

Senator Curtis S. Bramble proposes the following substitute bill:

CONSUMER PROTECTION AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: Val L. Peterson

LONG TITLE

General Description:

This bill modifies provisions related to consumer protection.

Highlighted Provisions:

This bill:

- ▶ clarifies and amends certain requirements related to the Division of Consumer Protection's enforcement powers;
- ▶ establishes a statute of limitations for an administrative or civil action filed under a chapter administered and enforced by the Division of Consumer Protection;
- ▶ modifies the definition of "educational credentials";
- ▶ addresses institutions that are exempt from the Utah Postsecondary Proprietary School Act; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



- 26 13-2-6, as last amended by Laws of Utah 2010, Chapter 378
- 27 13-11-17, as last amended by Laws of Utah 2017, Chapter 98
- 28 13-11-19, as last amended by Laws of Utah 2010, Chapter 378
- 29 13-34-103, as last amended by Laws of Utah 2014, Chapter 360
- 30 13-34-105, as last amended by Laws of Utah 2014, Chapter 360
- 31 13-42-137, as last amended by Laws of Utah 2012, Chapter 152

32

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

34 Section 1. Section 13-2-6 is amended to read:

35 **13-2-6. Enforcement powers.**

36 (1) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, the
37 division shall have authority to convene administrative hearings, issue cease and desist orders,
38 and impose fines under all the chapters identified in Section 13-2-1.

39 (2) Any person who intentionally violates a final cease and desist order entered by the
40 division of which the person has notice is guilty of a third degree felony.

41 (3) If the division has reasonable cause to believe that any person ~~[is engaged in]~~ has
42 violated or is violating any chapter listed in Section 13-2-1, the division may promptly issue the
43 alleged violator a citation signed by the division's director or the director's designee.

44 (a) Each citation shall be in writing and shall:

45 (i) set forth with particularity the nature of the violation, including a reference to the
46 statutory or administrative rule provision ~~[being]~~ violated;

47 (ii) state that any request for review of the citation shall be made in writing and be
48 received by the division no more than ~~[+0]~~ 20 calendar days following issuance;

49 (iii) state the consequences of failing to make a timely request for review; and

50 (iv) state all other information required by Subsection 63G-4-201(2).

51 (b) In computing any time period prescribed by this section, the following days may
52 not be included:

53 (i) the day on which the division issues a citation ~~[is issued by the division]; and~~

54 (ii) the day on which the division ~~[received]~~ receives a request for review of a
55 citation[;].

56 ~~[(iii) Saturdays and Sundays; and]~~

57 [~~(iv) a legal holiday set forth in Subsection 63G-1-301(1)(a).~~]

58 (c) If the recipient of a citation makes a timely request for review, within [~~+0~~] 20
59 calendar days [~~of~~] after receiving the request, the division shall [~~convene~~] initiate an
60 adjudicative proceeding in accordance with Title 63G, Chapter 4, Administrative Procedures
61 Act.

62 (d) (i) If the presiding officer finds that there is not substantial evidence that the
63 recipient violated a chapter listed in Section 13-2-1 [~~at the time the citation was issued~~], the
64 citation may not become final, and the division shall immediately vacate the citation and
65 promptly notify the recipient in writing.

66 (ii) If the presiding officer finds that there is substantial evidence that the recipient
67 violated a chapter listed in Section 13-2-1 [~~at the time the citation was issued~~], the citation
68 shall become final and the division may enter a cease and desist order against the recipient.

69 (e) A citation issued under this chapter may be personally served upon any person upon
70 whom a summons may be served in accordance with the Utah Rules of Civil Procedure. A
71 citation also may be served by first-class mail, postage prepaid.

72 (f) If the recipient fails to make a timely request for review, the citation shall become
73 the final order of the division. The period to contest the citation may be extended by the
74 director for good cause shown.

75 (g) If the chapter violated allows for an administrative fine, after a citation becomes
76 final, the director may impose the administrative fine.

