

## CHAPTER 162

## S.B. No. 1172

An Act relating to the registration and termination of registration of business opportunity sellers; to the sale, lease, transfers, or termination of certain business opportunities; and to the authority of the secretary of state; requiring certain security; amending the Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes), by amending Subdivision (2), Article 16.05; Article 16.06; Sections (b), (c), and (d), Article 16.08; and Articles 16.09 and 16.14; and by adding Subdivision (12) to Article 16.05 and new Articles 16.16 and 16.17.

*Be it enacted by the Legislature of the State of Texas:*

**SECTION 1.** Article 16.05, Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes), is amended by amending Subdivision (2) and adding Subdivision (12) to read as follows:

"(2) 'Business opportunity' means the sale or lease of any products, equipment, supplies, or services:

"(A) which are sold to the purchaser upon payment of an initial required consideration exceeding \$500 which will be used by or on behalf of the purchaser to begin a business; and

"(B) in which the seller represents that the purchaser will earn or is likely to earn a profit in excess of the initial consideration paid by the purchaser; and

"(i) that the seller will provide locations or assist the purchaser in finding locations for the use or operation of the products, equipment, supplies, or services on premises neither owned nor leased by the purchaser or seller; or

"(ii) that the seller will provide a sales, production, or marketing program; [~~provided that this subsection shall not apply to sales, production, or marketing programs offered in conjunction with a federally or Texas State registered trademark or service mark;~~] or

"(iii) that the seller will buy back or is likely to buy back any products, supplies, or equipment purchased or any product made, produced, fabricated, grown, or bred by the purchaser using in whole or in part the product, supplies, equipment, or services which were initially sold or leased or offered for sale or lease to the purchaser by the seller."

"(12) 'Marketing program' means advice or training provided to the purchaser by the seller or a person recommended by the seller, pertaining to the sale of any products, equipment, supplies, or services, and the advice or training includes but is not limited to preparing or providing:

"(A) promotional literature, brochures, pamphlets, or advertising materials;

"(B) training regarding the promotion, operation, or management of the business opportunity;

or

"(C) operational, managerial, technical, or financial guidelines or assistance."

**SECTION 2.** Article 16.06, Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes), is amended to read as follows:

"Article 5069-16.06. EXEMPTIONS. As used in this statute:

"(1) 'Business opportunity' does not include:

"(A) the sale or lease of an established and ongoing business or enterprise, whether comprised of one or more than one component businesses or enterprises, where the sale or lease represents an isolated transaction or series of transactions involving a bona fide change of ownership or control of such business or enterprise or liquidation thereof; or

“(B) any contract or agreement by which a retailer of goods or services sells the inventory of one or more ongoing leased departments to a purchaser who is granted the right to sell the goods or services within or adjoining the retail business establishment as a department or division thereof; or

“(C) transactions regulated by the Texas Motor Vehicle Commission, Texas Department of Labor and Standards, State Board of Insurance, or the Texas Real Estate Commission when engaged in by persons licensed by such agencies; or

“(D) real estate syndications; or

“(E) a sale or lease to an existing or beginning business enterprise which also sells or leases equipment, products, and supplies or performs services (1) which are not supplied by the seller and (2) which the purchaser does not utilize with the equipment, products, supplies, or services of the seller;

“(F) any contract or agreement defined as a ‘product or package franchise’ under the then current Federal Trade Commission regulations entitled *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures* (16 Code of Federal Regulations Section 436) if the franchisor complies in all material respects in the State of Texas with the disclosure requirements and prohibitions concerning franchising in such Federal Trade Commission regulations. Any alternative franchise disclosure statements permitted by the Federal Trade Commission may be used in lieu of its franchise disclosure requirements. This subsection applies provided that prior to offering for sale or selling a franchise in this state, a person files a notice with the secretary of state, along with any reasonable fee that may be charged by the secretary of state to cover the costs incurred as a result of this filing. The form of the notice shall be prescribed by the secretary of state and shall require only the name of the franchisor, the name under which the franchisor intends to do business, and the franchisor’s principal business address.

