International Franchise Association
57th Annual Legal Symposium
May 4-6, 2025

Antitrust Dos and Don'ts

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1. Introduction of Antitrust Principles[1]

Although the title suggests a well-defined set of bright-line rules that franchisors and franchisees can follow to ensure that their conduct always complies with the antitrust laws, the reality is more nuanced. To be sure, there are some activities that almost always will be deemed to violate the antitrust laws and are to be scrupulously avoided, and others that are generally considered low risk or even benign. But there are also types of conduct for which lawfulness depends on the facts and circumstances. Accordingly, to place "Dos and Don'ts" in a proper context, we first consider the antitrust principles that are most relevant to franchising and then explain the factors that can create antitrust risk in common situations.[2]

2. The Legal Framework

The Sherman Antitrust Act, which was originally signed into law in 1890, prohibits all agreements that unreasonably restrain trade.[3] Unlike some statutes that attempt to provide detailed guidance as to specific actions that are permissible and those that are not (e.g., the Internal Revenue Code), it has been left to the courts to decide in particular cases when an interaction between parties constitutes "an agreement," if so whether it restrains trade, and if it does, whether that restraint of trade is "unreasonable." As a result of court decisions that have been issued over the 135 years since the Sherman Act was signed into law, legal practitioners now have some fairly clear guidance in many areas regarding how to comply with federal antitrust law. But the law is still developing in other respects, and, as business and technology continue to advance, new questions are frequently presented concerning how antitrust laws should apply to those developments.

2.1. *Horizontal Competitors*

As a general matter, the antitrust laws apply a stricter level of scrutiny to agreements between "horizontal" competitors—those who are at the same level in the chain of distribution (e.g., competing retail stores or competing wholesalers)—than to agreements between "vertically" related parties (e.g., supplier and purchaser or distributor and retail store). *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) (agreements among competitors are traditionally considered horizontal, whereas agreements among "firms at different levels of distribution" on matters on which they do not compete are considered vertical); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982) (horizontal restraints are "generally less defensible" than vertical restraints). Some forms of horizontal agreements (e.g., price fixing, bid rigging, market

[1] This paper also represents the collective work of the authors and represents their individual views and not necessarily the views of their firm or company. Moreover, given the nature of the topic and its treatment, as well as the desire to present the topic in a unified paper, any views expressed in the paper do not necessarily represent the individual views of both authors.

[2] The focus of this presentation is on U.S. (federal and state) laws; the laws in other countries may differ in various respects.

[3] This part of the Sherman Act dealing with agreements between two or more parties is known as Section 1. *See* 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits various forms of unilateral conduct, for example monopolization, but that section is not frequently at issue in franchising scenarios.

or customer allocation) are considered "per se" unlawful, that is, the conduct is presumed to be anticompetitive. This presumption has been applied by the courts to restraints "that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20 (1979). It is appropriate only when a practice is one with which courts have had considerable experience. *Id*. at 20 n.33. These categories of conduct represent serious antitrust violations that can give rise to civil litigation by the government or private parties and can even be the basis for criminal prosecution by the U.S. Department of Justice ("DOJ").

2.2. *Vertically Related Parties*

In contrast, most conduct between vertically related parties is judged by the so-called "rule of reason," which requires proof of certain legal elements in a prescribed step-by-step analysis. *See Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) ("The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]' s actual effect' on competition."). The party seeking to prove a violation must define a relevant geographic market and a relevant product or service market and then must show that the defendant's conduct resulted in anticompetitive effects in the relevant market. If such a showing is made, the defendant can offer proof of procompetitive benefits or efficiencies that counter the anticompetitive effects; and if the defendant makes such a showing, the plaintiff can offer proof that such benefits could have been achieved by less restrictive means. *Id*. at 541-42. This "rule of reason" analysis is highly focused on the particular facts, so conduct that is problematic in one setting may be perfectly acceptable in another.

2.3. *State Considerations*

Aside from the federal antitrust laws, there are also antitrust laws on the books of virtually all states. Many of those states' laws are patterned on the federal laws and follow federal precedents. But some states' antitrust laws differ in ways that can be significant, so there are circumstances for example, in which certain conduct may comply with federal law but run afoul of state law. Some of these differences in treatment are discussed later in this paper.

3. The Franchise Business Model

3.1 *Franchise as a Single Business Enterprise*

Several decades ago, it was not uncommon for courts to find that the participants in a franchise system were all part of a single business enterprise and, therefore, that they could not "collude" with each other. *See, e.g., Williams v. Nevada*, 794 F. Supp. 1026 (D. Nev. 1992). These cases based their approach on the so-called *Copperweld* doctrine, named after the Supreme Court case, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Court ruled that a corporation and its wholly owned subsidiaries are essentially a single business entity. Because a conspiracy or agreement, by definition, requires more than one participant, the doctrine effectively made the Sherman Act's prohibition on agreements that unreasonably restrain trade inapplicable to interactions within such a single corporate family.

3.2 *Importance of American Needle*

In 2010, however, the Supreme Court decided *American Needle, Inc. v. National Football League,* a case involving the various clubs in the National Football League, and ruled that, although the clubs may act as a single enterprise with respect to sports matters, they do not do so when engaging in commercial procurement of club clothing. 560 U.S. 183 (2010). Instead, each club is an independent center of decision making, and by agreeing jointly on such commercial matters, they deprived the marketplace of competition among them. Since *American Needle*, courts have applied this principle in various contexts, including franchising. Most notably, the United States Court of Appeals for the Eleventh Circuit relatively recently decided *Arrington v. Burger King Worldwide, Inc.*, a case in which the plaintiffs alleged that Burger King and its franchisees engaged in unlawful "no-poach" agreements. 47 F.4th 1247 (11th Cir. 2022). The District Court granted Burger King's motion to dismiss based on the single enterprise precedent, but the Eleventh Circuit reversed in light of *American Needle* and remanded for further proceedings.[4] In essence, the appellate court ruled that, at least for purposes of the "market" for labor, the franchisor and its franchisees were not a unified single enterprise but independent centers of decision making. In the wake of *American Needle*, the *Copperweld* doctrine remains good law, as applied to a franchisor and its company-owned outlets—they are considered a single enterprise. But many franchise systems include some, or even all, independently owned franchisees, which may open the door for them to be viewed as independent centers of decision making, at least for some purposes.

3.3 *Impact on Franchise Systems*

So, what is the impact on franchise systems of *American Needle* in relation to non-labor issues? It is too soon to say with a high degree of certainly. A franchisor has contractual relationships with all its independently owned franchisees, and they all have a common interest in building and maintaining the brand's value, regardless of whether the franchises are owned by the franchisor independently. But franchisees are also centers of independent decision making in many respects, and as noted below, may be horizontal competitors, potentially subjecting them to claims for per se scrutiny.

