

BILL ANALYSIS

C.S.S.B. 1169
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Licensing & Administrative Procedures
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Service contract providers enter into agreements with consumers for the repair, replacement, or maintenance of a product or for payment to repair, replace, or maintain the product for a specified period. Identity recovery service contract providers offer services to return the identity of an identity theft victim to the person's status before the identity theft occurred. Concerned parties contend that current laws governing such providers need revision to provide additional consumer protections, including the ability of a contract holder to cancel a contract and receive a refund. C.S.S.B. 1169 proposes such revisions.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Commission of Licensing and Regulation in SECTIONS 1.02, 1.11, 1.12, 1.21, 2.02, 2.07, 2.10, 2.11, and 2.20 of this bill.

ANALYSIS

C.S.S.B. 1169 amends the Occupations Code to prohibit a provider or administrator of service contracts or identity recovery service contracts sold or issued in Texas from contracting with or using the services of a person to perform an activity that requires registration with the Texas Department of Licensing and Regulation (TDLR) as such a provider or administrator unless that person is appropriately registered. The bill, in statutory provisions authorizing TDLR to take certain actions against an applicant for an original or renewal registration application or a controlling person of the applicant under specified conditions, includes among those actions the suspension or revocation of a registration or any other disciplinary action authorized under state law. The bill specifies, in the provisions making it a ground for refusing to issue or renew a registration, suspending or revoking a registration, or taking other disciplinary action that the applicant or controlling person of the applicant has violated a rule adopted or order issued by the Texas Commission of Licensing and Regulation or executive director of TDLR, that the rule or order was adopted or issued, as applicable, under provisions of law governing service contract providers and administrators and identity service contract providers and administrators. The bill includes among those grounds that the applicant or controlling person of the applicant has made a material misrepresentation or false statement in an application or any document accompanying an application; has had a professional license issued under the Insurance Code revoked; or has had a license or registration as a provider, administrator, or seller of service contracts or identity recovery service contracts revoked in Texas or in another state.

C.S.S.B. 1169 makes the requirement that an applicant for an original or renewal provider registration file a reimbursement insurance policy contingent on whether the provider is using the policy to meet certain financial security requirements. The bill includes among the items an applicant is required to file with the application the financial security deposit and the documentation required by TDLR demonstrating adequate funding of the reserve account, if the provider is using a funded reserve account and financial security deposit to meet certain financial security requirements, and the proof necessary to demonstrate that the applicant or its parent

company maintains at least \$100 million net worth, if the applicant is using net worth to meet the financial security requirements. The bill requires the applicant to file with the application information about each controlling person of the applicant, rather than a biographical affidavit, in a form prescribed by the executive director.

C.S.S.B. 1169 removes the requirement for the commission to set the amounts of fees to cover certain administrative costs relating to a service contract provider and requires the commission to set fees to cover those costs. The bill requires the commission by rule to set the fees required to cover the costs of administering provisions of law relating to identity recovery service contract providers and administrators, rather than requiring the commission by rule to set the amounts of the registration and renewal fees required to cover those costs.

C.S.S.B. 1169 removes provisions of law specifying that information concerning the number of service contracts sold or issued by a provider of such contracts may be used only by the executive director and TDLR in developing a tiered fee schedule and that information concerning the number of identity service contracts sold or issued by a provider of such contracts may be used only by the executive director and TDLR for the purposes of statutory provisions relating to certain fees paid by such providers.

C.S.S.B. 1169, in the requirement that a provider of service contracts or identity recovery service contracts place in trust with the executive director a financial security deposit to ensure the faithful performance of the provider's obligations to its contract holders, includes as a source for the security deposit a certificate of deposit issued by a qualified financial institution and removes as sources for the security deposit a surety bond issued by an authorized surety, securities of the type eligible for deposit by an authorized insurer in Texas, cash equivalents of a statutory deposit of cash, and another form of security prescribed by rules adopted by the commission.

C.S.S.B. 1169 prohibits the amount of the required financial security deposit from being less than \$250,000, rather than less than the greater of \$25,000 or an amount equal to five percent of the gross consideration the provider received from consumers from the sale of all service contracts or identity recovery service contracts, as applicable, that are issued and outstanding in Texas, minus any claims paid. The bill requires the provider to submit to the executive director on request a copy of the provider's financial statements that must be prepared in accordance with generally accepted accounting principles, be without qualification as to the going concern status of the provider, and be audited by an independent certified public accountant. The bill authorizes the commission by rule to require the provider to submit additional financial reports.