77 (4) (a) A person [~~violating~~] who has violated, is violating, or has attempted to violate a
78 chapter identified in Section 13-2-1 is subject to the division's jurisdiction if:

79 (i) the violation or attempted violation is committed [~~either~~] wholly or partly within the
80 state;

81 (ii) conduct committed outside the state constitutes an attempt to commit a violation
82 within the state; or

83 (iii) transactional resources located within the state are used by the offender to directly
84 or indirectly facilitate a violation or attempted violation.

85 (b) As used in this section, "transactional resources" means:

86 (i) any mail drop or mail box, regardless of whether [~~or not~~] the mail drop or mail box
87 is located on the premises of a United States Post Office;

- 88 (ii) any telephone or facsimile transmission device;
- 89 (iii) any Internet connection by a resident or inhabitant of this state with ~~[either]~~ a
90 resident_ or nonresident_maintained internet site;
- 91 (iv) any business office or private residence used for a business-related purpose;
- 92 (v) any account with or services of a financial institution;
- 93 (vi) the services of a common or private carrier; or
- 94 (vii) the use of any city, county, or state asset or facility, including any road or
95 highway.

96 (5) The director or the director's designee, for the purposes outlined in any chapter
97 administered by the division, may administer oaths, issue subpoenas, compel the attendance of
98 witnesses, ~~[and]~~ or compel the production of papers, books, accounts, documents, ~~[and]~~ or
99 evidence.

100 (6) (a) An administrative action filed under this chapter or a chapter listed in Section
101 13-2-1 shall be commenced no later than 10 years after the day on which the alleged violation
102 occurs.

103 (b) A civil action filed under this chapter or a chapter listed in Section 13-2-1 shall be
104 commenced no later than five years after the day on which the alleged violation occurs.

105 (c) The provisions of this Subsection (6) control over the provisions of Title 78B,
106 Chapter 2, Statutes of Limitations.

107 Section 2. Section 13-11-17 is amended to read:

108 **13-11-17. Actions by enforcing authority.**

109 (1) The enforcing authority may bring an action in a court of competent jurisdiction to:

- 110 (a) obtain a declaratory judgment that an act or practice violates this chapter;
- 111 (b) enjoin, in accordance with the principles of equity, a supplier who has violated, is
112 violating, or is otherwise likely to violate this chapter;

113 (c) recover, for each violation, actual damages, or obtain relief under Subsection (2)(b),
114 on behalf of consumers who complained to the enforcing authority within a reasonable time
115 after it instituted proceedings under this chapter; and

116 (d) obtain a fine in an amount determined after considering the factors in Subsection
117 (6).

118 (2) (a) The enforcing authority may bring a class action on behalf of consumers for the

119 actual damages caused by an act or practice specified as violating this chapter in a rule adopted
120 by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on
121 which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by final judgment
122 of courts of general jurisdiction and appellate courts of this state that was either reported
123 officially or made available for public dissemination under Subsection 13-11-7(1)(c) by the
124 enforcing authority 10 days before the consumer transactions on which the action is based, or,
125 with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent
126 judgment that became final before the consumer transactions on which the action is based.

127 (b) (i) On motion of the enforcing authority and without bond in an action under this
128 Subsection (2), the court may make appropriate orders, including appointment of a master or
129 receiver or sequestration of assets, but only if it appears that the defendant is threatening or is
130 about to remove, conceal, or dispose of the defendant's property to the damage of persons for
131 whom relief is requested. An appropriate order may include an order to:

- 132 (A) reimburse consumers found to have been damaged;
- 133 (B) carry out a transaction in accordance with consumers' reasonable expectations;
- 134 (C) strike or limit the application of unconscionable clauses of contracts to avoid an
135 unconscionable result;
- 136 (D) impose a fine in an amount determined after considering the factors listed in
137 Subsection (6); or
- 138 (E) grant other appropriate relief.

139 (ii) The court may assess the expenses of a master or receiver against a supplier.

