

**Representative Wayne A. Harper** proposes the following substitute bill:

**INTERNET PRIVACY ACT**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: Wayne A. Harper**

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**LONG TITLE**

**General Description:**

This bill modifies provisions of the Commerce and Trade Code related to truth in advertising.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ requires an Internet business to:
  - take reasonable steps to maintain a consumer's privacy; and
  - provide a privacy notice to a consumer;
- ▶ prohibits an Internet business from making a false or misleading statement in a privacy policy; and
- ▶ makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**13-11a-2**, as enacted by Chapter 205, Laws of Utah 1989



26           **13-11a-3**, as enacted by Chapter 205, Laws of Utah 1989

27 ENACTS:

28           **13-11a-3.5**, Utah Code Annotated 1953

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30 *Be it enacted by the Legislature of the state of Utah:*

31           Section 1. Section **13-11a-2** is amended to read:

32           **13-11a-2. Definitions.**

33           As used in this chapter:

34           (1) "Advertisement" means any written, oral, or graphic statement or representation  
35 made by a supplier in connection with the solicitation of business. It includes, but is not  
36 limited to, communication by noncable television systems, radio, printed brochures,  
37 newspapers, leaflets, flyers, circulars, billboards, banners, or signs. It does not include any  
38 oral, in person, representation made by a sales representative to a prospective purchaser.

39           (2) To "clearly and conspicuously disclose" means:

40           (a) in the print media:

41           (i) to state in typeface that is sufficiently bold to be obviously seen;

42           (ii) to state in type size of at least 10 point type for a 14" x 23" document, and, in larger  
43 documents, of a type size of proportionately the same size; and

44           (iii) to place in the text so as to be obviously seen;

45           (b) in radio advertising, to verbally state in the same volume as that used in the  
46 advertisement;

47           (c) in television advertising, the method for print media or radio advertising is  
48 acceptable unless contrary to other governing laws.

49           (3) (a) Except as provided in Subsection (3)(b), "consumer" means a resident of Utah  
50 who:

51           (i) (A) enters into a contract with an Internet service provider for access to the Internet  
52 for personal, family, or household purposes; and

53           (B) receives the access described in Subsection (3)(a)(i)(A); or

54           (ii) accesses a website operated by a website operator.

55           (b) "Consumer" does not include a person who resells the access described in  
56 Subsection (3)(a)(i)(A).

57           ~~[(3)]~~ (4) "Generic good" means a product which is offered for sale under its common  
58 descriptive name rather than under a trademark, trade name, brand name, house brand, or other  
59 distinguishing appellation.

60           ~~[(4)]~~ (5) "Goods and services" means all items which may be the subject of a sales  
61 transaction.

62           (6) "Internet business" means:

63           (a) an Internet service provider; or

64           (b) a website operator.

65           (7) (a) Except as provided in Subsection (7)(b), "Internet service provider" means a  
66 person who:

67           (i) provides a consumer:

68           (A) authenticated access to the Internet; or

69           (B) authenticated presence on the Internet; and

70           (ii) provides the access or presence described in Subsection (7)(a)(i) by providing  
71 transit routing of Internet protocol packets for and on behalf of the consumer.

72           (b) "Internet service provider" does not include a person that offers on a common  
73 carrier basis:

74           (i) access to telecommunications facilities; or

75           (ii) telecommunication services by means of telecommunications facilities.

76           (8) (a) "Personally identifiable information" means information that identifies:

77           (i) a consumer by:

78           (A) name; and

79           (B) (I) account number;

80           (II) physical address;

81           (III) email address;

82           (IV) telephone number;

83           (V) Social Security number;

84           (VI) credit card information; or

85           (VII) bank account information;

86           (ii) a consumer as having requested or obtained specific materials or services from an  
87 Internet business;

88            (iii) an Internet site visited by a consumer; or  
89            (iv) any of the contents of a consumer's data-storage device.  
90            (b) "Personally identifiable information" does not include:  
91            (i) information:  
92            (A) in aggregate or summary form; and  
93            (B) from which the identity of an individual consumer is not ascertainable; or  
94            (ii) information:  
95            (A) from which all information identifying an individual consumer has been removed;  
96    and  
97            (B) that cannot be combined with other information to identify an individual consumer.  
98            (9) "Website operator" means a person who:  
99            (a) (i) is domiciled in Utah; or  
100           (ii) knowingly transacts business with residents of Utah;  
101           (b) operates a website on the Internet for a commercial purpose; and  
102           (c) collects or maintains personally identifiable information about a consumer.  
103           [~~5~~] (10) "Nondiscounted price" means a price at which the goods or services are  
104    offered at the time of the price assessment without a temporary store reduction in price.  
105           [~~6~~] (11) "Person" means an individual, including a consumer, corporation,  
106    government, or governmental subdivision or agency, business trust, estate, trust, partnership,  
107    unincorporated association, two or more of any of the foregoing having a joint or common  
108    interest, or any other legal or commercial entity.  
109           [~~7~~] (12) "Price assessment" means the determination of the prices underlying a price  
110    comparison.  
111           [~~8~~] (13) "Price assessor" means a firm or individual that determines the prices,  
112    including the reference prices, underlying the price comparison, or who makes the price  
113    comparison.  
114           [~~9~~] (14) "Price comparison" means any express representation that a specific savings,  
115    reduction, or discount exists or will exist between the supplier's advertised price and another  
116    specific price. A representation which does not reasonably imply a comparison to identifiable  
117    prices or items does not express a price comparison. Language constituting mere sales  
118    "puffing" is not prohibited by this chapter.

