

Notes on Drafting LC0074

REQUIRING COMMERCIAL WEBSITES TO POST PRIVACY POLICIES

Prepared for
the State Administration and Veterans' Affairs Interim Committee
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Bill Title

Bill Drafting Manual The title must clearly summarize the content of the bill for legislators and the public. The Montana constitution states: "If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void."

Issues/options:

A well-drafted title is the responsibility of the drafter and will be subject to legal review.

Notes (optional space):

Preamble

Bill Drafting Manual A preamble is optional. It does not become law and is not codified in the statutes. It will appear in the Montana Laws book and in the annotations. It is a preliminary statement of the reasons for the enactment of the law.

Issues/options:

The committee may wish to consider a purpose section instead of a preamble. (See the Purpose Section discussion below, after the short title discussion.)

1. Does the committee want a preamble?
2. If so, do the WHEREAS clauses reflect the committee's rationale?

Notes (optional space):

Section 1. Short title.

Bill Drafting Manual	A short title is typically used to identify a significant new area of law in a definable area. It enables quick future identification. <i>It is not appropriate to include a year in the short title.</i>
Privacy Shield	Privacy Shield Framework
California	Online Privacy Protection Act of 2003
Utah	Notice of Intent to Sell Nonpublic Personal Information Act
Montana (for government agencies)	Governmental Internet Information Privacy Act.

Issues/options:

1. What would SAVA like the short title to be?

Notes (optional space):

Purpose Section (not now included in LC0074)

Bill Drafting Manual	A purpose statement is not enforceable law. Courts have relied on purpose sections to construe unclear and ambiguous language. A well-drafted act should not require an extraneous statement to recite reasons for its enactment or what it seeks to accomplish. However, occasionally it is necessary to express the reason prompting the legislation or the policy or purpose of an act, such as when a law imposes a burden on a particular class of persons, thus requiring at least a rational basis for treating them differently.
Privacy Shield	A portion of a statement by the Undersecretary for International Trade, U.S. Department of Commerce reads: The new Framework will yield several significant benefits for both individuals and businesses. First, it provides an important set of privacy protections for the data of EU individuals. It requires participating U.S. organizations to develop a conforming privacy policy, publicly commit to comply with the Privacy Shield Principles so that the commitment becomes enforceable under U.S. law, annually re-certify their compliance to the Department, provide free independent dispute resolution to EU individuals, and be subject to the authority of the U.S. Federal Trade Commission ("FTC"), Department of Transportation ("DOT"), or another enforcement agency.

Privacy Shield
(continued)

Second, the Privacy Shield will enable thousands of companies in the United States and subsidiaries of European companies in the United States to receive personal data from the European Union to facilitate data flows that support transatlantic trade. The transatlantic economic relationship is already the world's largest, accounting for half of global economic output and nearly one trillion dollars in goods and services trade, supporting millions of jobs on both sides of the Atlantic. Businesses that rely on transatlantic data flows come from all industry sectors and include major Fortune 500 firms as well as many small and medium-sized enterprises (SMEs). Transatlantic data flows allow U.S. organizations to process data required to offer goods, services, and employment opportunities to European individuals. The Privacy Shield supports shared privacy principles, bridging the differences in our legal approaches, while furthering trade and economic objectives of both Europe and the United States.

California

Section 22578, CA Business and Professions Code (BPC), states:
It is the intent of the Legislature that this chapter is a matter of statewide concern.

Utah

No purpose section.

Drafter's Rationale

I did not include a purpose statement because a preamble can convey the rationale for the act. However, because the act requires a certain class of entities to post a privacy policy, the committee may wish to consider a purpose statement.

Issues/options:

1. Does the committee want a purpose section?
2. If so, what concepts would the committee like to have expressed?

Notes (optional space):

Section 2. Definitions.