140 (c) If an act or practice that violates this chapter unjustly enriches a supplier and
141 damages can be computed with reasonable certainty, damages recoverable on behalf of
142 consumers who cannot be located with due diligence shall be transferred to the state treasurer
143 pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

144 (d) If a supplier shows by a preponderance of the evidence that a violation of this
145 chapter resulted from a bona fide error notwithstanding the maintenance of procedures
146 reasonably adapted to avoid the error, recovery under this Subsection (2) is limited to the
147 amount, if any, by which the supplier was unjustly enriched by the violation.

148 ~~[(e) An action may not be brought by the enforcing authority under this Subsection (2)~~
149 ~~more than two years after the occurrence of a violation of this chapter.]~~

150 (3) (a) The enforcing authority may terminate an investigation or an action other than a
151 class action upon acceptance of the supplier's written assurance of voluntary compliance with
152 this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse
153 consumers or take other appropriate corrective action.

154 (b) An assurance is not evidence of a prior violation of this chapter. Unless an
155 assurance has been rescinded by agreement of the parties or voided by a court for good cause,
156 subsequent failure to comply with the terms of an assurance is prima facie evidence of a
157 violation.

158 (4) (a) In addition to other penalties and remedies set out under this chapter, and in
159 addition to its other enforcement powers under Chapter 2, Division of Consumer Protection,
160 the division director may issue a cease and desist order and impose an administrative fine of up
161 to \$2,500 for each violation of this chapter.

162 (b) All money received through fines imposed under this section shall be deposited in
163 the Consumer Protection Education and Training Fund created by Section 13-2-8.

164 (5) (a) Within 30 days after agency or judicial review of a final division order imposing
165 an administrative fine, the supplier on whom the fine is imposed shall pay the fine in full.

166 (b) The unpaid amount of a fine is increased by 10%:

167 (i) if the fine has not been paid in full within 60 days after the final division order
168 imposing the fine; and

169 (ii) unless the division waives the 10% increase in a stipulated payment plan.

170 (6) A fine imposed under Subsection (1)(d) or Subsection (2)(b)(i)(D) shall be
171 determined after considering the following factors:

172 (a) the seriousness, nature, circumstances, extent, and persistence of the conduct
173 constituting the violation;

174 (b) the harm to other persons resulting either directly or indirectly from the violation;

175 (c) cooperation by the supplier in an inquiry or investigation conducted by the
176 enforcing authority concerning the violation;

177 (d) efforts by the supplier to prevent occurrences of the violation;

178 (e) efforts by the supplier to mitigate the harm caused by the violation, including a
179 reimbursement made to a consumer injured by the act of the supplier;

180 (f) the history of previous violations by the supplier;

181 (g) the need to deter the supplier or other suppliers from committing the violation in
182 the future; and

183 (h) other matters as justice may require.

184 Section 3. Section 13-11-19 is amended to read:

185 **13-11-19. Actions by consumer.**

186 (1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at
187 law, a consumer may bring an action to:

188 (a) obtain a declaratory judgment that an act or practice violates this chapter; and

189 (b) enjoin, in accordance with the principles of equity, a supplier who has violated, is
190 violating, or is likely to violate this chapter.

191 (2) A consumer who suffers loss as a result of a violation of this chapter may recover,
192 but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs.

193 (3) Whether a consumer seeks or is entitled to recover damages or has an adequate
194 remedy at law, he may bring a class action for declaratory judgment, an injunction, and
195 appropriate ancillary relief against an act or practice that violates this chapter.

196 (4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring
197 a class action for the actual damages caused by an act or practice specified as violating this
198 chapter by a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the
199 consumer transactions on which the action is based, or declared to violate Section 13-11-4 or
200 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and
201 appellate courts of this state that was either officially reported or made available for public
202 dissemination under Subsection 13-11-7(1)(c) by the enforcing authority 10 days before the
203 consumer transactions on which the action is based, or with respect to a supplier who agreed to
204 it, was prohibited specifically by the terms of a consent judgment which became final before
205 the consumer transactions on which the action is based.