C.S.S.B. 1169 authorizes the executive director, in the event of a bankruptcy of a provider of service contracts or identity recovery service contracts or a similar event affecting the ability of the provider to faithfully perform its obligations to its contract holders, to distribute any funds held in trust as financial security for the provider under the bill's provisions to eligible contract holders as payment for claims. The bill requires the executive director to distribute the funds in an equitable and cost-effective manner as determined by the executive director.

C.S.S.B. 1169 requires a provider of service contracts or identity recovery service contracts that maintained a funded reserve account on August 31, 2011, to submit to the executive director not later than September 1, 2012, documentation that the provider is in compliance with financial security requirements established under provisions of law as amended by the bill for service contracts or identity recovery service contracts sold or issued in Texas on or after September 1, 2012. The bill prohibits such a provider from selling or issuing a service contract or identity recovery service contract, as applicable, on or after that date unless the provider is in compliance with that requirement.

C.S.S.B. 1169 requires a provider of service contracts or identity recovery service contracts that maintained a funded reserve account either to continue to maintain the account and security deposit at appropriate levels for such contracts that were sold or issued in Texas before

September 1, 2012, until the contracts are no longer in effect or to provide financial security for contracts sold or issued before September 1, 2012, by complying with statutory provisions governing financial security requirements, as amended by the bill. The bill requires a provider that provides financial security for such contracts sold or issued before September 1, 2012, by complying with those provisions to give to the executive director satisfactory documentation that the reimbursement insurance policy, funded reserve account and security deposit, or net worth covers all outstanding contracts issued before that date. The bill prohibits the extension or renewal of a contract that is sold or issued before September 1, 2012, and covered under a funded reserve account and security deposit unless the provider, before the extension or renewal, provides financial security for those contracts by complying with statutory provisions governing financial security requirements, as amended by the bill.

C.S.S.B. 1169 authorizes a provider of service contracts or identity recovery service contracts to employ or contract with a seller to be responsible for all or any part of the sale or marketing of such contracts for the provider and for compliance with the provisions of law governing service contract providers and administrators and identity recovery service contract providers and administrators in connection with the sale or marketing of such contracts. The bill establishes that the hiring of or contracting with a seller under this authorization does not affect a provider's responsibility to comply with those provisions of law. The bill prohibits a seller from engaging in activities that would require registration as a provider or administrator unless the seller is registered as a provider or administrator. The bill requires a seller to process a service contract or identity recovery service contract application and a payment from a consumer in accordance with the provisions of law governing providers and administrators of such contracts and with any sales agreement or contract between the provider and the seller.

C.S.S.B. 1169 includes among the identifying information required to be on a service contract or identity recovery service contract any registration number issued to an administrator under statutory provisions governing service contract providers and administrators and identity recovery service contract providers and administrators. The bill includes such a registration number, if applicable, among the information that is not required to be preprinted on the contract and that may be added to the contract at the time of sale.

C.S.S.B. 1169, in a provision of law requiring a service contract insured under a reimbursement policy to include certain information, establishes that such a policy is governed by a statutory provision relating to such policies, rather than a statutory provision relating to financial security requirements. The bill, in the requirement that a service contract or an identity recovery service contract state that the contract holder may apply for reimbursement directly to the insurer under certain circumstances, includes among those circumstances that a refund or credit is not paid within a specified period after the date on which the contract is canceled under provisions of the bill relating to the cancellation of a contract by the contract holder, rather than within a specified period of time after the contract is returned to the provider under provisions of law relating to voiding a service contract or returning an identity recovery service contract to a provider, as applicable.

C.S.S.B. 1169 requires a service contract or identity recovery service contract to allow the contract holder to cancel the contract at any time. The bill requires a contract provider to refund to a holder or credit to the holder's account the full purchase price of the contract, decreased by the amount of any claims paid under the contract, if the holder cancels the contract before the 31st day after the date of purchase and prohibits the provider from imposing a cancellation fee. The bill requires a provider, if a contract holder meets the cancellation requirements, to refund to a holder or credit to the holder's account the prorated purchase price of the contract reflecting the remaining term of the contract, based on specified criteria, and authorizes the provider to impose a reasonable cancellation fee not to exceed \$50. The bill authorizes a provider to allow a holder to cancel a contract on other terms included in the contract, provided the terms do not conflict with the bill's provisions.