In a Statement of Interest filed by the DOJ in a no-poach civil lawsuit, the DOJ staked out its position that a franchisor and its independently owned franchisees may be horizontal competitors at least for some purposes (in that case, for an alleged labor market). *See* Corrected Statement of Interest, filed by the U.S. DOJ in *Stigar, et al. v. Dough Dough, Inc.*, Case No. 2:18-cv-00244, ECF #34, filed 3/8/19, at 12 ("Even though the typical no-poach agreement between a franchisor and one of its franchisees is vertical, it could be horizontal if it restrains competition between the two interrelated entities."). Further, in a decision by the United States Court of Appeals for the Seventh Circuit in another no-poach civil lawsuit, the appellate court ruled that the district court had prematurely rejected application of the per se standard to the alleged conduct. *See Deslandes v. McDonald's, USA, LLC,* 81 F.4th 699 (7th Cir. 2023). As the impact of *American Needle* on franchising develops, reliance on case law that treats entire

[4] The parties recently completed supplemental briefing on the defendant's motion to dismiss. *See Arrington V. Burger King Worldwide, Inc. et al.*, Case No. 1:18-cv-24128 (S.D. Fla.).

franchise systems as singular entities, in which none of the constituent stakeholders could ever collude with each other as a matter of law, should be tempered.

3.4 Implications for Franchisees Participating in Industry Trade Groups and Associations

The Federal Trade Commission ("FTC") recognizes that "[m]ost trade association activities are procompetitive or competitively neutral"[5], but franchise systems with either a franchisee association or a franchise advisory council may be considered a trade association. Those franchisees should be aware that "forming a trade association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association. For instance, it is illegal to use a trade association to control or suggest prices of members."[6] Given the uncertain impact of *American Needle* in terms of when and to what extent independent franchisees may be considered horizontal competitors, it would be prudent for franchisees participating in industry trade groups and associations to abide by customary antitrust guidelines for such activities. The rules for complying with the antitrust laws should be followed not only at meetings but also during any surrounding social activities or events. For example:

- A written agenda should be prepared in advance and followed at meetings. Minutes or notes of the topics discussed should be kept.

- Meetings among independent franchisees should not be used to exchange competitively sensitive information, especially relating to prices, and agreements (written or verbal) among independent franchisees should not be reached or even discussed.

- If improper topics come up in trade association or other industry meetings, attending franchisees should object to the discussion of such topics immediately. If improper discussions continue, they should leave the meeting, making sure that their actions are recorded in the minutes or notes of the meeting.

- Associations of independent franchisees should ensure that the internal governance of the group is managed fairly and in a non-discriminatory manner (e.g., regarding how membership is determined, under what circumstances a member may be disciplined or have its membership terminated, and whether there are restrictions that may apply to some members but not to other similarly situated members).

4. Assessing Potential Antitrust Exposure

So, given the current state of the law, what "dos and don'ts" can we identify for franchisors and franchisees at this time?

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[5] Fed. Trade Commission, *Spotlight on Trade Associations*,https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations (last visited March 29, 2025).
[6] *Id*.

4.1 *Vertical restraints*

As noted previously, the antitrust laws generally take a less harsh view of vertical restraints than horizontal restraints. That is not to say that vertical restraints are per se *lawful*, but under federal law and the laws of almost all states, vertical price restraints are not deemed unlawful without proof of their anticompetitive effects. This first requires definition of a relevant market, and then direct or indirect proof of a "substantial anticompetitive effect that harms consumers in the relevant market." *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition." *Id*. at 542; *see also Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 70 (2021) (The rule of reason requires "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition."). Importantly, a single franchise normally would not constitute a relevant market. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997). As the *Queen City* court noted, the franchisee plaintiff had the burden under the rule of reason of defining the relevant market and proving that the restraint of trade impacted consumers.[7] In dismissing the franchisee's claims, the court determined that if the franchisor asserted any "power," it arose from the franchise agreement.[8] In the court's view, therefore, even if a franchisor's vertical pricing restraints on franchisees (*e.g.*, setting specific prices for a promotion of a branded product) had some alleged impact, that likely would not be sufficient to show an impact in the entire relevant market *(i.e.*, taking into account all the substitute products that might be available to consumers from other sources).[9] In relation to vertical price restraints, the rule of reason does not presume anticompetitive effects—those must be proven, and such proof can be quite fact intensive and demanding.

4.2 *Rule of Reason*

Additionally, in the realm of vertical pricing restraints, as a general matter, maximum resale pricing restrictions (agreements prohibiting the reseller from charging more than X for a particular product) are viewed as of less potential concern than minimum pricing restrictions (prohibiting the reseller from charging less than X). This difference in the level of scrutiny is reflected in the history of judicial decisions on resale pricing restrictions. More than one hundred years ago, the Supreme Court ruled in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, that vertical resale pricing restrictions were *all* per se illegal. 220 U.S. 373 (1911). (Many decades later, the Court reaffirmed that ruling in relation to maximum resale pricing restrictions in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).) But then nearly thirty years after *Albrecht*, the Court overruled it in *State Oil Co. v. Khan*, ruling unanimously that maximum resale price restrictions should be assessed under the rule of reason. 522 U.S. 3 (1997). It was still another ten years, nearly a century after *Dr. Miles*, that the Court finally overruled it in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, deciding that minimum resale pricing restrictions

[7] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d at 436.
[8] *Id.* at 443.
[9] *Id*. at 436-37.

also should be assessed under the rule of reason. 551 U.S. 877 (2007). The greater concern for minimum resale pricing restraints is also consistent with the underlying objectives of the antitrust laws to foster competition so that consumers benefit from more choices, better quality products, at *lower* prices. *See Nat'l Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232, 1242-45 (S.D. Fla. 2010) (upholding a maximum resale price restriction).

Because the rule of reason demands rigorous proof, vertical price restraints are relatively rarely challenged under federal law or the laws of almost all states.[10] There are a few states, however, where minimum resale price maintenance remains either explicitly prohibited by statute (Maryland) or it is at best unclear whether the per se standard or the rule of reason applies. (California and New York).

4.3 *State Law Considerations*

4.3(i) *Maryland*

In the wake of *Leegin*, the Maryland General Assembly passed a "*Leegin*-repealer" statute, Md. Com. Law Code Ann. § 11-204 prohibiting minimum resale price restrictions. To-date, no cases have applied that statute in the franchise context, but the statute remains good law and has been applied in other contexts. *See The Yellow Cab Co. v. Uber Techs., Inc.*, No. CIV. RDB14-2764, 2015 WL 4987653 (D. Md. Aug. 19, 2015); *Maryland v. Johnson & Johnson*, No. 02-C-002271 (Cir. Ct. Baltimore Cty. Feb. 29, 2016). In November 2023, the Chief of Maryland Attorney General's Antitrust Division disclosed that Maryland had active investigations regarding resale price maintenance. *See, e.g.,* David Hamilton, et. al, *Maryland Antitrust Enforcers Hint at Aggressive New* Action, DLA Piper (Feb. 20, 2024) https://www.dlapiper.com/en/insights/publications/2024/02/maryland-antitrust-enforcers-hint-at-aggressive-new-action.

