

1 SB164
2 209289-1
3 By Senator Whatley
4 RFD: Judiciary
5 First Read: 02-FEB-21

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8 SYNOPSIS: Under existing law, it is a deceptive trade
9 practice for a person to sell or offer to sell a
10 right to participate in a pyramid sales structure,
11 which are plans for the sale or distribution of
12 goods, services, or other property in which a
13 person, for consideration, acquires the opportunity
14 to receive a pecuniary benefit, which is based
15 primarily upon the inducement of additional persons
16 by that person and others, regardless of number, to
17 participate in the same plan or operation, and is
18 not primarily contingent on the volume or quantity
19 of goods, services, or other property sold or
20 distributed.

21 This bill would further provide for the
22 prohibition against pyramid sales structures by
23 excluding plans that include a bona fide inventory
24 repurchase program and would provide requirements
25 for bona fide inventory repurchase programs.

26 Amendment 621 of the Constitution of Alabama
27 of 1901, now appearing as Section 111.05 of the

1 Official ReCompilation of the Constitution of
2 Alabama of 1901, as amended, prohibits a general
3 law whose purpose or effect would be to require a
4 new or increased expenditure of local funds from
5 becoming effective with regard to a local
6 governmental entity without enactment by a 2/3 vote
7 unless: it comes within one of a number of
8 specified exceptions; it is approved by the
9 affected entity; or the Legislature appropriates
10 funds, or provides a local source of revenue, to
11 the entity for the purpose.

12 The purpose or effect of this bill would be
13 to require a new or increased expenditure of local
14 funds within the meaning of the amendment. However,
15 the bill does not require approval of a local
16 governmental entity or enactment by a 2/3 vote to
17 become effective because it comes within one of the
18 specified exceptions contained in the amendment.

19
20 A BILL
21 TO BE ENTITLED
22 AN ACT
23

24 Relating to deceptive trade practices; to amend
25 Sections 8-19-3 and 8-19-5, Code of Alabama 1975, to provide
26 further for the prohibition against pyramid sales structures;
27 and in connection therewith would have as its purpose or

1 effect the requirement of a new or increased expenditure of
2 local funds within the meaning of Amendment 621 of the
3 Constitution of Alabama of 1901, now appearing as Section
4 111.05 of the Official Recompilation of the Constitution of
5 Alabama of 1901, as amended.

6 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

7 Section 1. Sections 8-19-3 and 8-19-5, Code of
8 Alabama 1975, are amended to read as follows:

9 "§8-19-3.

10 "As used in this chapter, the following words and
11 phrases shall have the meanings hereinafter ascribed to them:

12 "(1) ATTORNEY GENERAL. The Attorney General of the
13 State of Alabama or his duly designated representatives.

14 "(2) BONA FIDE INVENTORY REPURCHASE PROGRAM. A
15 program by which an entity repurchases from a salesperson
16 current and marketable inventory in possession of the
17 salesperson, on request and on commercially reasonable terms,
18 when the salesperson's business relationship is terminated.

19 "(3) COMMERCIALY REASONABLE TERMS. The repurchase
20 of current and marketable inventory within 12 months after the
21 date of purchase at not less than 90 percent of the original
22 net cost, less appropriate set-offs and legal claims, if any.

23 "~~(2)~~ (4) CONSUMER. Any natural person who buys goods
24 or services for personal, family, or household use.

25 "(5) CURRENT AND MARKETABLE. The term does not
26 include inventory to which any of the following apply:

1 "a. Is no longer within its commercially reasonable
2 use or shelf-life period.

3 "b. Was clearly described to salespersons prior to
4 purchase as seasonal, discontinued, or special promotion
5 products not subject to the plan or organization's inventory
6 repurpose program.

7 "c. Has been used or opened.

8 ~~"(3)~~ (6) GOODS. Includes but is not limited to any
9 property, tangible or intangible, real, personal, or any
10 combination thereof, and any franchise, license,
11 distributorship, or other similar right, privilege, or
12 interest.

13 "(7) INVENTORY. Includes both goods and services,
14 including company-produced promotional materials, sales aids,
15 and sales kits that an entity requires independent
16 salespersons to purchase.

17 "(8) INVENTORY LOADING. The requirement or
18 encouragement by a plan or operation to have the independent
19 salesperson of the plan or operation purchase inventory in an
20 amount that exceeds the amount that the salesperson can expect
21 to resell for ultimate consumption or to use or consume in a
22 reasonable time period, or both.

23 ~~"(4)~~ (9) KNOW, KNOWING, KNOWINGLY, KNOWLEDGE, and
24 KNEW. Either actual awareness or such awareness as a
25 reasonable person should have considering all the surrounding
26 circumstances.

1 "~~(5)~~ (10) PERSON. Includes, but is not limited to,
2 natural persons, corporations, trusts, partnerships,
3 incorporated or unincorporated associations, and any other
4 legal entity.

