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COMMERCE AND TRADE

Multilevel Distribution Companies: Regulate Under Business Opportunities Act

CODE SECTIONS:	O.C.G.A. §§ 10-1-410 to -416 (amended), 10-1-417 (new), 16-12-38 (amended)
BILL NUMBER:	HB 1565
ACT NUMBER:	1453
SUMMARY:	The Act provides for regulation of multilevel distribution companies under the Business Opportunities Act.
EFFECTIVE DATE:	July 1, 1988 (O.C.G.A. § 10-1-415(c)—(d) became effective December 31, 1988.)

History

In 1973, the Georgia General Assembly first passed legislation to regulate multilevel distribution companies.¹ The legislation predated the Fair Business Practices Act of 1975 (FBPA)² which created the Office of Consumer Affairs (OCA) to regulate certain business practices.³ Because the multi-level distribution legislation was enacted before the FBPA, multi-level distribution companies were regulated primarily by the Attorney General instead of the OCA.⁴

In 1980, the General Assembly enacted legislation regulating the sale of business opportunities;⁵ the OCA administered these regulations.⁶ Be-

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1. 1973 Ga. Laws 336. The Code defines "multilevel distribution company" as:
. . . any person, firm, corporation, or other business entity which sells, distributes, or supplies for a valuable consideration goods or services through independent agents, contractors, or distributors at different levels wherein such participants may recruit other participants and wherein commissions, cross-commissions, bonuses, refunds, discounts, dividends, or other considerations in the program are or may be paid as a result of the sale of such goods or services or the recruitment, actions, or performances of additional participants. The term shall not include licensed insurance agents or insurance agencies. A multilevel distribution company which is not operating in compliance with this part shall be considered an unlawful pyramid club under Code Section 16-12-38.

O.C.G.A. § 10-1-410(6) (Supp. 1988).

2. O.C.G.A. §§ 10-1-390 to -407 (1982 & Supp. 1988), enacted by 1975 Ga. Laws 376.
3. O.C.G.A. § 10-1-395 (Supp. 1988).
4. 1973 Ga. Laws 336 (formerly found at O.C.G.A. §§ 10-1-512 to -514 (1982)).
5. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. §§ 10-1-410 to -416 (1982)).
6. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-413 (1982)). The Code

cause the two acts had similar purposes and provisions,⁷ and because the OCA is better staffed to handle complaints and required filings, the legislature incorporated the multilevel distribution provisions into the Sale of Business Opportunities Act.⁸ The merging of the acts allowed the drafters to revise the business opportunities provisions.⁹ Except for the correction of a typographical error,¹⁰ HB 1565 passed as introduced.¹¹ The bill encountered very little resistance and passed both houses of the legislature unanimously.¹²

HB 1565

The Act amends the Code by replacing the sections relating to the sale of business opportunities.¹³ The Code now combines the former Sale of Business Opportunities Act and the former Multilevel Distribution Companies Act.¹⁴

Code section 10-1-410 was amended by revising the definition of "business opportunity."¹⁵ Prior to the Act, a business opportunity was defined as "the sale or lease of, . . . any products, equipment, supplies, or services which requires a total initial payment of an amount exceeding \$500.00 for the purpose of enabling the purchaser to start a business."¹⁶ In addition,

authorizes an administrator, "appointed by the Governor," to enforce these regulations. *See* O.C.G.A. § 10-1-395(a) (Supp. 1988). The OCA is "headed by the Administrator of the Fair Business Practices Act, that exists for the protection of consumers . . . through enforcement of the [FBPA]." GA. COMP. R. & REGS. r. 122-1-.02(a) (1977).

7. For example, both statutes required filing notice of activity within the state. *Compare* 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-413 (1982)) (requiring seller of business opportunity to file disclosure statement with administration) *with* 1973 Ga. Laws 336 (formerly found at O.C.G.A. § 10-1-512 (1982)) (requiring multilevel distribution company to file notice with Secretary of State).

8. Interview with Jim Hurt, Legislative Liaison, Georgia Governor's Office of Consumer Affairs (Apr. 5, 1988) [hereinafter Hurt Interview].

9. *Id.*

10. HB 1565 (HCA), 1988 Ga. Gen. Assem.

11. *Compare* HB 1565, as introduced, 1988 Ga. Gen. Assem. *with* O.C.G.A. §§ 10-1-410 to -417 (Supp. 1988).

