



Ohio Legislative Service Commission

Final Analysis

Aida S. Montano

Sub. S.B. 196

129th General Assembly
(As Passed by the General Assembly)

Sens. Wagoner, Gillmor, Seitz, Bacon, Beagle, Coley, Daniels, Eklund, Hite, Hughes, Lehner, Obhof, Oelslager, Patton

Reps. Letson, R. Adams, Blair, Buchy, Carney, Combs, Dovilla, Duffey, Fende, Gardner, Garland, Goyal, Hackett, Hall, Johnson, Kozlowski, Martin, McClain, Milkovich, Newbold, O'Brien, Scherer, Schuring, Slesnick, Wachtmann, Young, Yuko

Effective date: September 28, 2012

ACT SUMMARY

- Modifies the definition of "business opportunity plan" by raising the upper threshold for the initial payment in a plan purchase to less than \$100,000, as opposed to less than \$50,000 under former law.
- Expands the definition of "initial payment" to include more initial payment situations and promissory note situations and excludes from the definition goods or services purchased for resale or lease.
- Makes changes to the cancellation provisions of the Ohio Business Opportunity Plan Law, allows cancellation for up to 12 months if certain continuing law provisions are not fulfilled, and adds e-mail and fax to the methods for sending notice of cancellation.
- Changes certain exemptions from the Ohio Business Opportunity Plan Law.
- Adjusts the remedies available to purchasers when a seller violates the Ohio Business Opportunity Plan Law and requires that a purchaser who rescinds an agreement give the seller written notice within three years of the date of the agreement.
- Modifies the time frame within which an action for recovery may be brought under the Ohio Business Opportunity Plan Law.

- Renders any venue or choice of law provision that deprives a purchaser who is an Ohio resident of the benefit of the Ohio Business Opportunity Plan Law void and unenforceable.
- Declares that the Ohio Business Opportunity Plan Law represents a fundamental public policy for Ohio.
- Voids any provision of a business opportunity plan contract that restricts the jurisdiction or venue of a claim otherwise enforceable under the Business Opportunity Plan Law to a forum outside of Ohio.

CONTENT AND OPERATION

Changes to definitions

Business opportunity plan

The act changes the definition of "business opportunity plan." A business opportunity plan is an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under certain conditions.¹ Under former law, the purchaser was required to make an initial payment greater than \$500, but less than \$50,000 to the seller or an affiliated person to begin or maintain the plan. The act raises the upper threshold for the initial payment to less than \$100,000.²

Initial payment

The act makes changes to the definition of "initial payment." Under prior law, the definition included the total sale price of a business opportunity plan if the total sale price consisted of a down payment followed by specific monthly payments. Under the act, the definition refers to payment of the total sale price in "one or more installments" instead of a down payment followed by monthly payments. This change expands the definition of "initial payment" to include those situations where a business opportunity plan does not specify a down payment, and instead specifies installments that may be on a monthly, or other, basis.

Under former law, the definition of "initial payment" included the amount of a promissory note signed by the purchaser prior to or during the first six months after commencing operation of the business opportunity plan. The act expands this element of the definition to include the full amount of any promissory note given by a

¹ R.C. 1334.01(D).

² R.C. 1334.01(D)(2).

purchaser, or an affiliated person, to the seller, or an affiliated person, prior to or during the first six months after commencing operation of the business opportunity plan.

Finally, the act excludes from the definition of "initial payment" purchases at bona fide wholesale prices of reasonable quantities of goods or services for resale or lease.³

Cancellation

The act modifies a provision of the Ohio Business Opportunity Plan Law⁴ that allows a purchaser of a business opportunity plan to cancel an agreement selling or leasing to the purchaser a business opportunity plan. Under former law, a purchaser had the right to cancel an agreement until midnight of the fifth business day after the day on which the purchaser signed the agreement. Under the act, *if the seller complies with certain specified continuing law provisions*, the purchaser may cancel the agreement before midnight of the fifth business day after the day on which the purchaser signs the agreement. However, the act allows a purchaser to cancel an agreement any time within 12 months after the day on which the purchaser signs the agreement if the seller has failed to comply with those specified continuing law provisions.⁵ The act adds e-mail and fax to the methods by which notice of cancellation may be sent and specifies that notice sent by these methods is effective when successfully transmitted.⁶ The applicable continuing law provisions (amended to account for notice of cancellation by e-mail or fax) with which a seller must comply to limit the cancellation period to five days include all of the following:⁷