5 "(11) PYRAMID PROMOTIONAL SCHEME. A plan or
6 operation by which a person gives consideration for the
7 opportunity to receive compensation that is derived primarily
8 from the introduction of other persons into the plan or
9 operation rather than from the sale or consumption of goods,
10 services, or intangible property by a participant or other
11 persons introduced into the plan or operation. The term
12 includes any plan or operation under which the number of
13 people who may participate is limited either expressly or by
14 the application of conditions affecting the eligibility of a
15 person to receive compensation under the plan or operation.
16 The term also includes any plan or operation under which a
17 person, on giving consideration, obtains goods, services, or
18 intangible property in addition to the right to receive
19 compensation.

20 "~~(6)~~ (12) SALE, BUYING, and DISTRIBUTION. In
21 addition to their ordinary meanings, include, but are not
22 limited to, the act of leasing, renting, or consigning.

23 "~~(7)~~ (13) SERVICES. Work, labor, and other services,
24 including, but not limited to, services furnished in
25 connection with the sale or repair of goods.

26 "~~(8)~~ (14) TRADE or COMMERCE. Includes, but is not
27 limited to, the advertising, buying, offering for sale, sale

1 or distribution or performance of any service or goods, and
2 any other article, commodity, or thing of value wherever
3 situated and shall include any trade or commerce affecting the
4 people of this state.

5 "§8-19-5.

6 "The following deceptive acts or practices in the
7 conduct of any trade or commerce are hereby declared to be
8 unlawful:

9 "(1) Passing off goods or services as those of
10 another, provided that this section shall not prohibit the
11 private labeling of goods or services.

12 "(2) Causing confusion or misunderstanding as to the
13 source, sponsorship, approval, or certification of goods or
14 services.

15 "(3) Causing confusion or misunderstanding as to the
16 affiliation, connection, or association with, or certification
17 by another, provided that this section shall not prohibit the
18 private labeling of goods or services.

19 "(4) Using deceptive representations or designations
20 of geographic origin in connection with goods or services.

21 "(5) Representing that goods or services have
22 sponsorship, approval, characteristics, ingredients, uses,
23 benefits, or qualities that they do not have or that a person
24 has sponsorship, approval, status, affiliation, or connection
25 that he or she does not have.

26 "(6) Representing that goods are original or new if
27 they are deteriorated, reconditioned, reclaimed, used,

1 secondhand, or altered to the point of decreasing their value
2 or rendering the goods unfit for the ordinary purpose for
3 which they were purchased, provided that this subdivision
4 shall not apply to new goods which have been reconditioned,
5 reclaimed, or repaired and such fact is disclosed to the
6 purchaser.

7 "(7) Representing that goods or services are of a
8 particular standard, quality, or grade, or that goods are of a
9 particular style or model, if they are of another.

10 "(8) Disparaging the goods, services, or business of
11 another by false or misleading representation of fact.

12 "(9) Advertising goods or services with intent not
13 to sell them as advertised.

14 "(10) Advertising goods or services with intent not
15 to supply reasonably expectable public demand unless the
16 advertisement discloses a limitation of quantity.

17 "(11) Making a false or misleading statement of fact
18 concerning the reasons for, existence of, or amounts of, price
19 reductions.

20 "(12) Knowingly failing to identify flood, water,
21 fire, or accidentally damaged goods as damaged goods if they
22 are damaged to the point of decreasing their value or
23 rendering the goods unfit for the ordinary purpose for which
24 they were purchased, provided, that this subdivision shall not
25 apply to accidentally damaged new goods where the goods are
26 reconditioned, reclaimed, or repaired to substantially their

1 original condition and such fact is disclosed to the
2 purchaser.

3 "(13) Knowingly making false or misleading
4 statements of fact concerning the need for parts, replacement,
5 or repair service.

6 "(14) Misrepresenting the authority of a
7 salesperson, representative, or agent to negotiate the final
8 terms of a transaction.

9 "(15) Disconnecting, turning back, replacing, or
10 resetting the odometer of any motor vehicle so as to reduce
11 the number of miles indicated on the odometer gauge with the
12 intent of deception.

13 "(16) Advertising of any sale by falsely
14 representing that a person is going out of business.

15 "(17) After receipt of payment for goods or
16 services, failing to ship the goods or furnish such services
17 within the time advertised or otherwise represented or, if no
18 specific time is advertised or represented, failing to ship
19 the goods or furnish such services within 30 days, unless
20 within the applicable time period the seller provides the
21 buyer with the option to either cancel the sales agreement and
22 receive a refund of all previous payments to the seller or to
23 extend the date to a specific date proposed by the seller. Any
24 refund shall be mailed or delivered to the buyer within 10
25 business days after the seller receives written notification
26 from the buyer of the buyer's option to cancel the sales
27 agreement and receive the refund.