4.3(ii) *California*

California state and federal courts have taken conflicting approaches in applying California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, to minimum resale price restrictions. In *Mailand v. Burckle*, the Supreme Court of California held that a resale price maintenance agreement between entities at different distribution levels was a per se violation of California law. 20 Cal. 3d 367 (Cal. 1978). Of course, that approach was consistent with federal precedent at the time. Since the 2007 U.S. Supreme Court's *Leegin* decision, the California Supreme Court has not had occasion to revisit *Mailand*, and some lower courts in California continue to follow it. *See Alan Darush MD APC v. Revision LP*, No. CV 12-10296 GAF AGRX, 2013 WL 1749539 (C.D. Cal. Apr. 10, 2013); *Alsheikh v. Superior Ct.*, No. B249822, 2013 WL 5530508 (Cal. Ct. App. Oct. 7, 2013); *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1195 (2013). Other decisions cast doubt on whether the per se approach in *Mailand* would still apply in light of *Leegin*. *See*

[10] That is not to say there are no challenges to vertical pricing restraints. An exception, for example, is a case concerning alleged vertical restraints between delivery platforms and restaurants called "no price competition clauses" prohibiting restaurants from offering the same menu items directly to consumers or on other restaurant platforms at a price lower than the price charged on the defendant's platform. *See Davitashvili v. Grubhub Inc.*, Case No. 1:20-cv-3000 (S.D.N.Y.)

Kaewsawang v. Sara Lee Fresh, Inc., No. BC360109, 2013 WL 3214439 (Cal. Super. May 06, 2013); *see also In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig*., No. 3:12-CV-3515-B, 2014 WL 5460450 (N.D. Tex. Oct. 27, 2014) ("Lower courts have diverged on this issue [of RPM] following *Leegin*, leaving the law in California unclear.").

4.3(iii) *New York*

New York law relating to resale price maintenance agreements is also somewhat unclear. In *New York v. Herman Miller, Inc.*, New York's Attorney General took the position that resale price maintenance was per se illegal under New York General Business Law § 369-a. No. 08 CV-02977 (S.D.N.Y. Mar. 25, 2008). The court did not rule on the issue, as the case settled with a Consent Decree. However, other courts, ruling on claims under that statute, have rejected the per se approach, *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, No. 10 CIV. 3205 BSJ, 2011 WL 2565284 (S.D.N.Y. June 22, 2011), or have found that resale price restraints are unenforceable and not actionable, but not illegal. *People ex rel. State v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (Sup. Ct. 2011). *See also Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10 CIV. 7781 NRB, 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011) (noting, without deciding the issue, that "the accepted standard for evaluating most Donnelly Act claims is the rule of reason.").

4.4 *Horizontal Restraints*

In contrast to vertical price restraints, horizontal price restraints are fraught with antitrust risk. In addition to outright price fixing agreements between horizontal competitors, which have long been considered among the categories of conduct subject to per se liability or even criminal penalties, several variations of such horizontal agreements also may be presumed anticompetitive. For example, there are "hub and spoke" conspiracies, in which a vertically related party acts as a facilitator or coordinator of a conspiracy among a number of horizontal competitors. *See, e.g., Toys "R" Us, Inc. v. FTC*, 221 F. 3d 928 (7th Cir. 2000); *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), cert. denied, No. 15-565, 2016 WL 854227 (Mar. 7, 2016) (mem.). Similarly, in some cases, third parties such as trade associations, industry groups and entities that aggregate and disseminate industry statistical information have been subject to scrutiny for allegedly facilitating collusion among horizontal competitors.

Recently, as technology advances, governmental enforcers and legislators focus increasingly on the use of algorithmic tools and artificial intelligence as possible means by which price fixing might occur. Franchisors, mindful of the significant antitrust risk associated with horizontal competitors colluding on price, may wish to consider providing some form of guidance to franchisees on avoiding antitrust risk.[11] So, does that mean that if franchisees entered into agreements among themselves on pricing, they could be subject to the harsh per se standard? No published decisions since *American Needle* have addressed whether pricing agreements among franchisees might constitute

[11] If they do provide such guidance, franchisors should also consider making clear that they are not providing legal advice, and that franchisees should consult their own counsel if they have specific concerns.

horizontal price fixing, such that they are subject to per se liability. Accordingly, one cannot say with absolute assurance that such agreements might not be challenged on that basis.[12] The prudent approach would be to avoid agreements on price among franchisees and for any pricing agreements to run only vertically from franchisor to franchisees.

There are also circumstances in which even horizontal competitors may collaborate in a procompetitive way that would be subject to the rule of reason, even with regards to conduct that otherwise would be considered per se unlawful. This involves the doctrine of "ancillary restraints," a subject that is highly fact intensive and legally nuanced. In essence though, to qualify for rule of reason treatment, the restriction must be subordinate to and reasonably necessary for the collaboration. *See, e.g., Aya Healthcare Services, Inc. v. AMN Healthcare, Inc*., 9 F.4th 102 (9th Cir. 2021) [13]; *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). Whether the facts surrounding the conduct of any particular franchise stakeholders would qualify under the doctrine of ancillary restraints is too fact-specific to address here.

5. Franchisor Pricing Strategies

5.1 *Franchise Disclosure Document, Item 16*

Franchisors are required to provide prospective franchisees with a franchise disclosure document ("FDD") that complies with the Federal Trade Commission Franchise Rule ("Franchise Rule").[14] As stated in the Franchise Rule summary, its purpose is to give "prospective purchasers of franchises the material information they need in order to weigh the risks and benefits of such an investment".[15] All franchisors intending to offer its franchise to prospects must disclose twenty-three specific items.[16] Item 16 conveys to franchisees how and under what conditions the franchisor may restrict the franchisees' sales of goods and services:

> ***Item 16****: Restrictions on What the Franchisee May Sell. Disclose any franchisor-imposed restrictions or conditions on the goods or services that the franchisee may sell or that limit access to customers, including:*
> *(1) Any obligation on the franchisee to sell only goods or services approved by the franchisor.*

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[12] Even though pricing agreements between a *franchisor* with units and an independently owned competing franchisee also might be characterized as "horizontal," that arrangement bears similarity to so-called "dual distribution" circumstances (where a manufacturer markets its product itself and also through independent outlets), which are usually reviewed under the rule of reason. *See, e.g.,* Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1605a (4th and 5th ed. 2015-2021). Such arrangements are typically judged under the rule of reason, because the restraints generally "serve legitimate purposes without harming market competition."

[13] One of the authors of this paper, David Bamberger, represented AMN Healthcare, Inc. in this case.

[14] 16 C.F.R. §§ 436 and 437 (2007).

[15] Franchise Rule, Rule Summary, available at https://www.ftc.gov/legal-library/browse/rules/franchise-rule (last visited Feb. 22, 2025).

[16] 16 C.F.R. §436.4 (2007).

(2) Any obligation on the franchisee to sell all goods or services authorized by the franchisor.
(3) Whether the franchisor has the right to change the types of authorized goods or services and whether there are limits on the franchisor's right to make changes.[17]

If the franchisor requires its franchisees to comply with minimum, maximum, and other pricing policies established by the franchisor for products, services, or promotions, those provisions are most commonly found in Item 16.