119           ~~[(10)]~~ (15) "Product area" means the geographical area in which the prospective  
120 purchasers to whom the advertisement is aimed could reasonably be expected to seek the goods  
121 or services in question.

122           ~~[(11)]~~ (16) "Reference price" means a higher price to which a supplier compares a  
123 lower price to indicate that a reduction in price exists or will exist.

124           ~~[(12)]~~ (17) "Regular price" means the price at which a supplier has recently offered the  
125 goods or services for sale in good faith in the regular course of business. Every price  
126 represented in an advertisement is considered a regular price unless it is specifically  
127 represented as a price other than a regular price, such as a discount price or a manufacturer's  
128 suggested price. It is prima facie evidence that a price is other than a regular price when it was  
129 not offered as the nondiscount price of the goods or services for the 15 days immediately  
130 preceding an advertisement of the price, and the price change during the 15 day period was not  
131 due to price changes inherent in the pricing of seasonal or perishable goods, due to changes in  
132 cost of the goods or services to the supplier, or due to pricing changes made to match a  
133 competitor's price.

134           ~~[(13)]~~ (18) "Sales transaction" means a sale, lease, assignment, award by chance, or  
135 other written or oral transfer or disposition of goods, services, or other property, both tangible  
136 and intangible (except securities and insurance), to a person or business, or a solicitation or  
137 offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or  
138 solicitation, any agreement, and any performance of an agreement with respect to any of these  
139 transfers or dispositions.

140           ~~[(14)]~~ (19) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person  
141 who regularly solicits, engages in, or enforces sales transactions, whether or not he deals  
142 directly with the purchaser.

143           Section 2. Section **13-11a-3** is amended to read:

144           **13-11a-3. Deceptive trade practices enumerated -- Records to be kept -- Defenses.**

145           (1) Deceptive trade practices occur when, in the course of his business, vocation, or  
146 occupation:

147           (a) A person passes off goods or services as those of another.

148           (b) A person causes likelihood of confusion or of misunderstanding as to the source,  
149 sponsorship, approval, or certification of goods or services.

150 (c) A person causes likelihood of confusion or of misunderstanding as to affiliation,  
151 connection, association with, or certification by another.

152 (d) A person uses deceptive representations or designations of geographic origin in  
153 connection with goods or services.

154 (e) A person represents that goods or services have sponsorship, approval,  
155 characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has  
156 a sponsorship, approval, status, affiliation, or connection that he does not have.

157 (f) A person represents that goods are original or new if they are deteriorated, altered,  
158 reconditioned, reclaimed, used, or second-hand.

159 (g) A person represents that goods or services are of a particular standard, quality, or  
160 grade, or that goods are of a particular style or model, if they are of another.

161 (h) A person disparages the goods, services, or business of another by false or  
162 misleading representation of fact.

163 (i) A person advertises goods or services or the price of goods and services with intent  
164 not to sell them as advertised. If specific advertised prices will be in effect for less than one  
165 week from the advertisement date, the advertisement must clearly and conspicuously disclose  
166 the specific time period during which the prices will be in effect.

167 (j) A person advertises goods or services with intent not to supply a reasonable  
168 expectable public demand, unless:

169 (i) the advertisement clearly and conspicuously discloses a limitation of quantity; or

170 (ii) the person issues rainchecks for the advertised goods or services.

171 (k) A person makes false or misleading statements of fact concerning the reasons for,  
172 existence of, or amounts of price reductions.

173 (l) A person makes a comparison between his own sale or discount price and a  
174 competitor's nondiscounted price without clearly and conspicuously disclosing that fact.

175 (m) A person, without clearly and conspicuously disclosing the date of the price  
176 assessment makes a price comparison with the goods of another based upon a price assessment  
177 performed more than seven days prior to the date of the advertisement or uses in an  
178 advertisement the results of a price assessment performed more than seven days prior to the  
179 date of the advertisement without disclosing, in a print ad, the date of the price assessment, or  
180 in a radio or television ad, the time frame of the price assessment.

181 (n) A person advertises or uses in a price assessment or comparison a price that is not  
182 his own unless this fact is:

183 (i) clearly and conspicuously disclosed; and

184 (ii) the representation of the price is accurate. With respect to the price of a  
185 competitor, the price must be one at which the competitor offered the goods or services for sale  
186 in the product area at the time of the price assessment, and must not be an isolated price.

