



NEWS RELEASE | **FOR IMMEDIATE RELEASE** | June 17, 2020

Notice Regarding Historical Financial Performance Representations During the COVID-19 Pandemic

Bismarck ND – The Securities Department is issuing this notice to inform franchisors and their counsel that the Department will be following the guidance recently issued by the NASAA Franchise Project Group regarding historical financial performance representations (“FPRs”) in light of the fact that the COVID-19 pandemic has significantly impacted many franchise systems.

On June 17, 2020, the NASAA Franchise Project Group posted guidance (“NASAA Guidance”) titled “Disclosing Financial Performance Representations in the time of COVID-19” on NASAA’s website.

DOWNLOAD: [Disclosing Financial Performance Representations in the Time of COVID-19](#)

The NASAA Guidance explores the question of whether franchisors can include an FPR based on historical data from franchisee or company-owned outlets from fiscal year 2019 and previous periods that predate the impact of the COVID-19 pandemic. The NASAA Guidance notes that state anti-fraud provisions impose certain disclosure requirements on franchisors. In North Dakota, N.D.C.C. § 51-19-11 makes it unlawful for any person to sell or offer to sell a franchise using a Franchise Disclosure Document (“FDD”) that contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

As the NASAA Guidance advises, those franchisors that submit FDDs that make historical FPRs based on data that predates the COVID-19 pandemic should be prepared to receive a comment from the Securities Department that asks for an explanation of why the FPR complies with federal and North Dakota requirements.

The Department also echoes the NASAA Guidance’s reminder that franchisors have an affirmative obligation under state franchise disclosure laws to continue to update all material disclosures they include in their FDDs, including FPRs. In North Dakota, N.D.C.C. § 51-19-07(6)

requires that franchisors promptly amend their registration on file with the Department if any material change in the information contained in its disclosure document should occur.

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