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Steering Franchisors Through the Mobile Food Truck Trend

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Over the past several years, mobile food trucks have made a big comeback, albeit in a new format. Long gone are the days of the silver metal "roach coaches" offering cold sandwiches, hot dogs, fried food and watered down coffee. Today's food trucks are bright, bold and sassy, and offer such delicacies as Korean BBQ, carne asada tacos, Indian roti wraps and specialty cupcakes, along with branded fare. This mobile food trend started several years ago by gourmet foodie entrepreneurs in Seattle, Los Angeles and New York City, but has quickly expanded throughout the United States

and Canada and transitioned from small business owners to large multinational franchisors. More recently, franchise lawyers have started to receive requests from restaurant franchisor clients wondering how to incorporate this trend into their current franchise offerings.

First, franchisors who wish to incorporate mobile food trucks into their franchise system need to consider the business issues and determine what kind of food truck franchise they wish to offer. Will the food truck sell only frozen or prepackaged food or will it act more like a restaurant-on-wheels? Will the food truck target business and school zones (e.g., office complexes, college campuses, construction sites and military bases), or will it be limited to catering or temporary events where groups gather (e.g., fairs, sporting events and concerts)? Will the food truck be operated year-round or on a seasonal basis?

Second, franchisors need to determine whether their mobile food trucks will operate as a "separate but equal" franchise offering or as an add-on license to existing restaurant franchises, similar to catering services or satellite units. If a "separate but equal" franchise concept, franchisees will purchase a food truck franchise separately from a restaurant franchise. There may be separate franchise agreements or the restaurant franchise agreement may be modified to include the food truck franchise option. If an add-on license model is used instead, the food truck franchise will be treated more like a catering, kiosk, satellite or other non-traditional offering. The existing franchisee would execute a food truck franchise addendum similar to a satellite addendum whereby it would be permitted to operate a food truck in conjunction with the franchised restaurant. This option may be preferable if the food truck will only be operated on a seasonal basis or only at special events. Franchisors may find that their treatment of food truck franchises varies depending on where the franchisee is located, since the area within which the truck will operate will dictate the weather and its seasonality, exclusivity restrictions, customer accessibility, permit and licensing requirements, and other local sales limitations. Most notably, local zoning laws can make it very difficult for food trucks to operate by restricting or even prohibiting them from parking and opening for business on city streets or other places.

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Finally, for any food truck franchise offering, franchisors need to consider a myriad of issues, any or all of which may result in a modified or new form of franchise agreement and franchise disclosure document. Of course, any material changes to the franchise documents must be properly documented and disclosed pursuant to applicable franchise laws. U.S. and Canadian case law on food truck and catering franchises, while sparse, may apply on occasion to issues such as territorial exclusivity and non-compete provisions. At a minimum, franchisors should evaluate the following:

Initial Investment / Franchise Fees. One of the commonly cited benefits of a food truck franchise is the lower initial investment, which could for instance be only 30-40% of the investment for a bricks and mortar restaurant franchise. Given the recent recession, reportedly this has been one of the main contributors to the rise in popularity of food trucks. Franchisees do not need as much capital to start a food truck business, since an equipment-fitted truck and commissary (a facility where food, supplies and the truck are stored) are less expensive to acquire than a restaurant with a kitchen and dining area, visible signage and a real property lease. In times when small business loans are hard to come by, this makes for an attractive alternative franchise entry.

Operating food trucks may help franchisees eventually transition to a restaurant franchise since it allows them the opportunity to try out the franchise concept with less risk, access the market quickly, gain insight into where a good site may be prior to committing to a lease, and build up records, data and experience that a lender will find attractive prior to requesting a loan.

Because of the lower initial investment, franchisees may expect to see a lower initial franchise fee, even if, practically speaking, the franchisor is spending the same amount in recruiting, training and assisting the franchisee. Perhaps the franchisor needs to spend even more on these items, as the food truck model of doing business is newer and not as well-tested. So while lowering the initial franchise fee may be an effective recruiting strategy for a newer channel of distribution, there may be little incentive to reduce initial fees. And, certainly, franchisors should not adjust royalties or advertising fees without first evaluating the food truck franchise revenue structure. Because of the relative novelty of the food truck franchise model, the franchisor may need flexibility in the franchise agreement to adjust royalties and advertising fees after its initial food truck franchises are up and running.

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Territory / Competition. Franchisors must carefully consider the territory and competition implications in offering food truck franchises. This has the potential to be the thorniest and most legally complicated issue. It also is the most difficult issue upon which to provide specific advice, as there are many possible scenarios and combinations to consider. In particular, systems wishing to add this channel will likely have existing franchisees, with varying forms of franchise agreement, that provide for very different franchisor and franchisee rights. Franchisees may have been granted wholly or partially exclusive territories, while franchisors may or may not have reserved the explicit right to engage or franchise others to engage in the operation of a food truck in close proximity to or in the territory of the "bricks and mortar" units. While mobility is one of the unique benefits for food trucks, there is potential for creating inter-system competition if new franchise models within the system are not carefully structured or existing practices and agreements are not well understood.

