

# United States Senate

April 30, 2020

The Honorable Joseph J. Simons  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Simons,

I write to urge the Federal Trade Commission to provide guidance to franchisors under the Franchise Rule in response to the unpredictable trajectory, scope and duration of the 2020 COVID-19 pandemic and of the global economic events taking place. I recommend the FTC makes changes to 1) Financial Performance Representations; 2) Updating Requirement and 3) Conditions on Pandemic Relief.

## **1. Financial Performance Representations Must be Timely.**

Because of the uncertainty caused by the pandemic, it is not possible to have a reasonable basis for a Financial Performance Representation as required by the Rule. Historically based Financial Performance Representations are already known to be unreliable and misleading. I believe that any Financial Performance Representation will be outdated and thus, inaccurate. I recommend that a franchisor that elects to provide a Financial Performance Representation in its Franchise Disclosure Document must expressly assume the burden of proving that it has a reasonable basis founded on historic performance. The franchisor must specifically state, in a new stand-alone second paragraph of Item 19, that, in arriving at the representations contained in Item 19, it has considered the effects of both the COVID-19 pandemic and the global economic conditions and that it assumes the burden of proving that the representations have a reasonable basis under the circumstances. No part of the FDD, including any documents required to be signed by the prospective franchisee, shall contain any limitation of the franchisee's right to rely on said Financial Performance Representation(s).

## **2. Require Quarterly Updating Requirement.**

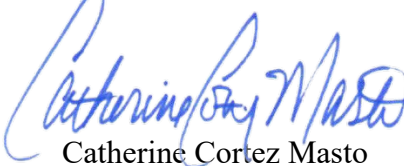
Franchisors should be reminded of the obligation to update the FDD quarterly as to any material changes and to notify the prospective franchisee at the time of delivering the FDD of any material change in any Financial Performance Information contained in the FDD. Of course, the Rule's updating requirements apply to the entire FDD, specifically including Item 21 (financial condition of the franchisor), although Item 21 updates need not be audited. Franchisors should also remember that many state franchise statutes have more strict updating requirements than does the FTC.

### 3. Conditions on Pandemic Relief

The Commission should find that it would be an unfair act or practice and thus a violation of Section 5 of the FTC Act (15 U.S.C. §45) for any franchisor to condition any form of relief (including, but not limited to, fee reduction, fee deferrals, deferrals for required store upgrades, etc.) granted to a franchisee on account of the COVID-19 pandemic or the related economic downturn on the franchisee agreeing to material changes in the franchise agreement, operating contract or on a general release of claims.

Thank you for considering my request for the FTC to proactively protect current and future franchise owners from inaccurate and outdated information as well as coerced acceptance of contract changes. I look forward to a response from the FTC by May 29, 2020.

Sincerely,



Catherine Cortez Masto  
United States Senator

CC:

The Honorable Noah Joshua Phillips, Commissioner  
The Honorable Rohit Chopra, Commissioner  
The Honorable Rebecca Kelly Slaughter, Commissioner  
The Honorable Christine S. Wilson, Commissioner