“(2) In any administrative, civil, or criminal proceeding related to this Act, the burden of proving an exemption, an exception from a definition, or an exclusion from this Act is upon the person claiming the exemption, exception, or exclusion.”

**SECTION 3.** Sections (b), (c), and (d), Article 16.08, Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon’s Texas Civil Statutes), are amended to read as follows:

“(b) Any seller who has registered as required by Section (a) of this article who does not comply with the requirements governing the updating of filings made under this article may have its registration terminated. The secretary of state may promulgate rules governing the termination of such delinquent registration, the effective dates thereof, and any grace periods.

“(c) Subject to principles of procedural due process under applicable law, no business opportunity registration shall be terminated under Section (a) of this article unless the secretary of state gives the business opportunity registrant not less than 30 days notice of its delinquency by certified mail addressed to the registered agent or to its principal place of business noted in the latest filing made under this Act.

“(d) The secretary of state may charge a reasonable fee to cover the costs incurred as a result of the filing herein required.”

**SECTION 4.** Article 16.09, Business Opportunity Act (Article 5069-16.01 et seq., Vernon’s Texas Civil Statutes), is amended to read as follows:

“Article 5069-16.09. **REQUIRED DISCLOSURE STATEMENT.** At least 10 business days prior to the time the purchaser signs a business opportunity contract or at least 10 business days prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled, in at least 12-point bold face capital letters ‘DISCLOSURES REQUIRED BY TEXAS LAW.’ Under this title shall appear the following statement in at least 10-point bold face type: ‘The State of Texas has not reviewed and does not endorse, approve, recommend, or sponsor any business opportunity. The information contained in this disclosure has not been verified by the state. If you have any questions about this investment, see an attorney before you sign a contract or agreement.’ Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

“(1) the name of the seller, whether the seller is doing business as an individual, partnership, corporation, or other business entity; the names under which the seller has done, is doing, or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with the purchasers or who takes responsibility for statements made by the seller;

“(2) the names, addresses, and titles of the seller’s officers, directors, trustees, general partners, general managers, principal executives, stockholders owning more than 20 percent of the stock shares of the seller, and any other persons charged with the responsibility for the seller’s business activities relating to the sale of business opportunities;

- “(3) the length of time the seller has:
- “(A) sold business opportunities; and
- “(B) sold business opportunities involving the products, equipment, supplies, or services currently being offered to the purchaser;
- “(4) a full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser;
- “(5) a copy of a current (not older than 13 months from date prepared) financial statement of the seller prepared according to generally accepted accounting principles, updated to reflect material changes in the seller’s financial condition;
- “(6) if training is promised by the seller, a complete description of the training, the length of training, and the cost or travel and lodging expenses of that training, which cost or expense the purchaser will be required to incur;
- “(7) if the seller promises services to be performed in connection with the placement of equipment, products, or supplies at a location, the full nature of those services as well as the nature of the agreements to be made with the owners or managers of the location where the purchaser’s equipment, product, or supplies will be placed;
- “(8) if the business opportunity seller is required to secure a bond or establish a trust account, either of the following statements:
- “(A) ‘As required by Texas law, the seller has secured a bond issued by \_\_\_\_\_, a surety company authorized to do business in this state. Before signing a contract to purchase this business opportunity, you should confirm the bond’s status with the surety company.’; or
- “(B) ‘As required by Texas law, the seller has established a trust account with \_\_\_\_\_. Before signing a contract to purchase this business opportunity, you should confirm with the bank or savings institution the current status of the trust account.’;
- “(9) if the seller is required to deliver to the purchaser the product, equipment, or supplies necessary to begin substantial operation of the business and states a definite or approximate delivery date for the same, the following statement: ‘If the seller fails to deliver the product, equipment, or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the seller in writing and cancel your contract.’;
- “(10) if the seller makes any statement concerning sales or earnings that may be made through this business opportunity, a statement disclosing:
- “(A) the total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered who to the seller’s knowledge have actually achieved sales of or received earnings in the amount or range specified, within three years prior to the date of the disclosure statement;
- “(B) the total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered within three years prior to the date of the disclosure statement;
- “(11) a statement disclosing which, if any, of the persons listed in Subdivisions (1) and (2) of this article:
- “(A) has, at any time during the previous seven fiscal years, been convicted of a felony or pleaded nolo contendere to a felony charge if the felony involved fraud, embezzlement, fraudulent conversion, or misappropriation of property;
- “(B) has, at any time during the previous seven fiscal years, been held liable in a civil action resulting in a final judgment, or has settled out of court any civil action or is a party to any civil action involving allegations of fraud, embezzlement, fraudulent conversion, or misappropriation of property or the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property or the use of unfair, unlawful, or deceptive business practices; or
- “(C) is subject to any currently effective injunction or restrictive order relating to business activity as a result of an action brought by a public agency or department; such statement shall set forth the identity and location of the court or agency, the date of conviction, judgment, or decision, the penalty imposed, the damages assessed, the terms of the settlement or the terms of the order, and the date, nature, and issuer of each such order or ruling;
- “(12) a statement disclosing who, if any, of the persons listed in Subdivisions (1) and (2) of this article at any time during the previous seven fiscal years has:
- “(A) filed in bankruptcy;
- “(B) been adjudged bankrupt;
- “(C) been reorganized due to insolvency;
- “(D) been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized, during or within one year after the period that such