In most instances, franchisors will want to have some control over acceptable route plans within the territory. It may be wise for a franchisor to approve an initial route and then contemplate in advance special events or occasions where the franchisee may choose to deviate from such route. The approval process must be flexible enough, however, to allow the franchisee to cope with weather, traffic and event complications.

Permits / Local Regulations. One of the most important considerations is the actual ability to stop and operate a food truck in particular locations. Franchisors and franchisees must take into account local regulations and zoning ordinances when developing the route plan and determining the territory, and they must perform due diligence to determine what restrictions exist as to operations (parking, timing, location, proximity to other restaurants, permissible food items, etc.) and what permits and/or licenses are required to operate a food truck and the barriers to obtaining those permits/licenses. For example, New York City caps the number of issued permits (there is reportedly a 10-15 year waiting list) and, recently, a New York State Supreme Court judge, in a non-final disposition, reinforced food truck bans at metered parking spaces, causing a mass exodus of food trucks from Midtown Manhattan. See *Monroy v. City of New York, et. al.*, No. 400357-2011 (N.Y. Sup. Ct. filed Mar. 4, 2011). In Toronto, a jigsaw puzzle of regulations limit what food carts or catering trucks may sell (generally only pre-packaged foods), in addition to strict parking rules. Sacramento has a 30-minute parking limit, and Miami Beach currently prohibits food trucks altogether.

Timing / Opening. One of the benefits of food truck franchises may be a shorter development and opening period. While some restaurants may take over a year to open, food trucks could be up and running in a much shorter time period. Franchisors should consider whether the timing requirements for opening should be shortened in the franchise agreement, giving appropriate weight to the time it may take to get local permits and other licenses that are novel for food truck businesses, and that regulatory agencies may not be used to administering such permits and licenses yet.

Trademarks / Branding / Décor. Franchisors should consider whether to use their existing trademarks and service marks for the food truck franchise program, or whether to modify or add new trademarks or service marks that highlight the mobile aspect of the food truck (e.g., adding "to go" or "express"). Because the food truck acts as a moving billboard for the franchise brand, franchisors should consider what branding and décor of the truck best promotes the entire franchise system. The franchise agreement should contain appropriate controls such that the franchisor has ultimate approval of and the right to request changes to the appearance of the truck.

Menu / Other Offerings. Because of space limitations in a truck, franchisors may need to abbreviate the menu offering for food truck franchisees. It may be advisable to prepare more items in advance, eliminate items that cannot easily be transported or prepared in the truck, or modify food items or delivery systems to accommodate the "take out" aspect of the business. For example, one food truck operator modified its restaurant's signature egg dish by serving it as a transportable breakfast burrito. Consideration also should be given as to whether the franchisee needs to rent or build a commissary in order to properly operate the food truck franchise.

Quality Control / Audits. It is important for franchisors to maintain quality control over their food truck franchisees to avoid health code violations and potential reputational damage to the franchise brand. Audit and inspection provisions in existing franchise agreements may need to be modified to specifically allow a franchisor to inspect the truck and commissary. Franchisors should consider GPS auditing controls, which provide great visibility into compliance with acceptable trade routes. Franchisors also should reserve the right to inspect inventory and franchisee records as food trucks tend to deal more with cash purchases which may be more difficult to audit.

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Operational Requirements. Franchisors may impose different operational requirements for food truck franchisees than they do for restaurant franchisees. For example, restaurants are typically open year-round and have steady operating hours and business days. However, franchisors may want to offer seasonal food truck franchises depending on the location of the franchisee. During cold winter months or rainy seasons, there are fewer outside events and potential customers are less likely to venture outside to patron a food truck. Franchisors may also want to revisit operating hour requirements, since many food trucks have great success operating in nightclub or bar areas targeting late night crowds.

Advertising / Social Media. Depending on whether franchisors treat food truck franchises as a separate or add-on concept, advertising fund contributions may vary. Some franchisors may want to require food truck franchisees to pay the same percentage of revenues as restaurant franchises and contribute their ad fees to the same fund. Other franchisors may want to create a separate food truck advertising program and fund that focuses more on social media and online advertising campaigns, rather than the traditional billboard, radio and TV campaigns. In addition, franchisors may want to consider giving existing restaurant franchisees some relief from ad contribution requirements if they own a food truck, since they will be acting as moving billboards.

Food truck owners are using social media sites and services such as Twitter, Facebook and Foursquare to create a following of loyal customers and to advertise truck routes and daily deals. If a franchisor's franchise agreement does not already address social media, the franchisor should amend it to include protections over ownership, permitted use and post-termination cancellation and/or relinquishment of webpages, accounts and usernames. Franchisors should also maintain control of electronic communications (blogs, tweets and other social media postings) and electronic coupon offerings (e.g., Groupon, ScoutMob, etc.).

Insurance. Recently, insurance companies have started to get creative with insurance offerings by developing targeted food truck insurance plans that include commercial automobile, inland marine, consumer food poisoning and other specialty insurance. Franchisors may want to impose different insurance requirements under the food truck franchise agreement or food truck addendum.

It is not clear whether food trucks are just a new trend or whether this business model is here to stay.

Because of the complexity of local regulations and zoning ordinances, it is difficult to quickly roll out food truck businesses in the United States and Canada. However, judging from recent food truck offerings, it is clear that some franchisors think mobile food trucks are more than just a fad.

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