Bill Drafting Manual	Definitions are used to avoid repetition and to ensure clarity. Definitions should not articulate substantive law. Definitions are not necessary for commonly accepted terms.
"Commercial website"	A term to describe what is covered
Privacy Shield	An "organization" participating in the Privacy Shield is covered by the agreement. Does not specifically define "organization".
California	Chapter requiring privacy policy applies to a "commercial Web site" and also covers an "online service", but the chapter does not provide a definition of either of these terms.
Utah	"Commercial entity" means a person that: (i) has an office or other place of business located in the state; and (ii) in the ordinary course of business transacts a consumer transaction in this state. (b) "Commercial entity" does not include: (i) a governmental entity; or (ii) an entity providing services on behalf of a governmental entity."
Montana (for government agencies)	Section 2-17-551. Definitions. (2) "Governmental entity" means the state and political subdivisions of the state. (3) "Government website operator" or "operator" means a governmental entity that operates a website located on the internet or an online service and that collects or maintains personal information from or about the users of or visitors to the website or online service or on whose behalf information is collected or maintained. (4) "Internet" means, collectively, the myriad of computer and telecommunications facilities, including equipment and operating software, that comprise the interconnected worldwide network of networks that use the transmission control protocol/internet protocol or any predecessor or successor protocols to communicate information of all kinds by wire or radio. (5) "Online" means any activity regulated by 2-17-550 through 2-17-553 that is effected by active or passive use of an internet connection, regardless of the medium by or through which the connection is established.

Drafter's Rationale

I used the "commercial website" terminology offered in Rep. Bennett's outline and taken from the CA statute.

- "Commercial" is commonly used in reference to a for-profit enterprise. I did not limit the term to a business located in Montana (as is done in UT) because my understanding is that SAVA wants to take an approach similar to the Privacy Shield and CA provisions.
- "Website" is a commonly accepted term. The Google definition is: "a location connected to the Internet that maintains one or more pages on the World Wide Web". The Merriam-Webster definition is: "a group of World Wide Web pages usually containing hyperlinks to each other and made available online by an individual, company, educational institution, government, or organization".
- Regarding "online service", this term was included in Rep. Bennett's outline based on CA statutes. However, I omitted it. I did not know if it was relevant to the intended scope of the bill that deals with privacy policies being posted on websites. If an online service provider has a website, it would be covered.

The "yourdictionary.com" definition of "online service" is:

(1) An organization that provides an information service over the Internet. Examples are search engines, cloud storage services and application service providers.

(2) An organization that provides access to the Internet. See ISP.

(3) An earlier organization that provided proprietary content online. Before the Internet was offered to the general public, online services such as AOL and CompuServe contained a unique mix of databases and resources available via dial-up modems. If e-mail was provided, it could only be sent to members of the same service.

Issues/options:

1. Nonprofit entities may also collect personal information. Does SAVA want to cover nonprofit entities as well as the for-profit entities?
2. Does SAVA want to include "online service" as a separate term and entity covered by this bill?

Notes (optional space):

"Operator"	Term to describe the responsible party (i.e., who is subject to enforcement actions)
Privacy Shield	Uses "organization" to describe both what is covered and who is covered, but does not specifically define the term.
California	Section 22577(c) of the California BPC states: The term "operator" means any person or entity that owns a Web site located on the Internet or an online service that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the Web site or online service if the Web site or online service is operated for commercial purposes. It does not include any third party that operates, hosts, or manages, but does not own, a Web site or online service on the owner's behalf or by processing information on behalf of the owner.
Utah	Section 13-37-102, of the Utah Code uses "commercial entity" for describing both what is covered and who is covered.
Montana (for government agencies)	Section 2-17-552, MCA, uses "government website operator " and does not have a separate term for <i>who</i> is covered. This term is not defined.
Drafter's Rationale	"Operator" was used in Rep. Bennett's instructions based on CA statute.

Issues/options:

I believe "operator" was used because the statutes to which the term applied to applied to websites and online service providers. I'm not sure it is necessary to have this term under the scope of SAVA's current bill. I believe the term "owner" could be used and this would nullify the need to define "operator".

1. Does SAVA want to use the term "operator" or revert to simply stating the "owner" of a commercial website?
2. Does SAVA want to use a different term? If so, what?
3. Does SAVA want to revise the definition of who is the responsible party? If so, how?