person held such position in relation to such other person; if so, the name and location of the person having so filed or having been adjudged or reorganized, the date thereof, or any other material facts relating thereto, shall be set forth;

“(13) a copy of the business opportunity contract which the seller uses as a matter of course and which is to be presented to the purchaser at closing.”

**SECTION 5.** Article 16.14, Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes), is amended to read as follows:

“Article 16.14. BOND, ~~[OR]~~ TRUST ACCOUNT, OR LETTER OF CREDIT REQUIRED. If the business opportunity seller makes any of the representations set forth in Subsection (B) of Section (2) of Article 16.05 of this chapter, or otherwise represents that the buyer is assured of making a profit from the business opportunity in question, the principal seller must either have obtained a surety bond by a surety company authorized to do business in this state, ~~[or]~~ have established a trust account, or obtained an irrevocable letter of credit. The amount of the bond, ~~[or]~~ trust account, or irrevocable letter of credit, shall be in an amount not less than \$25,000. The bond, ~~[or]~~ trust account, or irrevocable letter of credit shall be in the favor of the State of Texas. Any person who is damaged by any violation of this chapter, or by the seller's breach of contract for the business opportunity sale or of any obligation arising therefrom may bring an action against the bond, ~~[or]~~ trust account, or irrevocable letter of credit to recover damages suffered; provided that the aggregate liability of the surety, ~~[or]~~ trustee, or issuer shall be only for actual damages and in no event shall exceed the amount of the bond, ~~[or]~~ trust account, or irrevocable letter of credit.”

**SECTION 6.** The Business Opportunity Act, as amended (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes), is amended by adding new Articles 16.16 and 16.17 to read as follows:

“Article 16.16. VOLUNTARY TERMINATION OF A BUSINESS OPPORTUNITY REGISTRATION. (a) The principal seller of a registered business opportunity may voluntarily terminate its registration with the secretary of state when any of the following conditions exists:

“(1) the registered business opportunity will no longer be offered in Texas;

“(2) the registered business opportunity has been changed to a point where the definition of a business opportunity set forth in Article 16.05 of this chapter no longer defines the business opportunity being offered;

“(3) the registered business opportunity now falls within one of the exemptions listed in Article 16.06 of this chapter; or

“(4) the principal seller offering the registered business opportunity has ceased to exist as a legal entity.

“(b) The secretary of state may charge a reasonable fee to cover the costs incurred as a result of the filing herein required.

“Article 16.17. ADMINISTRATIVE AUTHORITY. The secretary of state shall have the authority to promulgate rules and regulations necessary to administer and enforce this Act.”

**SECTION 7.** The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate on April 4, 1985, by the following vote: Yeas 31, Nays 0; Senate concurred in House amendment on May 13, 1985, by the following vote: Yeas 29, Nays 0; passed the House, with amendment, on May 9, 1985, by the following vote: Yeas 145, Nays 0, one present not voting.

Approved: May 24, 1985

Effective: Immediately