Some franchisors provide a rather general statement, to the effect that the franchisor reserves the right, to the extent permitted by applicable law, to establish the prices at which the franchisee must offer and sell products and services.[18] Other franchisors, however, include a more detailed disclosure, relating to their ability to (1) set maximum or minimum prices that may be charged for products and services; (2) set a specific price; and (3) require their franchisees to comply with advertising policies, which may prohibit the franchisees from advertising any price for a product or service that is different than the franchisor's suggested retail price.[19]

5.2 *Franchise Agreement*

The Franchise Rule, Item 22 requires franchisors to include "a copy of all proposed agreements relating to the franchise offering that the franchisor provides or for which the franchisor makes arrangements", including the franchise agreement and other commonly used templated agreements such as leases, lease riders, financing documents, and guarantees.[20] In the template franchise agreement, franchisors with pricing policies often include those terms in the franchisee obligations section and may then cross reference that section with the default and termination section. Interestingly, as seen *supra* and in the Appendix, franchisors' approaches to drafting these clauses vary substantially.

5.2(i) *Franchise Agreements May Explicitly Require Franchisees to Follow Pricing Strategies and Participate in Price Point Promotions*

Franchise agreement clauses that require franchisees to follow pricing strategies often include the phrase "unless prohibited by applicable law" or similar.[21] By including this phrase, franchisors allow themselves the flexibility to not enforce this franchise agreement term if case law or state or federal law evolves over the duration of the franchise agreement, or they wish to vary their enforcement approach toward non-compliant franchisees located in states such as Maryland, New York, and California, which are perceived as higher risk due to those state's antitrust laws. Some franchisors

[17] 16 C.F.R. §436.5 (2007).
[18] Samples of Item 16 disclosures are found in the Appendix.
[19] *Id*.
[20] *See* Federal Trade Commission, Franchise Rule Compliance Guide, 116 (2008), available at https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf (last visited Feb. 23, 2025).
[21] Samples of franchise agreement clauses are found in the Appendix.

go as far as to state that changes in antitrust risk may extinguish the franchisee's obligation to comply with franchisor established pricing. For example, franchisors may reserve the right to change or eliminate their pricing program in the future to be consistent with changes to state or federal law and to move from a required to a recommended pricing structure.[22]

If included as a clause in the franchise agreement, the franchisor typically grants itself the right to (1) set a maximum or minimum price that the franchisee charges for products and services; (2) designate that the maximum and minimum prices for the same product or service may be the same (i.e., setting a specific price point); and (3) require franchisees to comply with an advertising policy adopted by the franchisor prohibiting the franchisee from advertising any price for a product or service that is different than the franchisor's suggested retail price.[23]

5.2(ii) *Default Provisions*

Item 17 of the FDD lists more than twenty important provisions of the franchise agreement, including those that may lead to the franchisor's right to terminate the franchise relationship.[24] Item 17 requires franchisors to pre-determine and disclose to prospective franchisees which defaults are non-curable, and which are curable. Yet, among the sampled FDDs' Item 17, franchisors did not specifically list the franchisee's failure to abide by franchisor established pricing or its advertising polices as either a curable or non-curable default, even though those defaults were, in some instances, specifically included in the template franchise agreement. The franchise agreement and what was disclosed in Item 17 should be consistent.

In the franchise agreement, franchisors list which defaults allow them to immediately terminate the franchise agreement and which defaults are curable and will only lead to termination if the franchisee fails to cure the default within a prescribed period after receiving notice. Some franchisors include the right to terminate after written notice, using a non-specific "catch-all" default language such as the franchisee's failure to maintain brand standards or failure to comply with material terms, while others call out the default specifically (i.e., "termination if Franchisee knowingly fails to comply with the pricing established by Franchisor for menu items, promotions, and services offered by the Store, to the extent allowed by applicable law").[25] If the failure to follow advertising and pricing policies are only included in the "catch- all" default provision, then there is no need to enumerate it in Item 17. However, if the default is specifically called out (see, example *infra*.), then the franchisor may want to include in Item 17.

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[22] Portion of a sample franchise agreement clause: "Consistent with state or federal law, Franchisor reserves the right to change or eliminate its pricing program in the future, or to move from a required to recommended pricing structure." *See*, Appendix.
[23] *See*, Appendix.
[24] 16 C.F.R. §436.5(q) (2007).
[25] *See*, Appendix.

5.3 *Franchisor Policies to Support Pricing Strategy*

5.3(i) *Operations Manual or Standalone Marketing Policy*

In addition to the franchisor's required disclosure to franchise prospects in the FDD and inclusion of clauses in the franchise agreement, the Operations Manual or standalone marketing policy gives franchisors another opportunity to provide pricing guidance to franchisees. Stating pricing and advertising policies in any of these documents is necessary for three reasons. First, the Franchise Rule requires the FDD and its templated franchise agreement to be renewed at least annually. During the renewal process, franchisors tend to modify franchise agreement provisions. If franchisors were to express their advertising policies and pricing strategies solely in the franchise agreement, then franchisees may be bound by different franchise agreement terms, making compliance across the brand difficult, if not impossible. Second, the duration of most franchise agreements is lengthy, often ten or more years. What worked well for a franchise brand ten years ago has likely changed, and franchisors need flexibility to adjust their policies as their franchise system evolves or to meet current market needs. Third, although franchisors advertising maximum or specific price points for their products or services seemingly have little concern for running afoul of antitrust laws; by pushing pricing and advertising strategies to the Operations Manual or to an advertising policy (or both), franchisors maintain flexibility if the antitrust risk changes.

Franchisors establish the franchisee's obligation to comply these standalone policies through a cross-reference to such policies within the franchise agreement (e.g., "[the] requirement to comply with **the advertising policy adopted by the franchisor** prohibits the franchisee from advertising any price for a product or service that is different than franchisor's suggested retail price").[26] Franchisors regularly update their policies and Operation Manuals, making it a convenient way to implement changes affecting all franchisees, regardless of when they signed the franchise agreement and what language was included in their particular version. By utilizing this approach, franchisors may alter their policies on an "as needed" basis and may encounter less difficulty in enforcing compliance if required to do so.

5.3(ii) *Waivers or variances*

Franchise agreements regularly include "no waiver" clauses, which state, in essence, that the failure of either party to enforce a contract term in one instance does not affect the ability to enforce that term in the future. However, franchisors need to be able to implement systemwide changes or to allow for an exception to certain terms or policies. For example, franchisors often reserve the right to make certain types of unilateral changes binding the franchisee without the need for both parties signing an amendment. Note a sample clause found in a food and beverage brand's franchise agreement:

> "**Except for those permitted to be made unilaterally by Franchisor hereunder**, no amendment, change, or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by

[26] *Id.*

their authorized officers or agents in writing shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing."[27]

Franchisors also allow waivers or variances from advertising and marketing policies due to specific circumstances (e.g., when compliance is impossible in certain non-traditional venues or if external forces, such as higher wages or rents, may result in higher price points in certain regions). Additionally, the statement "[p]rice and participation may vary" is found in most advertising disclaimers, signaling to consumers that not all franchise outlets will honor the promotion. While this disclaimer may be commonplace, some franchisors advise consumers whether certain franchises are participating or not by doing one or more of the following: (1) allowing consumers to access a list of participating locations through the use of an interactive map or geo-location technology; (2) stating that prices are higher in certain markets (e.g., "prices higher in California"); or (3) pushing out specific offers to certain markets at varying price points (e.g., creating separate materials with a different price for higher priced markets).