12. Hurt Interview, *supra* note 8. HB 1565 passed the House 137-0 and the Senate 43-0 according to roll call votes.

13. *See* O.C.G.A. §§ 10-1-410 to -417 (Supp. 1988).

14. Hurt Interview, *supra* note 8.

15. O.C.G.A. § 10-1-410(2)(A) (Supp. 1988).

16. 1984 Ga. Laws 523. Under prior law, in order to satisfy the definition of a business opportunity, the seller must have represented:

(i) That the seller or company will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, or premises neither owned nor leased by the purchaser, seller, or company;

(ii) That the seller or company will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using, in whole or in part, the supplies, services, or chattels sold to the purchaser;

the seller must have made representations regarding the placement of business fixtures, the purchase of the buyer's products, the guarantee of profit, or the provision of a sales or marketing program.¹⁷ Any business opportunity which required an initial total payment less than \$500 escaped regulation because it did not meet the primary definition of a business opportunity.¹⁸ Also, a seller could escape regulation by claiming no start-up costs while charging the purchaser for training, marketing, or sales programs.¹⁹ To close these loopholes, the initial payment limitation language was moved from the primary definition to the representation provisions concerning profit, and sales and marketing programs.²⁰

The Act regulates business opportunities in which the seller represents that a sale or marketing program will be provided "in conjunction with any agreement which requires a total initial payment" in excess of \$500.²¹ The guarantee of profit provision was changed to include opportunities which "may or will" provide income in excess of the initial investment instead of only those which "guarantee" income in excess of the initial investment.²²

The General Assembly amended the definition of "company" to include

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- (iii) That the seller or company guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller or company will refund all or part of the price paid for the business opportunity or repurchase any of the products, equipment, supplies, or chattels supplied by the seller or company, if the purchaser is dissatisfied with the business opportunity; or
 - (iv) That the company will provide a sales program or marketing program; provided, however, that this paragraph shall not apply to the sale of a marketing program made in conjunction with the licensing of a registered trademark or registered service mark.

Id.

17. *Id.*

18. Hurt Interview, *supra* note 8.

19. *Id.*

20. *Id.* The representations in Code section 10-1-410 now include:

- (iii) That, in conjunction with any agreement which requires a total initial payment of an amount exceeding \$500.00, the purchaser may or will derive income from the business opportunity which exceeds the initial payment for the business opportunity; or that the seller or company will refund all or part of the price paid for the business opportunity or repurchase any of the products, equipment, supplies, or chattels supplied by the seller or company, if the purchaser is dissatisfied with the business opportunity; or

- (iv) That the company, in conjunction with any agreement which requires a total initial payment of an amount exceeding \$500.00, will provide a sales program or marketing program; provided, however, that this paragraph shall not apply to the sale of a marketing program made in conjunction with the licensing of a registered trademark or service mark.

O.C.G.A. § 10-1-410(2)(A)(iii), (iv) (Supp. 1988).

21. O.C.G.A. § 10-1-410(2)(A)(iv) (Supp. 1988).

22. O.C.G.A. § 10-1-410(2)(A)(iii) (Supp. 1988).

both the business opportunity and the multilevel distribution company.²³ The Act also added definitions for "initial payment,"²⁴ "participant,"²⁵ "multilevel distribution company,"²⁶ "purchaser,"²⁷ "seller,"²⁸ and "agreement."²⁹

The General Assembly amended Code section 10-1-411 to require disclosure statements from multilevel distribution companies.³⁰ The Act further amends Code section 10-1-411(b)(11) relating to payments made to business opportunity sellers from escrow accounts.³¹ The amended provision allows funds to be paid out either upon compliance with the contract terms or sixty days "after the purchaser begins business."³² Prior to the Act, funds could be paid out only upon the seller's compliance with the terms of the agreement.³³ Amended Code section 10-1-411(c)³⁴ corresponds to the former business opportunities section previously found at Code section 10-1-411(b)³⁵ allowing disclosures which may be made pursuant to Federal Trade Commission regulations instead of those required under the Act.