206 (b) If an act or practice that violates this chapter unjustly enriches a supplier and the
207 damages can be computed with reasonable certainty, damages recoverable on behalf of
208 consumers who cannot be located with due diligence shall be transferred to the state treasurer
209 pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

210 (c) If a supplier shows by a preponderance of the evidence that a violation of this
211 chapter resulted from a bona fide error notwithstanding the maintenance of procedures

212 reasonably adapted to avoid the error, recovery under this section is limited to the amount, if
213 any, in which the supplier was unjustly enriched by the violation.

214 (5) Except for services performed by the enforcing authority, the court may award to
215 the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

216 (a) the consumer complaining of the act or practice that violates this chapter has
217 brought or maintained an action he knew to be groundless; or a supplier has committed an act
218 or practice that violates this chapter; and

219 (b) an action under this section has been terminated by a judgment or required by the
220 court to be settled under Subsection 13-11-21(1)(a).

221 (6) Except for consent judgment entered before testimony is taken, a final judgment in
222 favor of the enforcing authority under Section 13-11-17 is admissible as prima facie evidence
223 of the facts on which it is based in later proceedings under this section against the same person
224 or a person in privity with him.

225 (7) When a judgment under this section becomes final, the prevailing party shall mail a
226 copy to the enforcing authority for inclusion in the public file maintained under Subsection
227 13-11-7(1)(e).

228 ~~[(8) An action under this section shall be brought within two years after occurrence of a
229 violation of this chapter, or within one year after the termination of proceedings by the
230 enforcing authority with respect to a violation of this chapter, whichever is later. When a
231 supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising
232 out of the transaction on which suit is brought.]~~

233 Section 4. Section 13-34-103 is amended to read:

234 **13-34-103. Definitions.**

235 As used in this chapter:

236 (1) "Agent" means any person who:

237 (a) owns an interest in or is employed by a proprietary school; and

238 (b) (i) enrolls or attempts to enroll a resident of this state in a proprietary school;

239 (ii) offers to award educational credentials for remuneration on behalf of a proprietary
240 school; or

241 (iii) holds himself out to residents of this state as representing a proprietary school for
242 any purpose.

243 (2) (a) "Certificate of registration" means approval from the division to operate a
244 school or institution in compliance with this chapter and rules adopted under this chapter.

245 (b) "Certificate of registration" does not mean an endorsement of the school or
246 institution by either the division or the state.

247 (3) "Division" means the Division of Consumer Protection.

248 (4) "Educational credentials" means degrees, diplomas, certificates, transcripts, reports,
249 documents, or letters of designation, marks, appellations, series of letters, numbers, or words
250 [~~which~~] that signify or appear to signify [~~enrollment, attendance, progress, or~~] satisfactory
251 completion of [~~the requirements or prerequisites~~] any requirement or prerequisite for any
252 educational program.

253 (5) "Institution" means an individual, corporation, partnership, association,
254 cooperative, or other legal entity.

255 (6) "Offer" means to advertise, publicize, solicit, or encourage any person directly or
256 indirectly.

257 (7) "Operate" in this state means to:

258 (a) maintain a place of business in the state;

259 (b) solicit business in the state;

260 (c) conduct significant educational activities within the state; or

261 (d) offer or provide postsecondary instruction leading to a postsecondary degree or
262 certificate to any number of Utah residents from a location outside the state by correspondence
263 or any telecommunications or electronic media technology.

264 (8) "Ownership" means:

265 (a) the controlling interest in a school, institution, or college; or

266 (b) if an entity holds the controlling interest in the school, institution, or college, the
267 controlling interest in the entity that holds the controlling interest in the school, institution, or
268 college.

269 (9) "Postsecondary education" means education or educational services offered
270 primarily to individuals who:

271 (a) have completed or terminated their secondary or high school education; or

272 (b) are beyond the age of compulsory school attendance.