5.4 *Other Stakeholders*

5.4 (i) *Advertising Cooperatives*

Antitrust issues may arise in several additional ways. Franchise systems may have a regional or national advertising or marketing cooperative comprised of franchisee and franchisor representatives. Assuming that the franchisor is involved in the cooperative in its role as franchisor (and not as an owner of franchise units), the relationship between the franchisor and franchisees properly should be viewed as vertical and, pursuant to *Leegin*, the cooperative's actions likely would not be challenged and would not be unlawful without proof of anticompetitive effects under the rule of reason. However, because independent franchisees could be viewed under some circumstances as horizontal competitors, it would be prudent for participants to avoid any actions that potentially could be characterized as a "hub and spoke" arrangement (i.e., a vertically related party such as the franchisor acting as a coordinator of pricing agreements among the franchisees.[28]

5.4 (ii) *Franchisee Association or Franchise Advisory Council*

Many franchise systems either have a franchisee association, established as an independent entity, funded through dues and governed by an elected representative body or a franchise advisory council, funded by the franchisor and comprised of franchisees appointed by the franchisor.[29] Oftentimes, ahead of making the final decision or rolling out a new initiative, the franchisor will seek feedback on a proposed marketing initiative or pricing strategy. As long as the franchisor remains the decisionmaker setting the

[27] *Id.* (Emphasis added.)
[28] Section 4.4*, infra*.
[29] Andrew Beilfuss, Ronald K. Gardner, Eric Karp, Brenda Trickey & Kate Ward, *Multiple Voices at the Table – Effective Franchisee Associations and Franchise Advisory Counsel*, ABA 47th ANNUAL FORUM ON FRANCHISING at 2 (October 16-18, 2024).

pricing for its franchisees then vertical restraint analysis under the rule of reason should apply.

However, what if the franchisee association discusses pricing strategies among its members? Such discussions carry with it a higher level of antitrust risk. As noted in Section 3.4 *infra.*, franchisee communications among their peers may give rise to heightened scrutiny and therefore it is important for franchisees to be aware of the rules around communications relating to pricing and scrupulously avoid exchanging competitively sensitive pricing information. Some best practices include (a) setting an agenda ahead of each meeting to limit the possibility that such discussions could arise, (b) maintenance of meeting notes, (c) halting any improper discussions around pricing strategy, and (d) seeking advice of counsel if issues arise.

6. National Pricing Promotions

How do the various approaches taken by franchisors in the FDD, franchise agreement, and the Operations Manual or standalone policy play out when the franchised brand runs national or regional promotions in which franchisees are expected to sell their products or services at a specified price or at a maximum price?

6.1 *Franchisors Explicitly Require Franchisee Compliance*

As noted above, many franchise agreements explicitly require franchisees to comply with such pricing policies. Under federal law and the laws of most states, the rule of reason would apply to such vertical restraints, and ordinarily, no single franchise system would have sufficient market power to create substantial anticompetitive effects in a relevant market. That is not to say that vertical price restraints within a single franchise system are per se *lawful*, but the likelihood that an analysis under the rule of reason would result in finding an antitrust violation is likely low. [30]

Under federal law, requiring franchisees to comply with national promotional pricing is not likely to raise any significant antitrust concerns, for a number of reasons. First, such a promotion likely would specify a maximum price, and, as a general matter, there is far less concern with the potential for anticompetitive impact of maximum pricing restraints. Antitrust laws are intended to benefit consumers, such as by keeping prices low. *See generally, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (low prices, even prices below cost, are beneficial and not of concern unless they are part of a longer-term plan for driving competition out of the market). Second, the primary concern of antitrust law is to protect inter-brand competition. *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). Requiring franchisees to participate in a national pricing promotion enhances inter-brand competition (the franchise's competition against other brands) and thereby serves a procompetitive purpose. Finally, even if a vertical requirement to abide by a national pricing promotion had some potential

[30] If an independently owned franchisee refuses to comply with the national or regional promotional price, the dispute likely would be resolved according to the franchise agreement's contractual terms and probably would not implicate serious antitrust concerns. Even so, it would be prudent to consult with antitrust counsel as to any contemplated enforcement measures, especially if they are not specifically provided for under the relevant agreement.

for anticompetitive effects, most franchise systems would not have sufficient power in any plausible relevant market to raise significant antitrust concerns.

6.2 *Variances and Exceptions*

6.2(i) *States with Per Se Laws May Require a Different Approach*

However, some circumstances may call for careful handling. First, as noted previously, a few states either retain the per se approach for minimum resale price restrictions, or their law is unclear in that regard. A directive to franchisees in those states to charge specific promotional pricing could have higher antitrust risk than in most other parts of the country, as it could be interpreted as establishing a minimum price. Franchisors may want to consider taking a "softer" approach in those states, merely suggesting a resale price rather than enforcing compliance with the specific price. The franchisor lawfully may provide persuasive reasons to franchisees to participate in the promotion, but it should be careful in those states that their efforts do not cross the line and take the form of coercion or threats. Additionally, the franchisor might offer incentives for participating (*e.g.*, including mention of stores in advertising about the promotion, or listing them as "participating locations"). The franchisor also should make clear that franchisees in those states are required only not to exceed the promotional price and are free to charge less if they choose. As previously noted, restraints on maximum pricing have not been viewed in recent decades as a source of significant antitrust concern.

6.2(ii) *Franchisors Must Account for Granted Variances*

It has also become more common in recent years for franchisees to request variances from national promotional pricing programs due to the higher cost structure in certain parts of the country. For example, the minimum wage in California is higher than in many other states. Other costs and general overhead also may be higher in large cities than in rural areas. If franchisees in such higher-cost locales seek variances from the national pricing programs (to allow them to charge prices above the promotional level), the franchisor will have to decide whether to grant the variances, which could have impacts on such things as marketing strategies and advertising. The fact that the franchisor may have a contractual right in the franchise agreement to set franchisee pricing does not immunize the franchisor from the applicable federal and state antitrust laws or prohibit it from making exceptions. However, in granting variances, franchisors should determine and articulate an objective standard and carefully track any waivers to ensure that they do not run afoul of franchise relationship laws. [31] Some states such as Connecticut, Hawaii, Illinois, Minnesota and Washington have laws "that specifically prohibit discrimination between franchisees in the charges offered and made for royalties, goods, services, equipment, rentals, advertising services or in any other business dealings (except for Illinois), unless there is a reasonable and non-arbitrary distinction for