C.S.S.B. 1169 makes a provider who does not pay the refund or credit the contract holder's account before the 46th day after the date notice of cancellation is received by the provider liable to the holder for a penalty for each month an amount remains outstanding equal to 10 percent of the outstanding amount. The bill provides that the penalty is in addition to the full or prorated purchase price of the contract that is owed to the holder under the bill's provisions or the terms of the contract. The bill establishes that the right to cancel a service contract or an identity recovery service contract is not transferable to a subsequent holder of the contract.

C.S.S.B. 1169 includes among the conditions under which a provider is exempt from the requirement to provide prior notice of cancellation that a service contract or identity recovery service contract is canceled because of fraud by the holder to the provider or the provider's administrator or because of a material misrepresentation by the holder to the provider's administrator. The bill entitles a holder whose contract is canceled by the provider in accordance with statutory provisions governing such cancellation to a prorated refund of the purchase price of the contract reflecting the remaining term of the contract based on specified criteria. The bill prohibits a provider who cancels a contract under provisions of law relating to the cancellation of a service contract or identity recovery service contract by the provider from imposing a cancellation fee.

C.S.S.B. 1169, in a provision prohibiting certain acts relating to false or misleading statements in a provider's contracts or literature, expands such statements to include deceptive statements, expands the prohibition to include statements in any written communication, and expands the entities prohibited from performing such acts to include an administrator, seller, or other representative of a provider. The bill prohibits a person, including a bank, a savings and loan association, a lending institution, or the manufacturer or seller of a product, from requiring the purchase of a service contract as a condition of a loan or the sale of property. The bill prohibits a person regulated by provisions of law relating to the sale or lease of motor vehicles from requiring the purchase of an identity recovery service contract as a condition of a loan or the sale of a vehicle. The bill prohibits a provider of service contracts or identity recovery service contracts, or an administrator, seller, or other representative of such a provider, from making a telemarketing call to a consumer as provided by statutory provisions governing such calls unless the provider, administrator, seller, or representative has an established business relationship, as defined by provisions of the Business & Commerce Code, with the consumer.

C.S.S.B. 1169 extends to the executive director the authorization to impose an administrative sanction or penalty on a finding that a ground for disciplinary action exists under the statutory provisions governing service contract providers and administrators and identity service contract providers and administrators. The bill expands the disciplinary actions the commission and executive director are authorized to take on such a finding to include seeking a civil penalty or any other remedy under those provisions or under provisions of law governing TDLR.

C.S.S.B. 1169 requires a person who the commission by order, including an agreed order, determines has operated as a provider or administrator of service contracts or identity recovery service contracts in Texas without holding the appropriate registration under statutory provisions governing such providers or administrators to offer to a holder of a service contract or identity recovery service contract, as applicable, that was sold or issued by the person during the period that the person was not registered the right either to cancel the contract and obtain a refund of the full purchase price of the contract or to retain the contract. The bill authorizes the commission or executive director, by commission order, including an agreed order, to require a seller who fails to process an application for a service contract or an identity recovery service contract or a payment from a consumer in accordance with the statutory provisions governing providers or administrators of such contracts any sales agreement or contract between the provider and the seller to refund the full purchase price of the contract to the consumer. The bill establishes that the remedies described by the bill's provisions are in addition to any administrative penalty, administrative sanction, civil penalty, or other disciplinary or enforcement action sought under statutory provisions governing providers and administrators of service contracts and providers

and administrators of identity recovery service contracts or under statutory provisions governing TDLR.

C.S.S.B. 1169 transfers Section 1304.007, Occupations Code, relating to the general investigative power of the executive director, to Subchapter B, Chapter 1304, Occupations Code, redesignates that provision as Section 1304.051, Occupations Code, and amends that provision to make conforming changes in accordance with the bill's provisions. The bill transfers Section 1306.008, Occupations Code, relating to the general investigative power of the executive director, to Subchapter A-1, Chapter 1306, Occupations Code, redesignates that provision as Section 1306.021, Occupations Code, and amends that provision to make conforming changes in accordance with the bill's provisions.

