exclusive rights to Bliss-branded hotel spas. *Starwood Hotels Completes Sale of Bliss Spas to Steiner Leisure for $100 Million*, Hotel Online (Jan. 2010), www.hotel-online.com/News/PR2010_1st/Jan10_StarwoodBliss.html (last visited Jan. 30, 2011).

64. Sbarro, Venue Opportunities, www.sbarro.com/franchising/venueOpportunities.php (last visited Jan. 30, 2011).

65. *See, e.g.*, United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940).

66. *See id.*

67. *See* Kiowa Tribe of Okla. v. Mfg. Techs., 523 U.S. 751 (1998).

68. 25 U.S.C. § 461.

69. 25 U.S.C. § 477.

70. 25 U.S.C. § 2710(d)(1)(C).

71. *See* Libava, *supra* note 4.

72. Sarah E. Needleman, *Restaurant Franchises Try Truckin' as a Way to Grow*, Wall St. J. (Oct. 28, 2010).

73. Am. Express Market Briefing 2 (Aug. 2010).

74. *See* Hartford, *supra* note 5.

75. *The Education Foodservice Market in the U.S.: Elementary, Secondary and Higher Education*, Marketresearch.com, www.marketresearch.com/product/display.asp?productid=2848310 (last visited Jan. 30, 2011).

76. American Express Market Brief 6–7 (Sept. 2009).

77. *See* Robert A. Brymer, Hospitality & Tourism (Kendall/Hunt Publ'g Co., 11th ed. 2004).