Notes (optional space):

"Personal Information" Defines what type of information is covered

Privacy Shield

Definition states:

"Personal data" and "personal information" are data about an identified or identifiable individual that are within the scope of the Directive, received by an organization in the United States from the European Union, and recorded in any form.

California

Section 22577(a) of the California BPC states:

The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

- (1) A first and last name.
- (2) A home or other physical address, including street name and name of a city or town.
- (3) An e-mail address.
- (4) A telephone number.
- (5) A social security number.
- (6) Any other identifier that permits the physical or online contacting of a specific individual.
- (7) Information concerning a user that the Web site or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described in this subdivision.

Utah

Section 13-37-102 of the Utah Code uses two terms:

- (5) (a) "Nonpublic personal information" means information that:
 - (i) is not public information; and
 - (ii) either alone or in conjunction with public information, identifies a person in distinction from other persons.
- (b) "Nonpublic personal information" includes:
 - (i) a person's Social Security number;
 - (ii) information used to determine a person's credit worthiness including a person's:
 - (A) income; or
 - (B) employment history;
 - (iii) the purchasing patterns of a person; or
 - (iv) the personal preferences of a person.
- (6) "Public information" means a person's:
 - (a) name;
 - (b) telephone number; or
 - (c) street address.

Montana
(for government
agencies)

Under section 2-17-551, MCA, the following term and definition is used:

- (6) "Personally identifiable information" means individually identifiable information about an individual collected online, including:
- (a) a first and last name;
 - (b) a residence or other physical address, including a street name and name of a city or town;
 - (c) an e-mail address;
 - (d) a telephone number;
 - (e) a social security number; or
 - (f) unique identifying information that an internet service provider or a government website operator collects and combines with any information described in subsections (6)(a) through (6)(e).

Drafter's Rationale

- I used the term "Personal information" because it was the term used in Rep. Bennett's outline and is based on the Privacy Shield term.
- I used the same definition as is used in CA and in MT, except I did not include (f) from the MT statute or (7) from the CA statute, which SAVA may wish to discuss including.

Issues/options:

1. Does SAVA want to use a different term? If so, what term?
2. Does SAVA want to revise the definition (i.e., the type of personal information covered in the bill? If so, how?

Notes (optional space):

"Third party"

This term is used to determine when or if the privacy policy must identify the entities with which the personal information is shared.

Privacy Shield

Uses the term "third party", but does not define it.

California

Uses the term but does not define it.

Utah	Section 13-37-102, of the Utah Code states: (7) (a) Subject to Subsection (7)(b), "third party" means a person other than the commercial entity that obtains nonpublic personal information. (b) "Third party" does not include an affiliate or agent of the commercial entity that obtains nonpublic personal information.
Montana (for government agencies)	Section 2-17-552, MCA, uses the term but does not define it. "... if the personally identifiable information may be used for a purpose other than the express purpose of the website or may be given or sold to a third party, except as required by law, then the operator shall ensure that the website includes: ..."
Merriam-Webster	A third party is someone who is not one of the two main people involved in a legal agreement but who is still affected by it in some way.
Drafter's Rationale	<ul style="list-style-type: none"> • Modeled the definition after the UT definition, but including rather than excluded an affiliate or subsidiary. • Starting point for SAVA's further discussion.

Issues/options:

Not defining "third party" could leave the interpretation open and ambiguous. However, there could be disagreement about whether requiring disclosure of all affiliates or subsidiaries is too cumbersome.

1. Does SAVA want to define "third party"? If so, how?
2. Does SAVA want to revise the definition to *exclude* affiliates or subsidiaries?

Notes (optional space):

Section 3. Privacy policy required -- notice and content requirements.

Subsection (1)	Describes to whom the section applies.
Privacy Shield	Applies to any organization that self-certifies as a participating organization with respect to how the organization processes personal information about EU citizens.

California Section 22575(a) of the BPC states:
(a) An operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service shall conspicuously post its privacy policy on its Web site, or in the case of an operator of an online service, make that policy available in accordance with paragraph (5) of subdivision (b) of Section 22577.