The Act also amended Code section 10-1-412,³⁶ requiring bond, trust, or escrow accounts in some situations. Prior to the Act, Code section 10-1-412(a) provided that any bond, trust, or escrow account should favor the state.³⁷ The Act added that, although the bond or trust account favors the state, it must be for the benefit of a person injured by any violation of the Act.³⁸ The Act brings multilevel distribution companies under the bond, trust, or escrow account requirements unless the companies require

23. O.C.G.A. § 10-1-410(4) (Supp. 1988). " 'Company' means any multilevel distribution company or business opportunity company or seller." *Id.*

24. O.C.G.A. § 10-1-410(5) (Supp. 1988).

25. O.C.G.A. § 10-1-410(7) (Supp. 1988). " 'Participant' means anyone who participates at any level in a multilevel distribution company." *Id.*

26. *See supra* note 1.

27. O.C.G.A. § 10-1-410(9) (Supp. 1988). " 'Purchaser' means any person who is solicited to become obligated, or does become obligated, under any agreement." *Id.*

28. O.C.G.A. § 10-1-410(10) (Supp. 1988). " 'Seller' means any multilevel distribution company or it means any person who offers to sell to individuals any business opportunity, either directly or through any agent." *Id.*

29. O.C.G.A. § 10-1-410(1) (Supp. 1988). *See* O.C.G.A. § 10-1-410(2)(A)(iii), (iv) (Supp. 1988).

30. O.C.G.A. § 10-1-411(b) (Supp. 1988). New Code sections 10-1-411(b)(1) to -411(b)(10) correspond verbatim to the former business opportunities sections previously found at Code sections 10-1-411(a)(1) to -411(a)(10).

31. O.C.G.A. § 10-1-411(b)(11) (Supp. 1988).

32. *Id.*

33. 1980 Ga. Laws 1233.

34. O.C.G.A. § 10-1-411(c) (Supp. 1988).

35. 1980 Ga. Laws 1233.

36. O.C.G.A. § 10-1-412 (Supp. 1988).

37. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-412(a) (1982)).

38. O.C.G.A. § 10-1-412(a) (Supp. 1988).

a total initial payment of less than \$250.³⁹ The Act allows funds to be paid out of escrow sixty days after the purchaser commences operation of the business.⁴⁰

The Act amended Code section 10-1-413, which requires that multilevel distribution companies abide by the filing provisions for business opportunities.⁴¹ Prior to the Act, only multilevel distribution companies which included Georgia residents as participants were required to file notice of this fact with the Attorney General.⁴² Under the Act, every multilevel distribution company must file notice with the administrator of the OCA whenever it intends to have participants in Georgia, make agreements in Georgia, or locate its principal place of business within Georgia.⁴³ In addition to the existing filing requirements, the Act requires a disclosure statement which includes the history and business practices of the multilevel distribution company.⁴⁴ Section 10-1-413(b)—(e)(2)⁴⁵ corresponds to the former business opportunity provisions previously found at section 10-1-413(a)—(c)(2)⁴⁶ and is amended to include multilevel distribution companies.

The Act amends Code section 10-1-414, which prohibits certain conduct by sellers and multilevel distribution companies.⁴⁷ Prior to the Act, sellers were prohibited from referring to their compliance with the Act in any contact with prospective purchasers or in any advertisement.⁴⁸ The amended section proscribes both implicit and explicit representations that the state or "any department, agency, officer, or employee has reviewed, approved, sanctioned, or endorsed" the business opportunity or multilevel distribution company.⁴⁹ References which direct the purchaser to review information on file with the OCA, however, are permitted.⁵⁰ This modification prevents sellers from using compliance with the Act as an inducement to buy or to participate in multilevel distribution companies or business opportunities.⁵¹

The Act also amends Code section 10-1-415, to include multilevel distribution companies within the contract provisions for business opportunities.⁵² Every multilevel distribution company seller must provide as an

39. *Id.*

40. O.C.G.A. § 10-1-412(b) (Supp. 1988).

41. O.C.G.A. § 10-1-413 (Supp. 1988).

42. 1973 Ga. Laws 336 (formerly found at O.C.G.A. § 10-1-512 (1982)).

43. O.C.G.A. § 10-1-413(a) (Supp. 1988).

44. O.C.G.A. § 10-1-413(a)(1)—(4) (Supp. 1988).

45. O.C.G.A. § 10-1-413(b)—(e)(2) (Supp. 1988).

46. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-413(a)—(c)(2) (1982)).

47. O.C.G.A. § 10-1-414 (Supp. 1988).

48. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-414(3) (1982)).