(1) The agreement must contain a notice of the purchaser's right to cancel the agreement in at least ten-point boldface type, in the following form and in close proximity to the space reserved in the agreement for the signature of the purchaser:

You, the purchaser, may cancel this transaction at any time prior to midnight of the fifth business day after the date you sign this agreement. See the attached notice of cancellation for an explanation of this right.

³ R.C. 1334.01(G).

⁴ R.C. Chapter 1334.

⁵ R.C. 1334.05(A).

⁶ R.C. 1334.05(B).

⁷ R.C. 1334.06(A)(7), (B), and (C).

(2) A completed form, in duplicate, captioned "Notice of Cancellation," must be attached to the agreement signed by the purchaser and be easily detachable and must contain in ten-point boldface type, the following statement:

Notice of cancellation

..... (Enter date of transaction)

You may cancel this transaction, without penalty or obligation, within five business days from the above date. If you cancel, any payments made by you under the agreement, and any negotiable instrument executed by you will be returned within ten business days following the seller's receipt of your cancellation notice, and any security interest arising out of the transaction will be cancelled. If you cancel, you must make available to the seller at your business address all goods delivered to you under this agreement; or you may if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of them without further obligation. If you fail to make the goods available to the seller, or if you agree to return them to the seller and fail to do so, then you remain liable for the performance of all obligations under this agreement. To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business), or send a fax to (name of seller) at (seller's facsimile number) or an e-mail to (name of seller) at (seller's electronic mail address), not later than midnight of (enter date).

I hereby cancel this transaction.

.....
(Date)

.....
(Purchaser's signature)

(3) Before furnishing copies of the notice of cancellation to the purchaser, the seller must complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the agreement, and the date of the last day on which the purchaser may cancel.

If the seller fails to comply with those continuing law provisions, the 12-month cancellation created by the act will apply. The act repeals the former law provision that allowed the purchaser, until the seller had complied with the continuing law provisions discussed immediately above, to cancel the agreement by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of the purchaser's intention to cancel. The former law provision describing when the five-day period within which the purchaser could cancel the agreement began to run is also repealed.⁸

⁸ R.C. 1334.05 and former R.C. 1334.06(D).

Exemptions

Under continuing law, specified persons or transactions are exempt from the Ohio Business Opportunity Plan Law. Former law exempted a seller who had a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than \$5 million or a net worth, according to its most recent audited financial statement, of not less than \$1 million if the seller was at least 80% owned by a corporation that had a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than \$5 million. The act increases the requirement in that exemption, in both instances, from \$5 million to \$15 million.⁹

The act removes the exemption for the sale or lease of goods or services to a purchaser who had previously been engaged, for at least one year, in the business of selling or distributing the goods or services that were the subject of the business opportunity plan, and earned from that business a gross income of at least \$25,000 in one year.¹⁰

Prior law exempted the following two types of transactions from the majority of the Ohio Business Opportunity Plan Law:

(1) Any transaction that fully complied with the trade regulation rule of the Federal Trade Commission (FTC), "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. 436.1 *et seq.*;

(2) Any transaction in which the prospective purchaser, at least ten business days before the execution of an agreement selling or leasing a business opportunity plan, received a document containing truthful, accurate, and complete disclosures that fully complied with the requirements of the "Uniform Franchise Offering Circular" adopted by the Midwest Securities Commissioners Association on September 2, 1975, and the "Guidelines for Preparation of the Uniform Franchise Offering Circular and Related Documents" adopted by the Association on July 20, 1977.