Utah A notice of intent to sell the collected information must be posted only when nonpublic information is collected during a "commercial transaction" and the information is going to be sold to third party.

Montana (for government agencies) Section 2-17-552, MCA, states:
(1) A government website operator may not collect personally identifiable information online from a website user unless the operator complies with the provisions of this section.

Drafter's Rationale

- LC0074 language is modeled on CA's law, but altered a bit to conform to Montana's bill drafting style.
- I used "collected by any means" instead of the CA language about information collected "through the Internet".

Issues/options:

1. Does SAVA want to revise subsection (1)? If so, how?

Notes (optional space):

**Section 3.
Subsection (2)** **Specifies how the privacy policy must be provided and that the website must comply with the policy.**

Privacy Shield Principle 1, regarding notice, states: ...
(b) This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party.

Section 22575(a) of the BPC states that the commercial website or online service shall "conspicuously post"

Section 22577(b) states:

The term "conspicuously post" with respect to a privacy policy shall include posting the privacy policy through any of the following:

- (1) A Web page on which the actual privacy policy is posted if the Web page is the homepage or first significant page after entering the Web site.
- (2) An icon that hyperlinks to a Web page on which the actual privacy policy is posted, if the icon is located on the homepage or the first significant page after entering the Web site, and if the icon contains the word "privacy." The icon shall also use a color that contrasts with the background color of the Web page or is otherwise distinguishable.
- (3) A text link that hyperlinks to a Web page on which the actual privacy policy is posted, if the text link is located on the homepage or first significant page after entering the Web site, and if the text link does one of the following:
 - (A) Includes the word "privacy."
 - (B) Is written in capital letters equal to or greater in size than the surrounding text.
 - (C) Is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.
- (4) Any other functional hyperlink that is so displayed that a reasonable person would notice it.
- (5) In the case of an online service, any other reasonably accessible means of making the privacy policy available for consumers of the online service.

Utah

Utah does not require a privacy policy, but does require a notice if the information collected will be sold, the applicable provision in section 13-37-201 of the Utah Code states:

(3) The notice required by Subsection (1):

(a) Shall read substantially as follows: "We may choose to disclose nonpublic personal information about you, the consumer, to a third party for compensation."

(b) may be made:

(i) orally, if the consumer transaction itself is entirely conducted orally; or

(ii) in writing, if the notice is written in dark bold; and

(c) shall be sufficiently conspicuous so that a reasonable person would perceive the notice before providing the nonpublic personal information.

Montana
(for government
agencies)

Section 2-17-552, MCA, states:

(3) ..

(a) a clear and conspicuous notice ...

...and

(c) a clear, conspicuous, and easily understood ..

Drafter's Rationale

I followed Rep. Bennett's outline, which stated "conspicuously post a privacy policy on the site and comply with its policy", which was based on part of CA's statute.

For discussion purposes, I added language about clarity (i.e., that the policy must be "written in reasonably clear language and presented in a reasonably easy to read font typeface and size.")

I did add any language about what page the privacy policy or notice had to be provided on (e.g., the home page).

"Conspicuously" is a common term, and the dictionary definition should speak for itself. Merriam-Webster definition: 1. obvious to the eye or mind; 2 attracting attention.

Issues/options:

1. Does SAVA want to revise the provisions related to the appearance and posting of the privacy policy? If so, how?

Notes (optional space):

**Section 3.
Subsection (3)**

Privacy Shield

Specifies what information must be included in the privacy policy.

Principle 1, regarding notice, states:

- (a) An organization must inform individuals about:
 - i. its participation in the Privacy Shield and provide a link to, or the web address for, the Privacy Shield List,
 - ii. the types of personal data collected and, where applicable, the entities or subsidiaries of the organization also adhering to the Principles,
 - iii. its commitment to subject to the Principles all personal data received from the EU in reliance on the Privacy Shield,
 - iv. the purposes for which it collects and uses personal information about them,
 - v. how to contact the organization with any inquiries or complaints, including any relevant establishment in the EU that can respond to such inquiries or complaints,
 - vi. the type or identity of third parties to which it discloses personal information, and the purposes for which it does so,
 - vii. the right of individuals to access their personal data,
 - viii. the choices and means the organization offers individuals for limiting the use and disclosure of their personal data