[31] Several states, including Arkansas, Connecticut, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Washington, and Wisconsin, have so called relationship laws that may require franchisors to avoid treating franchisees in a discriminatory fashion.

doing so."[32] As long as the treatment is fair (e.g., not arbitrary and capricious) and based on business objectives, franchisors will be able to grant variances within the bounds of state relationship laws.[33]

If the franchisor denies the variance request and insists on compliance with the national or regional pricing program and perhaps considers contractual sanctions for failure to comply, what is the risk that the action would be found unlawful? Again, maximum resale pricing restraints have not been viewed as a source of substantial antitrust concern so there seems little antitrust exposure, but enforcement of the promotional pricing still could generate contractual disputes. As a practical matter, franchisors may be reluctant to exercise their enforcement rights, particularly if a significant number of franchisees refuse to participate in the promotion or offer the product at a different price than what is advertised. Instead, franchisors regularly employ several strategies, both formal (e.g., consultation with the franchisee advisory council) and informal (e.g., notice of upcoming promotions in marketing newsletters), to ensure alignment ahead of a national or regional launch.

6.3 *Consumer Protection Matters*

6.3(i) *The Federal and State Consumer Protection Laws*

Federal and state antitrust laws are not the only laws relating to pricing that franchisors and franchisees must consider. The Bureau of Consumer Protection of the Federal Trade Commission has broad authority to address unfair, deceptive and fraudulent business practices by conducting investigations, suing companies and persons that break the law, and promulgating rules to maintain a fair marketplace. Additionally, there are statutory and common law grounds under the laws of the various states to address business practices that are believed to be unfair or deceptive. Many states have some variant of a statutory Deceptive and Unfair Trade Practices Act. Some states have a panoply of legal remedies available for allegedly improper pricing practices. For example, there are multiple statutory and common law grounds on which claims of false advertising may be brought under California law, such as the Unfair Competition Law, the False Advertising Law, the Consumer Legal Remedies Act or the common laws of fraud or negligent misrepresentation. The analysis under all of these laws would be too detailed to address here and, in any event, are fact-specific. But in general, the issue is whether members of the public are likely to be deceived by the advertising, as adjudged through the eyes of a "reasonable consumer." *See, e.g., Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125 (2020).

6.3(ii) *Prohibitions Against Unfair and Deceptive Practices*

Franchisors that permit some franchisees to deviate from national or regional pricing promotions need to be mindful of the laws prohibiting unfair or deceptive practices. For example, if advertising or promotional material announces promotional pricing on a regional or national basis but certain franchisees will not participate, there should be a

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[32] *See* Jeffery S. Haff, Kevin Moran &Roger Schmidt, *Differential Treatment of Franchisees in Tough Economic Times*, ABA 34th ANNUAL FORUM ON FRANCHISING, at 20 (2011).

[33] *Id.*

clear disclaimer in the advertising and promotional material that the promotion pricing is offered only at participating locations. Depending on the circumstances, there could be additional measures considered, but the key is sufficient disclosure that reasonable consumers will not be misled.

There are a variety of pricing practices that could raise questions under consumer protection laws, such as bait-and-switch,[34] strike-through pricing[35] and price gouging. In recent years, technological advances have created an ability for companies to employ so-called "surge pricing," although it does not appear that legal challenges to that practice have been particularly successful so far. *See Meyer v. Kalanick*, 477 F. Supp. 3d 52 (S.D.N.Y. 2020) (refusing to vacate arbitration award in favor of Uber, where plaintiff sought declaratory and injunctive relief under the Sherman Act and New York's Donnelly Act to prohibit Uber from using surge pricing.); *Malden Transportation, Inc. v. Uber Techs., Inc.*, 404 F. Supp. 3d 404 (D. Mass. 2019) (Uber's use of surge pricing was not an extreme or egregious wrong, as required to prove unfair competition under Massachusetts statutory and common law.) It should be noted, however, that there has been increasing governmental focus on issues surrounding algorithmic pricing tools, and the law continues to develop in this area.[36]

6.3(iii) *Predatory Pricing*

It is a common misunderstanding that any price below cost constitutes unlawful predatory pricing. Although there can be differences between federal law and some states' laws, predatory pricing generally requires more than just below-cost pricing. Under federal law, claims for predatory pricing (pricing below an applicable measure of cost) are no longer common since the Supreme Court's decision in *Brooke Group, supra.* There, the Court ruled that, under the Sherman Act, a plaintiff must prove not only that the defendant charged prices below cost but also that there is a dangerous probability that the defendant will be able to recoup its investment in below-cost pricing in the form of monopoly profits at a later date. The Supreme Court's rationale for establishing such a high bar for predatory pricing claims was that lowering prices is actually a way of *stimulating* competition, and the courts are loathe to chill such *procompetitive* behavior on the basis of what may be mistaken inferences based solely on price levels.

Not all states have minimum pricing statutes, but of those that do, many follow the federal precedent. Others require a showing that the below-cost pricing was implemented with an intent to injure competitors. In California, for example, the Unfair Practices Act ("UPA") requires proof that below-cost pricing was undertaken *for the purpose* of injuring competitors or destroying competition (i.e., not just with knowledge of the pricing's likely effect) and that it resulted in a competitive injury. Although California's UPA does not require a showing of a dangerous probability of recoupment, this required showing of

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[34] *See, e.g., Veera v. Banana Republic, LLC*, 6 Cal. App. 5th 907 (2017).

[35] For example, when comparing a reduced price to a former price in California, the former price must have been the prevailing market price for the item within the immediately preceding three months. Cal. Bus. & Prof. Code § 17501.

[36] In February 2025, Senator Amy Klobuchar re-introduced a bill, The Preventing Algorithmic Collusion Act, S.232, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/senate-bill/232, aimed at "prohibiting the use of pricing algorithms that can facilitate collusion through the use of nonpublic competitor data." The DOJ and various states also have brought civil enforcement actions against companies for allegedly using pricing algorithms to raise prices above competitive level we expect s. *See, e.g., United States, et al. v. Real Page, Inc.*, Case No. 1:24-cv-00710 (M.D. N.C.).

intent under the laws of California and certain other states can pose a challenge for plaintiffs pursuing these claims. *See, e.g.*, *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999) (UPA makes it unlawful to sell below cost only "for the purpose of injuring competitors or destroying competition." Dismissing case when such a purpose was not shown.).

7. What May Be Over the Horizon

There are at least two areas in which federal and state enforcers are actively considering further measures to combat pricing practices enabled by technological advances. First, as previously noted, enforcers are laser focused on the increasing use of algorithmic tools that can "recommend" price levels for goods and services. The DOJ's Antitrust Division has made clear that collusion by technological means will not be tolerated any more than collusion in the traditional sense. *See, e.g., United States, et al. v. Agri Stats, Inc.*, Civil No. 23-3009 (D. Minn.); *United States v. Real Page, Inc.*, *supra*; *In re: RealPage, Rental Software Antitrust Litig. (No. II)*, 3:23-md-03071 (M.D. Tenn.) (DOJ Statement of Interest, Doc. 628 (Nov. 15, 2023); *see also* [former FTC Commissioner] Maureen K. Ohlhausen, *Should We Fear the Things That Go Bump In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing* at 10 (May 23, 2017) (noting that it makes no difference if confidential information is shared by use of an algorithm rather than by "a guy named Bob."). Despite the recent change in administrations in Washington, the government's interest in the potential use of algorithms to facilitate collusive pricing is expected to remain strong.