187 (o) A person represents as independent an audit, accounting, price assessment, or  
188 comparison of prices of goods or services, when such audit, accounting, price assessment, or  
189 comparison is not independent. Such audit, accounting, price assessment, or comparison shall  
190 be independent if the price assessor randomly selects the goods to be compared, and the time  
191 and place of such comparison, and no agreement or understanding exists between the supplier  
192 and the price assessor that could cause the results of the assessment to be fraudulent or  
193 deceptive. The independence of such audit, accounting, or price comparison is not invalidated  
194 merely because the advertiser pays a fee therefor, but is invalidated if the audit, accounting, or  
195 price comparison is done by a full or part time employee of the advertiser.

196 (p) A person represents, in an advertisement of a reduction from the supplier's own  
197 prices, that the reduction is from a regular price, when the former price is not a regular price as  
198 defined in [~~Subsection~~] Section 13-11a-2[(12)].

199 (q) A person advertises a price comparison or the result of a price assessment or  
200 comparison that uses, in any way, an identified competitor's price without clearly and  
201 conspicuously disclosing the identity of the price assessor and any relationship between the  
202 price assessor and the supplier. Examples of disclosure complying with this section are: "Price  
203 assessment performed by Store Z"; "Price assessment performed by a certified public  
204 accounting firm"; "Price assessment performed by employee of Store Y."

205 (r) A person makes a price comparison between a category of the supplier's goods and  
206 the same category of the goods of another, without randomly selecting the individual goods or  
207 services upon whose prices the comparison is based. For the purposes of this subsection,  
208 goods or services are randomly selected when the supplier has no advance knowledge of what  
209 goods and services will be surveyed by the price assessor, and when the supplier certifies its  
210 lack of advance knowledge by an affidavit to be retained in the supplier's records for one year.

211 (s) A person makes a comparison between similar but nonidentical goods or services

212 unless the nonidentical goods or services are of essentially similar quality to the advertised  
213 goods or services or the dissimilar aspects are clearly and conspicuously disclosed in the  
214 advertisements. It is prima facie evidence of compliance with this subsection if:

215 (i) the goods compared are substantially the same size; and

216 (ii) the goods compared are of substantially the same quality, which may include  
217 similar models of competing brands of goods, or goods made of substantially the same  
218 materials and made with substantially the same workmanship. It is prima facie evidence of  
219 a deceptive comparison under this section when the prices of brand name goods and generic  
220 goods are compared.

221 (t) A person engages in any other conduct which similarly creates a likelihood of  
222 confusion or of misunderstanding.

223 (2) Any supplier who makes a comparison with a competitor's price in advertising shall  
224 maintain for a period of one year records that disclose the factual basis for such price  
225 comparisons and from which the validity of such claim can be established.

226 (3) It shall be a defense to any claim of false or deceptive price representations under  
227 this chapter that a person:

228 (a) has no knowledge that the represented price is not genuine; and

229 (b) has made reasonable efforts to determine whether the represented price is genuine.

230 (4) Subsections (1) (m) and (q) do not apply to price comparisons made in catalogs in  
231 which a supplier compares the price of a single item of its goods or services with those of  
232 another.

233 (5) In order to prevail in an action under this chapter, a complainant need not prove  
234 competition between the parties or actual confusion or misunderstanding.

235 (6) This chapter does not affect unfair trade practices otherwise actionable at common  
236 law or under other statutes of this state.

237 Section 3. Section **13-11a-3.5** is enacted to read:

238 **13-11a-3.5. Internet business security and privacy notices.**

239 (1) An Internet business:

240 (a) shall take reasonable steps to maintain the security and privacy of a consumer's  
241 personally identifiable information;

242 (b) shall provide consumers notice of:



- 243 (i) the privacy policy of the Internet business; and  
244 (ii) the services provided by the Internet business that allow a consumer to increase the  
245 privacy of the consumer's personally identifiable information; and  
246 (c) may not make a false or misleading statement in a privacy policy, published on the  
247 Internet or otherwise distributed or published, regarding the use of personally identifiable  
248 information.
- 249 (2) The notice required by Subsection (1)(b):  
250 (a) shall be:  
251 (i) clearly and conspicuously disclosed; and  
252 (ii) written so that a consumer without technical knowledge of the Internet can  
253 understand the notice; and  
254 (b) may provide a consumer the option to:  
255 (i) allow disclosure of the consumer's personally identifiable information; or  
256 (ii) prohibit disclosure of the consumer's personally identifiable information.
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**Legislative Review Note****as of 2-16-04 10:38 AM**

This bill regulates Internet businesses who provide services to Utah residents. Case law surrounding regulation of Internet activities is evolving. State regulations of Internet activities have been challenged for violating principles such as the Commerce Clause of the United States Constitution. Some courts have indicated that the need for national uniformity might limit a state's ability to regulate Internet activities. Other court rulings indicate that regulations like those contained in this bill could be upheld because the regulations do not impose a greater burden on out of state Internet businesses than is imposed on in state Internet businesses and regulate only service that is provided to Utah residents.

**Office of Legislative Research and General Counsel**