California

Section 22575(b) of the BPC states that the privacy policy shall:

- (1) Identify the categories of personally identifiable information that the operator collects through the Web site or online service about individual consumers who use or visit its commercial Web site or online service and the categories of third-party persons or entities with whom the operator may share that personally identifiable information.
- (2) If the operator maintains a process for an individual consumer who uses or visits its commercial Web site or online service to review and request changes to any of his or her personally identifiable information that is collected through the Web site or online service, provide a description of that process.
- (3) Describe the process by which the operator notifies consumers who use or visit its commercial Web site or online service of material changes to the operator's privacy policy for that Web site or online service.

California
(continued)

- (4) Identify its effective date.
- (5) Disclose how the operator responds to Web browser “do not track” signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer’s online activities over time and across third-party Web sites or online services, if the operator engages in that collection.
- (6) Disclose whether other parties may collect personally identifiable information about an individual consumer’s online activities over time and across different Web sites when a consumer uses the operator’s Web site or service.

Utah

Utah does not require a privacy policy, but if the information collected will be sold, the applicable provision in section 13-37-201 of the Utah Code states:

- (3) The notice required by Subsection (1):
 - (a) Shall read substantially as follows: "We may choose to disclose nonpublic personal information about you, the consumer, to a third party for compensation."
 - (b) may be made:
 - (i) orally, if the consumer transaction itself is entirely conducted orally; or
 - (ii) in writing, if the notice is written in dark bold; and
 - (c) shall be sufficiently conspicuous so that a reasonable person would perceive the notice before providing the nonpublic personal information.

Montana
(government agencies)

Section 2-17-552,MCA, states:

- (2) A government website operator shall ensure that the website:
 - (a) identifies who operates the website;
 - (b) provides the address and telephone number at which the operator may be contacted as well as an electronic means for contacting the operator; and
 - (c) generally describes the operator's information practices, including policies to protect the privacy of the user and the steps taken to protect the security of the collected information.

Montana
(continued)

(3) In addition to the requirements of subsection (2), if the personally identifiable information may be used for a purpose other than the express purpose of the website or may be given or sold to a third party, except as required by law, then the operator shall ensure that the website includes:

- (a) a clear and conspicuous notice to the user that the information collected could be used for other than the purposes of the website;
- (b) a general description of the types of third parties that may obtain the information; and
- (c) a clear, conspicuous, and easily understood online procedure requiring an affirmative expression of the user's permission before the information is collected.

Drafter's Rationale

I modeled the language after the Privacy Shield requirements as listed in Rep. Bennett's outline.

For discussion purposes, I added in subsection (3)(e) with respect the right to access the information, language with respect to the right to "correct or delete" the information, which is a right expressed in the Privacy Shield. However, this language may go beyond what Rep. Bennett proposed.

The primary differences between the Privacy Shield and CA statute are that the Privacy Shield does not include:

- effective date of privacy policy.
- how the website responds to a "do not track" setting on a browser.
- whether the website tracks the consumer's online behavior over time.

Issues/options:

1. Does SAVA want to revise what information/notice to website users must be included in the privacy policy? If so, how?

Notes (optional space):

Section 4. Enforcement authority -- violation defined -- civil penalty -- disposition of fines.