1 "(18) Using or employing a chain referral sales plan
2 in connection with the sale or offering for sale of goods,
3 merchandise, or anything of value, involving a sales
4 technique, plan, arrangement, or agreement in which the buyer
5 or prospective buyer is offered the opportunity to purchase
6 merchandise or goods and in connection with the purchase
7 receives the seller's promise or representation that the buyer
8 shall have the right to receive compensation or consideration
9 in any form for furnishing to the seller the names of other
10 prospective buyers, if the receipt of the compensation or
11 consideration is contingent upon the occurrence of an event
12 subsequent to the time the buyer purchased the goods,
13 merchandise, or anything of value.

14 ~~"(19) Selling or offering to sell, either directly
15 or associated with the sale of goods or services, a right to
16 participation in a pyramid sales structure. As used herein,
17 "pyramid sales structure" includes any plan or operation for
18 the sale or distribution of goods, services, or other property
19 wherein a person for consideration acquires the opportunity to
20 receive a pecuniary benefit, which is based primarily upon the
21 inducement of additional persons by that person, and others,
22 regardless of number, to participate in the same plan or
23 operation, and is not primarily contingent on the volume or
24 quantity of goods, services, or other property sold or
25 distributed. For purposes of this subdivision, "consideration"
26 shall not include payments made for sales demonstration
27 equipment and materials furnished on a nonprofit basis for use~~

1 ~~in making sales and not for resale wherein such payments~~
2 ~~amount to less than one hundred dollars (\$100) annually.~~
3 Establishing, promoting, or operating a pyramid promotional
4 scheme.

5 "a. Nothing in this subdivision may be construed to
6 prohibit a plan or operation, or to define a plan or
7 operation, where the participants in the plan or operation
8 give consideration in return for the right to receive
9 compensation based upon purchases of goods, services, or
10 intangible property for personal use, consumption, or resale
11 if the plan or operation does not cause inventory loading and
12 the plan or operation implements a bona fide inventory
13 repurchase program.

14 "b. A bona fide inventory repurchase program under
15 this subdivision is subject to the following requirements:

16 "1. The program shall be clearly described in its
17 recruiting literature, sales manual, or contracts.

18 "2. The recruiting literature, sales manual, or
19 contracts shall disclose any inventory that is not eligible
20 for repurchase under the program, including inventory that is
21 beyond the commercially reasonable use or shelf life period or
22 has been used or opened.

23 "c. Before a repurchase of inventory is made, the
24 entity operating the repurchase program shall clearly describe
25 the inventory that is excluded from the entity's bona fide
26 repurchase program as seasonal, discontinued, or special

1 promotion products and the inventory that is not subject to
2 the entity's bona fide inventory repurchase program.

3 "(20) In connection with any seller-assisted
4 marketing plan, either misrepresenting the amount or extent of
5 earnings to result therefrom, or misrepresenting the extent or
6 nature of the market for the goods or services, or both, sold
7 or delivered in connection with the plan, or misrepresenting
8 that the seller of the plan will repurchase all or part of the
9 goods or services, or both, sold or delivered in connection
10 with the plan, or failing to deliver goods or services, or
11 both, within the time represented. As used herein,
12 "seller-assisted marketing plan" includes any plan, scheme, or
13 system in which for a consideration a buyer acquires goods or
14 services, or both, together with a plan, scheme, or system for
15 the resale of said goods or services, or both.

16 "(21) Intentionally misrepresenting that a warranty
17 or guarantee confers or involves certain rights or remedies.

18 "(22) In selling a new motor vehicle, failing to
19 disclose material damage to the motor vehicle as prescribed
20 hereafter:

21 "a. Each manufacturer, importer, or distributor of
22 new motor vehicles sold or transferred to a motor vehicle
23 dealer in this state, shall notify the motor vehicle dealer in
24 writing prior to delivery of the vehicle of any material
25 damage to the vehicle which is known to the manufacturer,
26 importer, or distributor, and which was sustained or incurred
27 by the motor vehicle at any time after the manufacturing

1 process is complete but prior to delivery of the vehicle to
2 the dealer.

3 "b. In selling a new motor vehicle, each motor
4 vehicle dealer in this state shall notify the purchaser in
5 writing at the time of sale of any material damage to the
6 vehicle which is known to the motor vehicle dealer and which
7 was sustained or incurred by the motor vehicle at any time
8 after the manufacturing process is complete, but prior to
9 delivery of the vehicle to the purchaser.

10 "c. For purposes of this section, "material damage"
11 means damage sustained or incurred by a motor vehicle, whether
12 corrected or uncorrected, which cost to repair exceeds three
13 percent of the manufacturer's suggested retail price of the
14 vehicle based upon the dealer's retail repair cost or the sum
15 of five hundred dollars (\$500), whichever is greater. Damage
16 to tires, glass, bumpers, and in-dash audio equipment shall
17 not be considered in determining the cost of repair if those
18 components are replaced by identical manufacturer's original
19 equipment. The failure of a manufacturer, importer,
20 distributor, or motor vehicle dealer to give notice of damage
21 below the threshold constituting "material damage" shall not
22 provide grounds for revocation of the sale nor shall such
23 failure constitute a material misrepresentation or omission of
24 fact.

25 "d. Each manufacturer, importer, or distributor of
26 new motor vehicles shall indemnify and hold harmless the motor
27 vehicle dealer obtaining a vehicle from the manufacturer,

1 importer, or distributor from and against any liability,
2 including reasonable attorneys' fees, which the motor vehicle
3 dealer may have to the purchaser of the vehicle as a result of
4 damage to the new motor vehicle which was known to the
5 manufacturer, importer, or distributor, which occurred prior
6 to delivery of the vehicle to the dealer, and which was not
7 disclosed in writing to the dealer prior to delivery of the
8 vehicle. This indemnity obligation of the manufacturer,
9 importer, or distributor shall apply regardless of whether the
10 damage constitutes "material damage" as defined herein.

11 "(23) Affixing an Alabama revenue stamp, including
12 local municipal or county stamps, to, or upon, any package of
13 cigarettes, or selling or holding for sale any package of
14 cigarettes to which an Alabama revenue stamp, including local
15 municipal or county stamps, has been affixed, if:

16 "a. The package differs in any respect with the
17 requirements of the Federal Cigarette Labeling and Advertising
18 Act (15 U.S.C. Sec. 1331 and following), for the placement of
19 labels, warnings, or any other information upon a package of
20 cigarettes that is to be sold within the United States;

21 "b. The package is labeled "For Export Only," "U.S.
22 Tax Exempt," "For Use Outside U.S.," or similar wording
23 indicating that the manufacturer did not intend that the
24 product be sold in the United States;

25 "c. The package, or a package containing
26 individually stamped packages, has been altered by adding or

1 deleting the wording, labels, or warnings described in
2 paragraph a. or b. of this subdivision;

3 "d. With respect to the cigarettes, any person is
4 not in compliance with 15 U.S.C. Sec. 1335a (relating to
5 submission of ingredient information to federal authorities),
6 19 U.S.C. Sec. 1681-1681b (relating to imports of certain
7 cigarettes), 26 U.S.C. Sec. 5754 (relating to previously
8 exported tobacco products), or any other federal law or
9 implementing federal regulations; or

10 "e. The package in any way violates federal
11 trademark or copyright laws.

12 "For the purposes of this subdivision, the term
13 "package" means a pack, carton, or container of any kind in
14 which cigarettes are offered for sale, sold, or otherwise
15 distributed, or intended for distribution, to consumers. Also
16 for the purposes of this subdivision, the term "Alabama
17 revenue stamp" means the stamp or stamps by the use of which
18 the tax levied under Article 1 of Chapter 25 of Title 40, is
19 paid.

20 "(24) Engaging in the sale, distribution,
21 possession, acquisition, importation, or transportation of any
22 cigarettes that do not comply with all applicable requirements
23 imposed by or pursuant to federal law and federal implementing
24 regulations.

25 "(25) Engaging in a scheme or artifice to defraud by
26 telephone communication. For purposes of this subdivision, a
27 "scheme or artifice to defraud" means a systematic, ongoing

1 course of conduct with the specific intent to defraud one or
2 more persons in order to obtain property from that person by a
3 telephone communication; and "telephone communication" means
4 the transmission of information by the use of the telephone,
5 with the specific intent of defrauding a person by a material
6 misrepresentation and obtaining property from that person as a
7 result of the fraud. Puffing or puffery does not constitute a
8 scheme or artifice to defraud.

9 "(26) Making any communication by telephone directly
10 to another person which offers to the other person a gift,
11 award, or prize, where the person making the communication has
12 actual knowledge at the time of making the communication that
13 the communication was materially false and the person making
14 the communication specifically intended to deprive the other
15 person of real or personal property as a result of the false
16 communication.

17 "(27) Engaging in any other unconscionable, false,
18 misleading, or deceptive act or practice in the conduct of
19 trade or commerce."

20 Section 2. Although this bill would have as its
21 purpose or effect the requirement of a new or increased
22 expenditure of local funds, the bill is excluded from further
23 requirements and application under Amendment 621, now
24 appearing as Section 111.05 of the Official Recompilation of
25 the Constitution of Alabama of 1901, as amended, because the
26 bill defines a new crime or amends the definition of an
27 existing crime.

1 Section 3. This act shall become effective on the
2 first day of the third month following its passage and
3 approval by the Governor, or its otherwise becoming law.