A second focus of intense interest for government enforcers as a result of recent technological developments is the area of "surveillance pricing," by which companies collect online data about consumers' demographics, locations, past interactions with sellers, browser histories, etc., all with the purpose of adjusting prices for individual consumers or groups. In mid-2024, the FTC began an investigation of this practice, and recently appointed FTC Chair Andrew Ferguson has committed to providing a final report when the investigation is concluded. Depending on how such practices are implemented, they also could generate issues for resolution under state laws that prohibit deceptive, misleading or unfair pricing practices.

8. Conclusion

It would be convenient if the law surrounding pricing in the context of franchise systems could be boiled down to a simple list of "Dos and Don'ts." Unfortunately, that is not feasible. We have discussed the few such straightforward rules, but a combination of factors often requires a more nuanced analysis. Depending on the specific factual circumstances, the franchising model itself can implicate antitrust doctrines dealing with both vertical and horizontal competitive effects, and this may generate legal disputes about the proper standard for assessing antitrust risk. Moreover, the applicable substantive law in relation to pricing has evolved in important ways in recent years, as a result of decisions like *Leegin* and *American Needle*. Advances in technology, including the use of algorithms and artificial intelligence in determining pricing, are adding a further level of complexity for the courts, legal practitioners and enforcers to understand and grapple with. We hope that the foregoing discussion at least will be helpful in providing a

useful framework for appreciating when and to what extent particular pricing practices may implicate significant legal risk.

Biographies

David H. Bamberger practices antitrust law in the Washington, D.C. office of DLA Piper LLP. He has litigated in numerous federal and state courts around the country for more than 40 years, having tried scores of cases and argued in many appellate courts, including the Supreme Court of the United States. He regularly counsels clients in a variety of industries on antitrust and trade regulation matters and frequently advises franchising stakeholders on federal and state law pricing issues.

Kristin L. Corcoran has broad commercial, transactional, and litigation experience and has practiced franchise law for over 25 years. She is currently Chief Legal Counsel for Marco's Franchising, LLC. In her previous role with DLA Piper and as co-founder of Appleby & Corcoran, LLC, Kristin provided legal advice on domestic and international franchise matters. She was previously Senior Associate General Counsel leading the international legal team for Subway restaurants, focusing on market entry, legal compliance, and supply chain management. In addition to teaching Franchise Law and the Commercial Transactions Workshop at Quinnipiac University School of Law, Kristin is on the steering committee for the International Franchise Association's Legal Symposium and is an active member of the ABA Forum on Franchising, and the ABA's International Contracts Committee.

Appendix

Excerpts from Food and Beverage, Health and Wellness, and Hospitality Brands FDDs and Franchise Agreements

Limited Service Restaurant | FDD and Franchise Agreement

FDD, Item 16

We have the right, to the extent permitted by applicable law, to establish the prices at which you must offer and sell products and services to your customers.

Franchise Agreement

Compliance with Standards. You agree to comply with all specifications, standards and operating procedures, rules, policies, and notices set forth in the Manuals, including without limitation, specifications, standards and operating procedures, rules, and notices relating to:

> The minimum, maximum, and other prices established by Franchisor for menu items, promotions, and services offered by the Store, to the extent allowed by applicable law. You expressly agree to honor all such pricing requirements by Franchisor.

With Notice and Opportunity to Cure (relevant language in **bold**)

Franchisor shall have the right, in addition to all other remedies at law or in equity or as otherwise set forth in this Agreement, to terminate this Agreement by giving written notice of termination (in the manner set forth under Section [ ] below) setting forth the nature of such default to Franchisee: (a) at least 24 hours before the effective date of termination for all defaults as a result of Franchisee's failure to remedy any defaults relating to failure to make only Approved Products in the Store, make Approved Products in strict compliance with our standards as set forth in the Manuals, provide service to customers in strict compliance with our standards as set forth in the Manuals, **or if Franchisee knowingly fails to comply with the pricing established by Franchisor for menu items, promotions, and services offered by the Store, to the extent allowed by applicable law.**

Variance.

Except for those permitted to be made unilaterally by Franchisor hereunder, no amendment, change, or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing

Sandwich Chain | FDD and Franchise Agreement

FDD, Item 16

You must offer and sell all Menu Items and perform all services we periodically require for the Restaurants. You may not offer or sell any products or perform any services we have not authorized. Our Brand Standards may regulate required and/or authorized Menu Items, Trade Secret Food Products, Branded Products, and Permitted Brands; unauthorized and prohibited food products, beverages, and services; purchase, storage, cooking, preparation, handling, and packaging procedures and techniques for Menu Items, Trade Secret Food Products, Branded Products, and Permitted Brands; and inventory requirements for Trade Secret Food Products, Branded Products, Permitted Brands, and other products and supplies so that your Restaurant operates at full capacity. We periodically may change required and/or authorized Menu Items, Trade Secret Food Products, Branded Products, and Permitted Brands. There are no limits on our right to do so. **To the extent allowed by applicable law, we may regulate the minimum, maximum, and other prices for Menu Items and services you Restaurant offers as well as pricing methods and procedures for in-store, delivery and on-line/electronic orders.**

Franchise Agreement

Franchisee agrees to operate according to Brand Standards, which may regulate any one or more of the following:

> ….**to the extent allowed by applicable law, the minimum, maximum, and other prices for Menu Items and services offered by the Restaurant as well as pricing methods and procedures for in-store, delivery, and on-line/electronic orders;**

Sandwich Chain | FDD and Franchise Agreement

Item 16

Company may periodically set a maximum or minimum price that you may charge for products and services offered by your Franchised Restaurant. If Company imposes such a maximum or minimum price for any product or service, you may charge any price for the product or service up to and including Company's designated maximum price or down to and including Company's designated minimum price. The designated maximum and minimum prices for the same product or service may, at Company's option, be the same. For any product or service for which Company does not impose a maximum or minimum price, Company may require you to comply with an advertising policy adopted by Company which will prohibit you from advertising any price for a product or service that is different than Company's suggested retail price. Although you must comply with any advertising policy that Company adopts, you will not be prohibited from

selling any product or service at a price above or below the suggested retail price unless Company imposes a maximum price or minimum price for such product or service.