C.S.S.B. 1169 defines "seller" and provides for the meaning of "provider that maintained a funded reserve account" for purposes of provisions of law governing providers and administrators of service contracts and governing providers and administrators of identity recovery service contracts. The bill makes conforming and nonsubstantive changes.

C.S.S.B. 1169 repeals provisions relating to returning or voiding a service contract or an identity recovery service contract and disciplinary actions for making a false statement in an application for registration or registration renewal as a service contract provider or as an identity recovery service contract provider.

C.S.S.B. 1169 requires the commission, not later than April 1, 2012, to adopt rules necessary to implement and administer provisions of the bill relating to the regulation of service contract providers and administrators and relating to the regulation of identity recovery service contract providers and administrators.

C.S.S.B. 1169 makes its provisions relating to the form of a service contract and an identity recovery service contract and the required disclosures for such contracts and provisions relating to the cancellation of such a contract by a provider and by a holder applicable only to a contract sold or issued on or after January 1, 2012. The bill prohibits a service contract or an identity recovery service contract sold or issued before that date from being extended or renewed at the end of the contract term unless the contract complies with those provisions of the bill.

C.S.S.B. 1169 repeals the following provisions of the Occupations Code, effective on the bill's effective date:

- Section 1304.006
- Section 1304.102(d)
- Section 1306.007
- Section 1306.052(d)

C.S.S.B. 1169 repeals the following provisions of the Occupations Code, effective January 1, 2012:

- Section 1304.157
- Section 1304.158
- Section 1306.107
- Section 1306.108

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.S.B. 1169, in the requirement that an applicant for issuance or renewal of a registration as a provider of service contracts or identity recovery service contracts file certain items with the application, contains as such an item not included in the original the financial security deposit and the documentation required by the Texas Department of Licensing and Regulation (TDLR) demonstrating adequate funding of the reserve account, if the provider is using a funded reserve account and financial security deposit to meet certain financial security requirements. The substitute differs from the original by including among such items the proof necessary to demonstrate that the applicant or its parent company maintains at least \$100 million net worth, if the applicant is using net worth to meet the financial security requirements, whereas the original includes the proof necessary to demonstrate that the applicant has at least that net worth, under the specified condition.

C.S.S.B. 1169, in a provision requiring a provider to take certain actions to ensure the faithful performance of the obligations of a provider of service contracts or identity recovery service contracts to its contract holders, retains as such an action maintaining a funded reserve account covering the provider's obligations under its service contracts that are issued and outstanding in Texas and placing in trust with the executive director of TDLR a financial security deposit consisting of security from certain sources, whereas the original removes that action. The substitute retains as such sources a statutory deposit of cash and a letter of credit issued by a qualified financial institution, whereas the original removes those sources. The substitute contains as a source not included in the original a certificate of deposit issued by a qualified financial institution.

C.S.S.B. 1169 contains provisions not included in the original prohibiting the amount of the security deposit from being less than \$250,000, requiring the provider to submit to the executive director on request a copy of the provider's financial statements that must meet specified requirements, and authorizing the commission by rule to require the provider to submit additional financial reports. The substitute, in a requirement that the executive director determine the equitable and cost-effective manner in which funds held in trust as financial security are distributed, contains a specification not included in the original that such manner is as determined by the executive director.

C.S.S.B. 1169, in the requirement that a provider that maintained a funded reserve account provide financial security for service contracts or identity recovery service contracts sold or issued before September 1, 2012, differs from the original by specifying that the provider meet that requirement by complying with certain specified financial security requirements, whereas the original provides that the requirement be met by obtaining a reimbursement insurance policy or maintaining a net worth of at least \$100 million.

C.S.S.B. 1169, in a requirement that the provider give to the executive director satisfactory documentation that certain assets cover all outstanding service contracts issued before September 1, 2012, contains as an asset not included in the original the funded reserve account and security deposit. The substitute, in the prohibition against the extension or renewal of a service contract or identity recovery service contract that is sold or issued before September 1, 2012, and is covered under a funded reserve account and security deposit at the end of the contract term, contains an exception to the prohibition not included in the original for a provider that provides financial security for those contracts by complying with the financial security requirements before the extension or renewal.

C.S.S.B. 1169 omits provisions contained in the original repealing provisions of law relating to the minimum amount that must be maintained in a funded reserve account to cover the obligations of a service contract provider or of an identity recovery service contract provider. The substitute differs from the original in nonsubstantive ways.