Bill Drafting Manual	It is generally better to group specifics regarding enforcement and penalties (such as the 30-day grace period) into their own section.
Privacy Shield	Enforcement against an organization that has voluntarily certified compliance falls under several areas of law, but key points are: <ul style="list-style-type: none">• Individuals may bring a complaint directly to a Privacy Shield participant and the participant must respond to the individual within 45 days.• Privacy Shield participants must provide, at no cost to the individual, an independent recourse mechanism by which each individual's complaints and disputes can be investigated and expeditiously resolved.
California	<p>Chapter 22. Internet Privacy Requirements. Does not include a specific reference to who enforces the provisions of the chapter. However, the Office of Attorney General has a Privacy Enforcement and Protection Unit.</p> <p>Section 22575 states: "An operator shall be in violation of this subdivision only if the operator fails to post its policy within 30 days after being notified of noncompliance."</p> <p>Section 22576 states: "An operator of a commercial Web site or online service that collects personally identifiable information through the Web site or online service from individual consumers who use or visit the commercial Web site or online service and who reside in California shall be in violation of this section if the operator fails to comply with the provisions of Section 22575 or with the provisions of its posted privacy policy in either of the following ways:</p> <ul style="list-style-type: none">(a) Knowingly and willfully.(b) Negligently and materially. <p>California's handbook for businesses states the following with respect to its "shine the light" law applicable to businesses that share consumer personal information with other businesses for marketing purposes (this is a different law than the online privacy law):</p>

California
(continued)

Remedies and Penalties

- Private right of action for damages, injunctive relief, civil penalties of up to \$500 per violation.
- Willful, intentional or reckless violation: damages, injunctive relief, civil penalty of up to \$3,000 per violation.
- A prevailing plaintiff is entitled to recover reasonable attorney fees and costs.
- Unless violation is willful, intentional or reckless, a business may assert as a complete defense that it provided accurate, complete information within 90 days of knowing of inadequacy.

With respect to California's Online Privacy Act that requires any commercial website that collects "personally identifiable information" to "conspicuously post" a privacy policy, the handbook for businesses states:

Remedies and Penalties

- An operator has a 30-day grace period after being notified of failure to post a policy that complies with the law.
- An operator subject to the law is in violation for failing to comply either "knowingly and willfully" or "negligently and materially."
- The law may be enforced through California's unfair competition statute, Business and Professions Code section 17200 and following.

Section 17206 states in part:

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

Section 17207 allows a penalty of up to \$6,000 for each violation that is intentionally disregarding an injunction.

Section 17208 places a statute of limitations on enforcement of 4 years after the cause of action accrued.

Utah

Utah's code provides for a personal right of action rather than for enforcement by the AG:

13-37-203. Liability.

(1) A person may bring an action against a commercial entity in a court of competent jurisdiction in this state if:

(a) the commercial entity enters into a consumer transaction with that person;

(b) as a result of the consumer transaction described in Subsection (1)(a), the commercial entity obtains nonpublic personal information concerning that person; and

(c) the commercial entity violates this chapter.

(2) In an action brought under Subsection (1), a commercial entity that violates this chapter is liable to the person who brings the action for:

(a) \$500 for each time the commercial entity fails to provide the notice required by this section in relation to the nonpublic personal information of the person who brings the action; and

(b) court costs.

(3) A person may not bring a class action under this chapter.

Montana

Under Title 30. Trade and Commerce, Chapter 14, Unfair Trade Practices and Consumer Protection, Part 2, Unfair Trade Practices Generally, section 30-14-224, MCA, relates to certain unfair trade practices (not online privacy issues) states:

30-14-224. Penalties. (1) A person, whether as principal, agent, officer, or director, who purposely or knowingly violates any of the provisions of 30-14-207 through 30-14-214 or 30-14-216 through 30-14-218 is guilty of an offense for each violation and upon conviction may be fined an amount not more than \$10,000 or imprisoned for a term not to exceed 2 years, or both.

Part 17. Impediment to Identify Theft Provisions. The enforcement provision is:

30-14-1705. Department to restrain unlawful acts -- penalty. (1) Whenever the department has reason to believe that a person has violated this part and that proceeding would be in the public interest, the department **may** bring an action in the name of the state against the person to restrain by temporary or permanent injunction or temporary restraining order the use of the unlawful method, act, or practice upon giving appropriate notice to that person pursuant to 30-14-111(2).

(2) The provisions of 30-14-111(3) and (4) and 30-14-112 through 30-14-115 apply to this part.

(3) A violation of this part is a violation of 30-14-103, and the penalties for a violation of this part are as provided in 30-14-142.