273 (10) (a) "Proprietary school" means a private institution, including a business,

274 modeling, paramedical, tax preparation, or trade or technical school, that offers postsecondary
275 education:

276 (i) in consideration of the payment of tuition or fees; and

277 (ii) for the attainment of educational, professional, or vocational objectives.

278 (b) "Proprietary school" does not include an institution that is exempt from this chapter
279 under Section [13-34-105](#).

280 (11) "Utah institution" means a school or institution that:

281 (a) offers postsecondary education; and

282 (b) is headquartered or primarily operates in Utah.

283 Section 5. Section **13-34-105** is amended to read:

284 **13-34-105. Exempted institutions.**

285 [~~(1)~~ This chapter does not apply to:]

286 (1) The following institutions are exempt from the provisions of this chapter, if the
287 institution establishes an exemption with the division in accordance with Subsection
288 [13-34-107\(1\)\(b\)\(ii\)](#):

289 (a) a Utah institution directly supported, to a substantial degree, with funds provided
290 by:

291 (i) the state;

292 (ii) a local school district; or

293 (iii) any other Utah governmental subdivision;

294 [~~(b)~~ an institution that offers instruction exclusively at or below the 12th grade level;]

295 [~~(c)~~ (b) a lawful enterprise that offers only professional review programs, including
296 C.P.A. and bar examination review and preparation courses;

297 [~~(d)~~ (c) a private institution that:

298 (i) provides postsecondary education; and

299 (ii) is owned, controlled, operated, or maintained by a bona fide church or religious
300 denomination, that is exempted from property taxation under the laws of this state;

301 [~~(e)~~ (d) ~~[a school or]~~ an institution that is accredited by a regional or national
302 accrediting agency recognized by the United States Department of Education;

303 [~~(f)~~ (e) subject to Subsection (4), a business organization, trade or professional
304 association, fraternal society, or labor union that:

- 305 (i) sponsors or conducts courses of instruction or study predominantly for bona fide
 306 employees or members; and
- 307 (ii) does not advertise as a school;
- 308 ~~[(g)]~~ (f) an institution that exclusively offers one or more of the following:
- 309 (i) ~~[(A) exclusively offers]~~ general education ~~[courses or instruction that are]:~~
 310 (A) that is remedial, avocational, nonvocational, or recreational in nature; and
 311 (B) for which the institution does not advertise occupation objectives or grant
 312 [educational credentials; or] a degree, diploma, or other educational credential commensurate
 313 with a degree or diploma;
- 314 (ii) ~~[exclusively prepares]~~ preparation for individuals to teach courses or instruction
 315 described in Subsection (1)~~[(g)]~~(f)(i)(A);
- 316 (iii) courses in English as a second language;
- 317 (iv) instruction at or below the 12th grade level;
- 318 (v) nurse aide training programs that are approved by:
- 319 (A) the Bureau of Health Facility Licensing and Certification; or
 320 (B) an entity authorized by the Bureau of Health Facility Licensing and Certification to
 321 approve nurse aide certification programs; or
- 322 (vi) content:
- 323 (A) that is exclusively available on the Internet;
- 324 (B) for which the institution charges \$1,000 or less in a 12-month period; and
 325 (C) for which the institution does not grant educational credentials other than a
 326 certificate that indicates completion and that does not represent achievement or proficiency;
- 327 ~~[(h)]~~ (g) an institution that offers only workshops or seminars:
- 328 (i) lasting no longer than three calendar days; and
- 329 (ii) for which academic credit is not awarded;
- 330 ~~[(i)]~~ (h) an institution that offers programs:
- 331 (i) in barbering, cosmetology, real estate, or insurance; and
- 332 (ii) that are regulated and approved by a state or federal governmental agency;
- 333 ~~[(j)]~~ (i) an education provider certified by the Division of Real Estate under Section
 334 [61-2c-204.1](#);
- 335 ~~[(k)]~~ (j) an institution that offers aviation training if the institution:

336 (i) (A) is approved under Federal Aviation Regulations, 14 C.F.R. Part 141; or
337 (B) provides aviation training under Federal Aviation Regulations, 14 C.F.R. Part 61;
338 and

339 ~~[(ii) exclusively offers aviation training that a student fully receives within 24 hours~~
340 ~~after the student pays any tuition, fee, or other charge for the aviation training;]~~

341 (ii) does not collect tuition, fees, membership dues, or other payment more than 24
342 hours before the student receives the aviation training; and

343 ~~[(f)] (k)~~ an institution that provides emergency medical services training if all of the
344 institution's instructors, course coordinators, and courses are approved by the Department of
345 Health~~;~~ and].