Franchise Agreement

Franchisor's Operations Assistance

Unless prohibited by applicable law, **Franchisor may periodically set a maximum or minimum price that Franchisee may charge for products and services offered by Franchised Restaurants**. **If Franchisor imposes such a maximum or minimum price for any product or service, Franchisee may charge any price for the product or service up to and including Franchisor's designated maximum price or down to and including Franchisor's designated minimum price. The designated maximum and minimum prices for the same product or service may, at Franchisor's option, be the same. For any product or service for which Franchisor does not impose a maximum or minimum price, Franchisor may require Franchisee to comply with an advertising policy adopted by Franchisor which will prohibit Franchisee from advertising any price for a product or service that is different than Franchisor's suggested retail price. Although Franchisee must comply with any advertising policy Franchisor adopts, Franchisee will not be prohibited from selling any product or service at a price above or below the suggested retail price unless Franchisor imposes a maximum price or minimum price for such product or service.**

Default

This Agreement shall terminate without further action by Franchisor or notice to Franchisee if Franchisee or Franchisee's owner:

> Fails or refuses to comply with any other provision of this Agreement, or any System Standards, and does not either correct such failure within thirty (30) days or provide proof acceptable to Franchisor that it has made all reasonable efforts to correct such failure, and will continue to make all reasonable efforts to cure until a cure is effected if such failure cannot reasonably be corrected within thirty (30) days after written notice of such failure to comply is delivered to Franchisee.

Variance

Except for those changes which Franchisor may make unilaterally, consistent with this Agreement, no amendment, change or variance from this Agreement shall be binding on either party unless signed inwriting by both parties.

<u>Health and Wellness | FDD and Franchise Agreement</u>

Item 16

[No reference to pricing restrictions in Item 16.]

Franchise Agreement

Pricing. The System has developed a reputation that is based in part on affordable prices for stretch services offered by [the franchise brand] operating as part of the System. To promote a consistent consumer experience, and to maximize the value of the products and services [the franchise brand] offer, **Franchisor may, subject to Applicable Laws (defined below), require fixed maximum or minimum prices for any products or services offered by the System and Franchisee**. Franchisee is obligated to abide by the pricing established by Franchisor from time to time, unless Franchisor consents to changes in local pricing offered by Franchisee in order to (i) allow Franchisee to respond to unique, local, marketing conditions, competition, or expenses; or (ii) **comply with changes or interpretations in state or federal anti-trust laws**. **Consistent with state or federal law, Franchisor reserves the right to change or eliminate its pricing program in the future, or to move from a required to recommended pricing structure.** For any product or service for which Franchisor does not impose a maximum or minimum price, Franchisor may require Franchisee to comply with **an advertising policy** adopted by Franchisor which will prohibit Franchisee from advertising any price for a product or service that is different than Franchisor's suggested retail price. **Although Franchisee must comply with Franchisor's advertising policy, Franchisee will not be prohibited from selling any product or service at a price above or below the suggested retail price unless Franchisor imposes a maximum price or minimum price for such product or service.**

Second Sample Health and Wellness | FDD and Franchise Agreement

Item 16

We may also periodically set maximum or minimum prices for services and products that your Business offers. We may periodically change the required and/or authorized products and services, and there are no limits on our right to do so. You must promptly implement these changes and must discontinue selling any products or services that we at any time decide to disapprove in writing. Items 8, 9 and 12, as well as the Manual, provide additional information regarding your specific obligations and limitations.

Franchise Agreement

Services. You will conform to all quality and customer service standards prescribed by us in writing, provided that the standards are not specifically set for you, but are set for our entire system, or a specific region or market in which other System businesses are operating. **We may also periodically set maximum or minimum prices for services and products that your Franchised Business offers**.

Burger Chain | FDD and Franchise Agreement

Item 11

During the operation of a Restaurant we will provide the following assistance and services:…

> **Designate the maximum prices you may charge, as permitted by applicable law. (Franchise Agreement, Section [ ].**) Our designation of the maximum pricing is not a guarantee that you will achieve a specific level of sales or profitability.

Item 16

We have the right to determine the maximum prices for the goods, products and services offered from your Restaurant, as permitted by applicable law. You must comply with the prices required by us, but we make no guarantees or warranties that offering the products or merchandise at the required price will enhance your sales or profits.

Franchise Agreement

Pricing. Where permitted by applicable law, we may provide you written advice regarding the maximum prices which you may charge your customers for menu items, products and services provided or sold under the System. Any such advice, if provided, will be binding on you and you agree to comply with our pricing guidelines. Nothing contained herein shall be deemed a representation by us that if you follow such guidelines you will, in fact, generate a profit. You are obligated to inform us of all prices charged for products sold by you and to inform us of any modifications of your prices. **We may exercise rights with respect to pricing programs and products to the fullest extent permitted by then-applicable law. These rights may include (without limitation) establishing the maximum retail prices which you may charge customers for the programs or products offered and sold at your Restaurant; recommending retail prices; advertising specific retail prices for some or all programs, products or sold by your Restaurant, which prices you agree to observe (sometimes known as "price point advertising campaigns"); engaging in advertising, promotional and related programs which you must participate in and which may directly or indirectly impact your retail prices (such as "buy one, get one free"); and otherwise mandating, directly or indirectly, the maximum retail prices which your Restaurant may charge the public for the programs, products and services it offers**. We may engage in any such activity at any time throughout the term of this Agreement. Further, **we may engage in such activity only in certain geographic areas (towns, cities, states, regions) and not others, or with regard to certain subsets of franchisees and not others.** You acknowledge and agree that any maximum or other prices we establish or suggest may or may not optimize the revenues or profitability of your Restaurant. You entirely release us, our Affiliates, officers, directors, shareholders, partners, and employees, in their corporate and individual capacities and

waive any and all claims related to our establishment of prices charged at your Restaurant.

Hotel chain | FDD and Franchise Agreement

Item 16

[Item 16 – no relevant language]

Franchise Agreement

Business Operations and Brand Standards.
Rates and Reservations. You will provide your prices and rates for use in the Central Reservation System in accordance with the Brand Standards and any then-applicable loyalty program. You will (i) honor any prices, rates or discounts set by you that appear in the Central Reservation system or elsewhere; (ii) honor all reservations made through the Central Reservation System or that are otherwise confirmed; and (iii) not charge any Hotel guest a rate higher than the rate specified in such Hotel guest's reservation confirmation. You will honor all pricing and terms for any other product or service offered in connection with your Hotel.

Unless prohibited by applicable law, we may periodically set a maximum or minimum price that you may charge for Guest Rooms and other products and services offered by Brand Hotels, including terms of promotional or discount programs we may offer to guests of the Brand Hotels. If we impose such maximum or minimum price for any Guest Room or other product or service, you may charge any price for the Guest Room, product, or service up to and including our designated maximum price or down to and including our designated minimum price. The designated maximum and minimum prices for the same Guest Room rate, product or service may, at our option, be the same. For any Guest Room, product, or service for which we do not impose a maximum or minimum price, we may require you to comply with an advertising policy adopted by us which will prohibit you from advertising any price for a Guest Room, product or service that is different than our suggested retail price. Although you must comply with any advertising policy we adopt, you will not be prohibited from selling any Guest Room stay or other product or service at a price above or below the suggested retail price unless we impose a maximum price or minimum price for such product or service.