The act instead exempts any transaction that complies (as opposed to fully complies) in all material respects with the trade regulation rule of the FTC, "Disclosure Requirements and Prohibitions Concerning Franchising," 16 C.F.R. 436.1 *et seq.*, as amended from time to time, that is in effect on the date of the transaction. Additionally, the act repeals the exemption described in (2) above, and instead exempts any transaction that complies in all material respects with the trade regulation rule of the Federal Trade Commission, "Disclosure Requirements and Prohibitions Concerning

⁹ R.C. 1334.12(L).

¹⁰ R.C. 1334.12(M).

Business Opportunities," 16 C.F.R. 437.1 *et seq.*, as may be amended from time to time, that is in effect on the date of the transaction.¹¹

Remedies for violations of Ohio Business Opportunity Plan Law

Under continuing law, a purchaser of a business opportunity plan has a cause of action and may seek damages if the seller violates the Ohio Business Opportunity Plan Law. Formerly, the purchaser could seek, in an individual action, to have the transaction rescinded and, if the purchaser was found to have been damaged, three times the amount of actual damages or \$10,000, whichever was greater. In the alternative, the purchaser, in a class action civil suit, could recover damages or other appropriate relief under Civil Rule 23.¹²

The act modifies the remedies for such violations. First, to have a business opportunity plan agreement rescinded the purchaser must submit to the seller a written notice of rescission within three years of the date of the agreement. Second, the purchaser may recover all sums paid to the seller, less the fair market value, at the time of delivery, of any goods supplied by the seller that are not returned to the seller.¹³ Third, the act stipulates that the purchaser may be awarded *up to* three times the amount of actual damages incurred, as opposed to just three times the amount of damages, or \$10,000, whichever is greater.¹⁴ Fourth, the purchaser may seek relief in either *or both* an individual action and a class action.¹⁵

The act requires that, if a business opportunity plan agreement is rescinded, the purchaser must make available to the seller, at a reasonable time and place, the goods received in accordance with the plan upon receipt by the purchaser of the amounts paid for the plan less the fair market value of goods that are not returned to the seller.¹⁶

The act stipulates that a purchaser of a business opportunity plan is not entitled to unjust enrichment by exercising the rights described above.¹⁷

¹¹ R.C. 1334.13(A).

¹² R.C. 1334.09.

¹³ R.C. 1334.09(A)(1)(a).

¹⁴ R.C. 1334.09(A)(1)(b).

¹⁵ R.C. 1334.09(A).

¹⁶ R.C. 1334.09(C).

¹⁷ R.C. 1334.09(C).

Statute of limitations for recovery

Under prior law, no action under the Ohio Business Opportunity Plan Law could be brought to recover for a transaction more than five years after the occurrence of the violation. Under the act, the action may be brought no more than five years after either the occurrence of the violation or the date on which the parties executed the agreement selling or leasing the business opportunity plan, whichever is earlier.¹⁸

Public interest and waivers of Ohio law, jurisdiction, or venue

In the act, the General Assembly declares that the offer and sale of business opportunity plans is a matter affected with a public interest, that it is the intent of R.C. Chapter 1334. to protect prospective purchasers of business opportunity plans by requiring that sellers provide the purchasers with the information necessary to make an intelligent decision about the business opportunity plan being offered, and that the Ohio Business Opportunity Plan Law represents a fundamental public policy for Ohio.

The act states that any waiver by a purchaser of any venue or choice of law provision that deprives a purchaser who is an Ohio resident of the benefit of the Ohio Business Opportunity Plan Law is contrary to public policy and is void and unenforceable.¹⁹

The act voids any provision of a business opportunity plan agreement that restricts the jurisdiction or venue of a claim otherwise enforceable under the Ohio Business Opportunity Plan Law to a forum outside of Ohio. Similarly, the act voids any provision that requires the application of the laws of another state to such a claim.²⁰

HISTORY

ACTION	DATE
Introduced	07-07-11
Reported, S. Insurance, Commerce & Labor	12-08-11
Passed Senate (31-0)	01-10-12
Reported, H. Judiciary & Ethics	03-14-12
Passed House (91-0)	05-24-12
Senate concurred in House amendments (32-1)	06-12-12

12-sb196-129.docx/jc

¹⁸ R.C. 1344.10(C).

¹⁹ R.C. 1334.15.

²⁰ R.C. 1334.06(E).

