



Holli Sullivan
Secretary of State

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State of Indiana

Securities Division

Alex Glass
Securities Commissioner

COMPLIANCE ALERT

TO: All Franchisors and Securities Issuers Registered in the State of Indiana
FROM: Alex Glass, Securities Commissioner
DATE: April 1, 2021
RE: Risk Disclosures Related to the COVID-19 Pandemic

The Indiana Secretary of State, Securities Division (“Division”) and Securities Commissioner are issuing this compliance alert to notify registrants of the Division’s position regarding risk disclosures for product offerings that have potentially been impacted by the COVID-19 pandemic, specifically for franchise systems, and securities offerings being registered by qualification or coordination.

Background

The Division recognizes that the COVID-19 pandemic has presented unique challenges to businesses across the country, and as such, many registrants have had their operations and financial condition significantly disrupted. It is important for registrants to be transparent during this unprecedented time, and to ensure that investors are receiving true and accurate representations of a business’s financial and operational condition in the prospectus, or in the case of a franchise, franchise disclosure document (“FDD”).

Historical Financial Performance Representations (“FPR”) during COVID-19

On June 17, 2020, the NASAA Franchise Project Group posted guidance (“NASAA Guidance”) titled [“Disclosing Financial Performance Representations in the time of COVID-19”](#). The NASAA Guidance contemplates 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 Indiana, I.C. § 23-2-2.5-27 makes it unlawful to “make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of circumstances under which they are made, not misleading.”

Franchisors that submit FDDs that make historical FPRs based on data that predates the COVID-19 pandemic should be prepared to explain why the FPR complies with federal and Indiana requirements. The Division also reminds franchisors of the duty to update FDDs within thirty (30) days of any material change, as enumerated in I.C. § 23-2-2.5-13.1. It is the Division’s position, in alignment with the NASAA Guidance, that if outlets represented in an FPR have experienced material changes in financial or operational performance, the franchisor may no longer make a Historical FPR that is not updated to reflect those changes.

Amendments to Prospectus during COVID-19

For securities offerings registering by coordination under I.C. § 23-19-3-3 or by qualification under I.C. § 23-19-3-4, the Division would like to reiterate the importance of filing supplements and amendments to the prospectus as necessary, particularly material changes of financial or operational performance in lieu of the

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COVID-19 pandemic. The pandemic affected businesses and individuals nationwide, therefore it is crucial for issuers to provide up-to-date information that is both relevant and complete. Securities offerings should include a risk disclosure related to any potential impact to the offering, the industry, or the market in its entirety related to the COVID-19 pandemic. If a registrant has experienced a material financial or operational change due to the COVID-19 pandemic, the registrant should disclose such change in the prospectus, and in the risk factor section. Additionally, if the offering expects to experience any long-term impact related to the pandemic or a change in its operation because of the pandemic, such information should be included in the offering documents.

Any questions regarding this alert may be directed to securities@sos.in.gov.

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