49. O.C.G.A. § 10-1-414(3) (Supp. 1988).

50. *Id.*

51. Hurt Interview, *supra* note 8.

52. O.C.G.A. § 10-1-415 (Supp. 1988).

addendum to its contracts information regarding the type and length of training promised, the bond or trust account if one is required, cancellation rights, and the availability of information on file at the OCA.⁵³ Additionally, a participant who cancels the multilevel distribution agreement must be able to recover at least ninety percent of the initial payment, regardless of whether it was applied to goods purchased or to administrative expenses.⁵⁴ The participant cannot, however, recover shipping expenses if informed of this responsibility in the disclosure of cancellation rights.⁵⁵

The Act amends Code section 10-1-416 by deleting from the former section provisions pertaining to purchasers' remedies.⁵⁶ Section 10-1-416 now provides that each seller of a business opportunity or multilevel distribution company must notify the administrator of the OCA whenever it has entered into any agreements within the state, located its place of business within the state, or can include among its participants or purchasers a Georgia resident.⁵⁷ The notice must irrevocably appoint the Secretary of State as agent for service of process.⁵⁸ Failure to comply with these requirements results in the automatic appointment of the Secretary of State as agent.⁵⁹ The provisions regarding the manner of service of process⁶⁰ correspond to the former requirements found at O.C.G.A. § 10-1-512(c).⁶¹

The Act added purchasers' remedies in Code section 10-1-417.⁶² A purchaser of a business opportunity may void the contract if the seller engages in any conduct prohibited by the Act.⁶³ Additionally, any violation of the Act is also a violation of the Fair Business Practices Act.⁶⁴ Former provisions for injunctions,⁶⁵ equitable remedies,⁶⁶ actions by the Attorney General or the District Attorney,⁶⁷ and private action by the purchaser⁶⁸

53. O.C.G.A. § 10-1-415(c)(1)—(5) (Supp. 1988).

54. O.C.G.A. § 10-1-415(d)(1)—(2) (Supp. 1988).

55. O.C.G.A. § 10-1-415(d)(3) (Supp. 1988).

56. O.C.G.A. § 10-1-416 (Supp. 1988). The provisions deleted may be found at 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(b)—(e) (1982)) and 1973 Ga. Laws 336 (formerly found at O.C.G.A. § 10-1-513 (1982)). See O.C.G.A. § 10-1-417 (Supp. 1988).

57. O.C.G.A. § 10-1-416(a) (Supp. 1988).

58. *Id.*

59. O.C.G.A. § 10-1-416(b) (Supp. 1988).

60. O.C.G.A. § 10-1-416(c) (Supp. 1988).

61. 1973 Ga. Laws 336 (formerly found at O.C.G.A. § 10-1-512(c) (1982)).

62. O.C.G.A. § 10-1-417 (Supp. 1988).

63. O.C.G.A. § 10-1-417(a) (Supp. 1988).

64. O.C.G.A. § 10-1-417(b) (Supp. 1988). See O.C.G.A. §§ 10-1-391 to -407 (1982 & Supp. 1988) (Fair Business Practices Act of 1975).

65. 1973 Ga. Laws 336 (formerly found at O.C.G.A. § 10-1-513 (1982)) and 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(c) (1982)).

66. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(d) (1982)).

67. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(e) (1982)).

68. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(b) (1982)).

were deleted because similar remedies are available under the Fair Business Practices Act.⁶⁹

Prior to the Act, failure to comply with the business opportunities provisions could be chargeable as a felony punishable by imprisonment not to exceed five years or by a fine of not more than \$50,000, or both.⁷⁰ The Act reduces the penalty for noncompliance to a misdemeanor of a high and aggravated nature.⁷¹ However, the Act also amended this section to allow individual owners, officers, directors, or partners in business organizations to be charged if they had actual knowledge of the violation.⁷²

Section 3 of the Act amends Criminal Code section 16-12-38, relating to lotteries, chain letters, and pyramid clubs, to reflect the new Code sections pertaining to multilevel distribution companies.⁷³

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69. Hurt Interview, *supra* note 8.

70. 1980 Ga. Laws 1233 (formerly found at O.C.G.A. § 10-1-416(h) (1982)).

71. O.C.G.A. § 10-1-417(d) (Supp. 1988).

72. *Id.*

73. O.C.G.A. § 16-12-38 (Supp. 1988).