346 ~~[(m) an institution that exclusively conducts nurse aide training programs that are~~
347 ~~approved by the State Office of Vocational Education and are subject to the Nurse Aide~~
348 ~~Registry.]~~

349 ~~[(2) If available evidence suggests that an exempt institution under this section is not in~~
350 ~~compliance with the standards of registration under this chapter and applicable division rules,~~
351 ~~the division shall contact the institution and, if appropriate, the state or federal government~~
352 ~~agency to request corrective action.]~~

353 (2) An institution that no longer qualifies for an exemption that the institution
354 established with the division under Subsection [13-34-107\(1\)\(b\)\(ii\)](#) shall comply with the other
355 provisions of Section [13-34-107](#).

356 (3) An institution, branch, extension, or facility operating within the state that is
357 affiliated with an institution operating in another state shall be separately approved by the
358 affiliate's regional or national accrediting agency to qualify for the exemption described in
359 Subsection (1)~~[(e)]~~(d).

360 (4) For purposes of Subsection (1)~~[(f)]~~(e), a business organization, trade or
361 professional association, fraternal society, or labor union is considered to be conducting the
362 course predominantly for bona fide employees or members if ~~[it]~~ the entity hires a majority of
363 the ~~[persons]~~ individuals who:

364 (a) successfully complete ~~[its]~~ the course of instruction or study with a reasonable
365 degree of proficiency; and

366 (b) apply for employment with that same entity.

367 (5) If the United States Department of Education no longer recognizes an institution's
 368 accrediting agency, the institution remains exempt under Subsection (1)(d):

369 (a) during any grace period provided by the United States Department of Education for
 370 obtaining new accreditation, if the institution demonstrates to the division that the institution is
 371 within the grace period; or

372 (b) if the institution demonstrates to the division that the United States Department of
 373 Education otherwise considers the institution to have recognized accreditation.

374 Section 6. Section **13-42-137** is amended to read:

375 **13-42-137. Statute of limitations -- Tolling.**

376 [~~(1) An action or proceeding brought pursuant to Subsection **13-42-133**(1), (2), or (3)~~
 377 ~~shall be commenced no later than four years after the conduct that is the basis of the~~
 378 ~~administrator's complaint.]~~

379 [~~(2) An action brought pursuant to Section **13-42-135** shall be commenced no later~~
 380 ~~than two years after the latest of:]~~

381 [~~(a) the individual's last transmission of money to a provider;]~~

382 [~~(b) the individual's last transmission of money to a creditor at the direction of the~~
 383 ~~provider;]~~

384 [~~(c) the provider's last disbursement to a creditor of the individual;]~~

385 [~~(d) the provider's last accounting to the individual pursuant to Subsection~~
 386 ~~**13-42-127**(1);]~~

387 [~~(e) the date on which the individual discovered or reasonably should have discovered~~
 388 ~~the facts giving rise to the individual's claim; or]~~

389 [~~(f) termination of actions or proceedings by the administrator with respect to a~~
 390 ~~violation of the chapter.]~~

391 [(~~2~~)] The period prescribed in Subsection [(~~2~~)(~~e~~)] **13-2-6(6)** is tolled during any period
 392 during which the provider or, if different, the defendant has materially and willfully
 393 misrepresented information required by this chapter to be disclosed to the individual, if the
 394 information so misrepresented is material to the establishment of the liability of the defendant
 395 under this chapter.