

LEGAL REVIEW NOTE

Bill No.: HB 470

LC#: LC2571, To Legal Review Copy, as
of January 24, 2025

Short Title: Generally revise laws relating
to trigger leads

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

1. Prohibition of Trigger Leads in HB 470

HB 470, as drafted, would prohibit entities from using unauthorized trigger leads relating to communications with persons who have applied or are applying for mortgage loans. Specifically, HB 470 creates a new section that provides:

NEW SECTION. Section 1. False or deceptive advertising -- trigger leads. In order

to prevent or mitigate identity theft, in addition to practices identified by the commissioner in rule under 32-9-149, false and deceptive advertising includes the use of a trigger lead as defined in 32-9-103, to communicate with any person who applies or has applied for a mortgage loan.

HB 470 defines a “trigger lead” as information relating to a consumer’s credit worthiness that is not initiated by the consumer:

Section 2. Section 32-9-103, MCA, is amended to read:

"32-9-103. Definitions. As used in this part, the following definitions apply:

[...]

(45) (a) "Trigger lead" means information relating to a consumer's credit worthiness compiled by a credit reporting agency obtained in accordance with the Fair Credit Reporting Act, 14 U.S.C. 1861b(c)(1)(B), that is not initiated by the consumer, but instead, is triggered by an inquiry to a consumer reporting agency in response to an application for credit initiated by the consumer in a separate transaction.

(b) The term does not include a consumer report obtained by a mortgage entity licensed by the department in response to an application for credit made by a consumer with that mortgage entity or that is otherwise authorized by the consumer.

Finally, HB 470 amends 32-9-149, to include “trigger leads” as false, deceptive, or misleading advertising:

Section 3. Section 32-9-149, MCA, is amended to read:

"32-9-149. Use of name -- advertising. (1) A licensee engaged in a business regulated by this part may not operate under a name other than the name licensed by the department.

(2) A licensee may not:

(a) advertise that an applicant has unqualified access to credit without disclosing that material limitations on the availability of credit may exist, such as the percentage required as a down payment, that a higher interest rate or points could be required, or that restrictions as to the maximum principal amount of the mortgage loan offered could apply;

(b) advertise a mortgage loan with a prevailing interest rate indicated in the advertisement unless the advertisement specifically states that the interest rate could change or not be available at the time of commitment or closing;

(c) advertise mortgage loans, including interest rates, margins, discounts, points, fees, commissions, or other material information, including material limitations on the mortgage loans, unless the licensee is able to make or broker the offered mortgage loans to a reasonable number of qualified applicants;

(d) engage in false, deceptive, or misleading advertising, including [section 1]; or

(e) falsely advertise or misuse names in violation of 18 U.S.C. 709.

2. Unsolicited Offers Generally Allowed in the Federal Fair Credit Reporting Act

The Federal Fair Credit Reporting Act (FCRA) regulates the use of credit across the United States. Specifically, 14 U.S.C. 1861b(c)(1)(B), which is referenced in LC 2571, allows for the

use of communications relating to credit transactions that are not initiated by the consumer:

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or
(B)

(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e);

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

Additionally, 14 U.S.C. 1861b(e)(1) of the FCRA requires that a consumer must opt-out of credit inquiries that are not initiated by the consumer:

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

Finally, the FCRA contains a limited preemption clause in 15 U.S.C. 1681t(a) and (b), which invalidates any state law that is inconsistent with federal provisions generally relating to the use of any information on consumers and specifically relating to transactions not initiated by the consumer:

(a) In general

Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State—

(1) with respect to any subject matter regulated under—

[...]

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

3. Analysis

HB 470 may raise potential federal constitutional issues because the FCRA expressly preempts state laws that seek to regulate communications relating to offers of credit not initiated by the consumer, i.e. trigger leads. Specifically, the FCRA allows the use of trigger leads and this use is expressly prohibited by HB 470. Additionally, the FCRA provides narrow exceptions that are potentially not met in HB 470.

The Supremacy Clause establishes that federal law “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, cl. 2. Where state and federal law “directly conflict,” state law must give way. Wyeth v. Levine, 555 U.S. 555, 583, 129 S. Ct. 1187 (2009) (Thomas, J., concurring in judgment); see also Crosby v. National Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288 (2000) (“[S]tate law is naturally preempted to the extent of any conflict with a federal statute”), and PLIVA, Inc. v. Mensing, 564 U.S. 604, 617-18, 131 S. Ct. 2567, 2577 (2011).

Because HB 470 conflicts with the provisions of the Fair Credit Reporting Act, it may raise a potential constitutional conformity question as to whether this legislation conflicts with the Supremacy Clause of the U.S. Constitution.

Requester Comments: