

HOUSE BILL NO. 554

INTRODUCED BY G. PIERSON

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS APPLYING TO SECURITIES MULTILEVEL MARKETING COMPANIES; CREATING REQUIREMENTS FOR NOTICE OF ACTIVITY AND CONSENT TO SERVICE TO BE SUBMITTED TO THE SECURITIES COMMISSIONER; REVISING DEFINITIONS; AMENDING SECTIONS 30-10-301, 30-10-303, AND 30-10-324, MCA; AND REPEALING SECTION 30-10-216, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Notice of activity -- consent to service.** (1) A multilevel marketing

company shall file with the commissioner on forms prescribed by the commissioner:

(a) prior to obtaining a participant that is a resident of this state:

(i) a notice that the company intends to operate in this state; and

(ii) an irrevocable consent designating the commissioner as its agent for service of process for any alleged violation of 30-10-325; and

(b) following the initial filing under subsection (1)(a), an annual notice of the company's operations in this state.

(2) The forms in subsection (1) must include, at a minimum:

(a) the names, home or business addresses, dates of birth, and titles of the multilevel marketing company's officers, directors, and trustees;

(b) the multilevel marketing company's corporate name, state of domicile and state of incorporation, and headquarters mailing address, e-mail address, and telephone and telefax numbers; and

(c) a detailed description of the levels of distribution in the multilevel marketing company, the manner of compensating participants, and the compensation structure of the marketing plan.

(3) Compliance with this ~~chapter~~ SECTION does not confer on a multilevel marketing company any license or registration or signify that the state has sanctioned, approved, or endorsed a multilevel marketing company or its sales plan or operation.

(4) A multilevel marketing company or any individual or entity affiliated with a multilevel marketing company may not represent that the multilevel marketing company, individual, or entity is licensed, sanctioned,

1 approved, or endorsed in this state by virtue of compliance with 30-10-325 and this section.

2 ~~(5) THE REQUIREMENTS OF SUBSECTIONS (1) AND (2) DO NOT APPLY TO A DIRECT SELLING ASSOCIATION~~
3 ~~MEMBER.~~

4

5 **Section 2.** Section 30-10-301, MCA, is amended to read:

6 **"30-10-301. Fraudulent and other prohibited practices.** (1) It is unlawful for any person, in connection
7 with the offer, sale, or purchase of any security, directly or indirectly, in, into, or from this state, to:

8 (a) employ any device, scheme, or artifice to defraud;

9 (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to
10 make the statements made, in the light of the circumstances under which they are made, not misleading; or

11 (c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit
12 upon any person.

13 (2) (a) It is unlawful for any person who receives, directly or indirectly, any consideration from another
14 person for advising the other person as to the value of securities or their purchase or sale, whether through the
15 issuance of analysis or reports or otherwise:

16 (i) to employ any device, scheme, or artifice to defraud the other person;

17 (ii) to engage in any act, practice, or course of business that operates or would operate as a fraud or
18 deceit upon the other person; or

19 (iii) without disclosing to the client in writing before the completion of the transaction the capacity in which
20 the person is acting and obtaining the consent of the client to the transaction:

21 (A) acting as principal for the person's own account, to knowingly sell any security to or purchase any
22 security from a client; or

23 (B) acting as agent for a person other than the client, to knowingly effect the sale or purchase of any
24 security for the account of the client.

25 (b) The prohibitions of subsection (2)(a)(iii) do not apply to any transaction with a customer of a
26 broker-dealer if the broker-dealer is not being compensated for rendering investment advice in relation to the
27 transaction.

28 (3) In the solicitation of advisory clients, it is unlawful for a person to:

29 (a) make a false statement of a material fact; or

30 (b) omit a material fact necessary to make a statement not misleading in light of the circumstances under

1 which it is made.

2 (4) Except as permitted by rule or order of the commissioner, it is unlawful for any investment adviser
3 who is registered or required to be registered to enter into, extend, or renew any investment advisory contract
4 unless it provides in writing that:

5 (a) the investment adviser may not be compensated on the basis of a share of capital gains upon or
6 capital appreciation of the funds or any portion of the funds of the client;

7 (b) an assignment of the contract may not be made by the investment adviser without the consent of the
8 other party to the contract; and

9 (c) the investment adviser, if a partnership, shall notify the other party to the contract of any change in
10 the membership of the partnership within a reasonable time after the change.

11 (5) Subsection (4)(a) does not prohibit an investment advisory contract that provides for compensation
12 based upon the total value of a fund averaged over a definite period or as of definite dates or taken as of a
13 definite date. "Assignment", as used in subsection (4)(b), includes any direct or indirect transfer or hypothecation
14 of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting
15 securities by a security holder of the assignor; but if the investment adviser is a partnership, an assignment of
16 an investment advisory contract is not considered to result from the death or withdrawal of a minority of the
17 members of the investment adviser having only a minority interest in the business of the investment adviser or
18 from the admission to the investment adviser of one or more members who, after admission, will be only a
19 minority of the members and will have only a minority interest in the business.

20 (6) It is unlawful for an investment adviser to take or have custody of any securities or funds of any client
21 if:

22 (a) the commissioner by rule prohibits custody; or

23 (b) in the absence of rule, the investment adviser fails to notify the commissioner that the investment
24 adviser has or may have custody.

25 (7) It is unlawful for a multilevel ~~distribution~~ marketing company or a person who directly or indirectly
26 controls a multilevel ~~distribution~~ marketing company, in the course of transacting business in, into, or from this
27 state, to:

28 (a) employ any device, scheme, or artifice to defraud;

29 (b) make a false statement of a material fact;

30 (c) omit a material fact necessary to make a statement not misleading in light of the circumstances under

1 which it is made; or

2 (d) engage in any other act, practice, or course of business that operates or would operate as a fraud
3 or deceit upon any person."

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5 **Section 3.** Section 30-10-303, MCA, is amended to read:

6 **"30-10-303. Unlawful representation concerning registration or exemption.** (1) The fact that an
7 application for registration under 30-10-201(6) ~~or 30-10-216~~, a notice filing under 30-10-211 [or section 1], or a
8 registration statement under 30-10-203, 30-10-204, or 30-10-205 has been filed or the fact that a person or
9 security is effectively registered or a complete notice filing has been made does not constitute a finding by the
10 commissioner that any document filed under parts 1 through 3 of this chapter is true, complete, and not
11 misleading.

12 (2) The fact that an application for registration or a notice filing has been filed or a person or security is
13 effectively registered or a complete notice filing has been made as provided in subsection (1) or the fact that an
14 exemption or exception is available for a person, security, or transaction does not mean that the commissioner
15 has passed in any way upon the merits of, qualifications of, or recommended or given approval to, any person,
16 security, or transaction. It is unlawful to make or cause to be made to any prospective purchaser, customer, or
17 client any representation inconsistent with this section."

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19 **Section 4.** Section 30-10-324, MCA, is amended to read:

20 **"30-10-324. Definitions.** As used in ~~30-10-216~~, 30-10-301, 30-10-324, and 30-10-325, and [section 1],
21 the following definitions apply:

22 (1) ~~(a)~~(A) "Compensation" means the receipt of money, a thing of value, or a financial benefit.

23 ~~(b) Compensation does not include:~~

24 ~~—— (i) payments to a participant based upon the sale of goods or services by the participant to third persons
25 when the goods or services are purchased for actual use or consumption; or~~

26 ~~—— (ii) payments to a participant based upon the sale of goods or services to the participant that are used
27 or consumed by the participant.~~

28 (B) COMPENSATION DOES NOT INCLUDE:

29 (I) PAYMENTS TO A PARTICIPANT BASED ON THE SALE OF GOODS OR SERVICES BY THE PARTICIPANT TO THIRD
30 PERSONS WHEN THE GOODS OR SERVICES ARE PURCHASED FOR ACTUAL USE OR CONSUMPTION; OR

1 (II) PAYMENTS TO A PARTICIPANT BASED ON THE SALE OF GOODS OR SERVICES TO THE PARTICIPANT THAT ARE
 2 USED OR CONSUMED BY THE PARTICIPANT.

3 (2) (a) "Consideration" means the payment of money, the purchase of goods or services, or the purchase
 4 of intangible property.

5 (b) Consideration does not include:

6 (i) the purchase of goods or services furnished at cost that are:

7 ~~(A) are used in for the purposes of making sales; and~~ USED IN MAKING SALES AND THAT ARE NOT FOR
 8 RESALE; OR

9 ~~(B) that are not intended primarily for resale; or~~

10 (ii) a participant's time and effort expended in the pursuit of sales or in recruiting activities.

11 (3) "Direct selling association" means the nonprofit entity incorporated in the state of Delaware and
 12 recognized by the department as the direct selling association.

13 (4) "Multilevel ~~distribution~~ marketing company" means a person that:

14 (a) sells, distributes, or supplies goods or services through independent agents, contractors, or
 15 distributors;

16 (i) at different levels of distribution; or

17 (ii) pursuant to a formula for compensating participants in whole or in part based on purchases of sales
 18 by or recruitment of other participants;

19 (b) ~~may~~ permits participants to recruit other participants in the company; and

20 (c) ~~is eligible~~ provides for commissions, cross-commissions, override commissions, bonuses, refunds,
 21 dividends, or other consideration that is or may be paid as a result of the sale of goods or services or the
 22 recruitment of or the performance or actions of other participants.

23 (5) "Participant" means a person involved in a sales plan or operation.

24 (6) "Person" means an individual, corporation, partnership, limited liability company, or other business
 25 entity.

26 (7) (a) "Pyramid promotional scheme" means a sales plan or operation in which a participant gives
 27 consideration for the opportunity to receive compensation derived primarily from obtaining the participation of
 28 other persons in the sales plan or operation rather than from the sale of goods or services by the participant or
 29 the other persons induced to participate in the sales plan or operation by the participant.

30 (b) A pyramid promotional scheme includes a Ponzi scheme, in which a person makes payments to

1 investors from money obtained from later investors, rather than from any profits or other income of an underlying
2 or purported underlying business venture.

3 (c) A pyramid promotional scheme does not include a sales plan or operation that:

4 (i) subject to the provisions of subsection ~~(7)(c)(v)~~ (7)(c)(iv), provides compensation to a participant
5 based primarily ~~upon~~ on the sale of goods or services by the participant, including goods or services used or
6 consumed by the participant or other participants, and not primarily for obtaining the participation of other persons
7 in the sales plan or operation ~~and that provides compensation to the participant based upon the sale of goods~~
8 ~~or services by persons whose participation in the sales plan or operation has been obtained by the participant;~~

9 (ii) does not require a participant to purchase goods or services in an amount that unreasonably exceeds
10 an amount that can be expected to be resold or consumed within a reasonable period of time;

11 ~~(iii) is authorized to use a federally registered trademark or servicemark that identifies the company~~
12 ~~promoting the sales plan or operation, the goods or services sold, or the sales plan or operation;~~

13 ~~(iv)~~(iii) (A) provides each person joining the sales plan or operation with a written agreement containing
14 or a written statement describing the material terms of participating in the sales plan or operation;

15 (B) allows a person at least 15 days to cancel the person's participation in the sales plan or operation;

16 and

17 (C) provides that if the person cancels participation within the time provided and returns any items given
18 to the person to assist in marketing goods or services under the plan, the person is entitled to a refund of any
19 consideration given to participate in the sales plan or operation; and

20 ~~(v)~~(iv) (A) ~~upon~~ on the request of a participant deciding to terminate participation in the sales plan or
21 operation, provides for the repurchase, at not less than 90% of the amount paid by the participant, of any currently
22 marketable goods or services sold to the participant within 12 months of the request that have not been resold
23 or consumed by the participant; and

24 (B) if disclosed to the participant at the time of purchase, provides that goods or services are not
25 considered currently marketable if the goods have been consumed or the services rendered or if the goods or
26 services are seasonal, discontinued, or special promotional items. Sales plan or operation promotional materials,
27 sales aids, and sales kits are subject to the provisions of this subsection ~~(7)(c)(v)~~ if they are a required purchase
28 for the participant or if the participant has received or may receive a financial benefit from their purchase.

29 (8) "Transacting business" means to directly or indirectly:

30 (a) offer, sell, distribute, or supply goods or services through independent agents, contractors, or

1 distributors at different levels of distribution; or

2 (b) recruit or attempt to recruit participants in a multilevel distribution company."

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4 NEW SECTION. Section 5. Repealer. The following section of the Montana Code Annotated is
5 repealed:

6 30-10-216. Registration requirements for multilevel distribution companies.

7

8 NEW SECTION. Section 6. Codification instruction. [Section 1] is intended to be codified as an
9 integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10, part 3, apply to [section 1].

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11 NEW SECTION. Section 7. Saving clause. [This act] does not affect rights and duties that matured,
12 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

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