Section 30-14-142, MCA, which is under the Consumer Protection Act, states:

30-14-142. Penalties. (1) In addition to any fine that a person might be subject to under subsection (2), a person who violates the terms of an injunction or temporary restraining order issued under 30-14-111 shall forfeit and pay to the state a civil fine of not more than \$10,000 for each violation. For the purposes of this section, the district court issuing an injunction or temporary restraining order retains jurisdiction and the cause must be continued, and in those cases, the department, acting in the name of the state, may petition for recovery of civil penalties.

(2) In an action brought under 30-14-111, if the court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by 30-14-103, the department, upon petition to the court, may recover on behalf of the state a civil fine of not more than \$10,000 for each violation. The fine provided for in this subsection is in addition to any liability that a person might be subject to under subsection (1).

(3) A person who engages in a fraudulent course of conduct declared unlawful by 30-14-103 shall upon conviction be fined an amount not more than \$5,000, imprisoned for not more than 1 year, or both, in the discretion of the court. This subsection does not limit any other provision of this part.

(4) For purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that the conduct was a violation of 30-14-103.

30-14-143. Disposition of civil fines, costs, and fees. (1) (a) Except as provided in subsection (1)(b), all civil fines, costs, and fees received or recovered by the department pursuant to this part must be deposited into a state special revenue account to the credit of the department and must be used to defray the expenses of the department in discharging its administrative and regulatory powers and duties in relation to this part. Any excess civil fines, costs, or fees must be transferred to the general fund.

(b) All civil fines received or recovered by the department pursuant to 30-14-144 [additional penalty for deceptive acts against older person or developmentally disabled] must be deposited in the general fund.

(2) All civil fines, costs, and fees received or recovered by a county attorney pursuant to this part must be paid to the general fund of the county in which the action was commenced. Section 30-14-143.

Drafter's Rationale

I based the language in LC0074 on Rep. Bennett's outline. However, I used "shall" enforce rather than "is authorized to enforce". I did not become aware of my departure from Rep. Bennett's outline until after I sent out the draft.

As a starting point for SAVA discussion on penalties, I added:

- a civil penalty of \$10,000 similar to other Montana provisions.
- one month (or portion of a month) as the time frame for defining "each violation".
- a provision about the disposition of the fines.

I did not provide for:

- a criminal penalty (i.e., imprisonment).
- a personal right of action similar to UT's law.
- a statute of limitations similar to CA's law.

Issues/options:

1. Does SAVA want the "shall" or the permissive language of either "is authorized to" or "may" enforce?
2. Does SAVA want to change the amount of the civil penalty or the description of what constitutes a violation? If so, how?
3. Does SAVA want to add a criminal penalty? If so, what?
4. Does SAVA want to add a personal right of action?
5. Does SAVA want to add a statute of limitations?
6. Does SAVA want any other revisions to this section?

Notes (optional space):

Section 5. Codification.

Bill Drafting Manual

Whenever a bill contains new sections, a codification instruction must be included in the draft. The standard codification instruction must be used in its entirety.

Issues/options:

The appropriate area of law for LC0074 provisions is as follows:

- Title 30 - Trade and Commerce.
- Chapter 14 - Consumer Protection.

I used the required standard codification instruction. Because I did not specify codification in a particular part, [sections 1 through 4] will become a separate part under Title 30, Chapter 14.

Notes (optional space):

Section 6. Effective Date.

Bill Drafting Manual

An effective date should not be included in a bill unless:

- the sponsor wants to delay the effective date (which should be done only in extraordinary circumstances)
- there is a reason requiring an early effective date
- the bill has fiscal impact necessitating a July 1 effective date
- the bill taxes motor vehicles, or
- the bill is drafted for a special session.

An effective date before October 1 may deprive the general public of sufficient notice and deprive administrators of the act of sufficient time to prepare procedures for the new act.

Drafter's Rationale

I drafted a July 1 effective date to correspond to the start of a fiscal year because there may be fiscal implications for the AG's office regarding enforcement costs.

Issues/options:

A July 1 effective date is not required even if there is a fiscal implication. So, an Oct. 1 effective date would be fine.

1. Does SAVA want a different effective date?

Notes (optional space):