CSPRA

COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

Date: September 11, 2023
To: Karen Winkel
Rules Coordinator
DCBS | Division of Financial Regulation
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Re: **Comments on proposed rules implementing HB 2052**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public records access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 75,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars and employs millions of people. Our economy and society depend on value-added information and services that includes public record data for many important aspects of our daily lives and work, and we work to protect those sensible uses of public records.

Staying Within the Grant of Authority and Plain Language of the Statute

Attached to this letter please find an Appendix that states our concerns about the proposed rules. We have provided numbered comments in this Appendix on each relevant section reflecting those concerns. To sum up, we are generally concerned that the parts of the proposed rules noted in the Appendix go beyond what the statute prescribes and the authority it conveys. We believe several of the provisions are regulatory in nature and not related to the adopted statutory scheme that provided for the registration of data brokers. Registration is not a broad grant to regulate but rather intended to inform the public with a standardized set of relevant data about who is acting as a data broker and the data policies and options adopted by a data broker. We are also concerned that some of the data the rules require is not required by statute and is not relevant to the statutory purpose and the information the law specifies as necessary for a registration to be approved. The law clearly states that upon providing the information listed and by paying the prescribed fee, the registration **shall** be approved. There is no discretion provided. There is no authorization to revoke a registration unless the business fails to provide one of the required elements specified in the law. We have provided more specific detail in the Appendix and ask that it be incorporated into our comments by this reference.

Thank you for your consideration of our input.

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A non-profit organization dedicated to promoting the principle of open public records access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit.

Appendix
Concerns Regarding the Proposed Rules Implementing the Oregon Data Broker Registration Law
Provided by the Coalition for Sensible Public Records Access (CSPRA)
Richard Varn, Executive Director, CSPRA

We have pasted the rules about which we have concerns below and added numbered comments in yellow highlights that reflect those concerns.

441-830-0070 Disclosure of Significant Developments

(1) A data broker registrant must notify the director within 10 days following the occurrence of any of the following significant developments:

(a) Filing for bankruptcy or reorganization;

COMMENT 1: We do not see the relevance of this to a registration. If a company is reorganizing but staying in business, they will still be registered and allowed to register again. If they cease doing business entirely, a notice will help keep the registry up to date but will also happen when they do not renew their registration.

(b) A data breach;

COMMENT 2: Oregon already has a comprehensive data breach law that covers all data users. To place a special and different reporting requirement in a registration bill is confusing and has conflicts with existing law as it does not include all the detailed step and exceptions deemed necessary in the current law. Data brokers are not managing different data than other data users nor should they be treated differently under a law that is for registering, not regulating, data brokers.

(c) The data broker registrant receives notice of a final order issued in this or another state that:

(A) Demands that the data broker registrant cease and desist from any act;

COMMENT 3: This provision is unmoored from any statutory framework or grant of authority. It is so broad that, for example, a company who was using a particular trademark that conflicted with that of another company's mark and was ordered to stop using it, could lose their right to be a data broker in Oregon if they do not report it. And it begs the question: what is the purpose of knowing about final orders even if related to a data brokerage practice? There is no statutory authority to revoke or deny a registration if the law's requirements are met. The purpose of registration is to know who is doing that kind of business in Oregon and to provide basic information on data practices and choices. This is not a data broker regulation law. The rules need to reflect the plain language of the statute: "**If a data broker complies with the requirements set forth in subsection (3) of this section** (section 1), **the department shall approve the registration. A registration under this section is valid until December 31 of the year in which the department approves the**

registration" (emphasis and reference added). The stature only grants of rulemaking authority in the law are for the purposes of implementing Section 1 of the act. It is not some kind of broad delegation of legislative authority to create a regulatory scheme for data brokers. Basic black letter law states: "An administrative agency cannot impose or substitute its judgments as that of the legislature without a valid statutory authority. It cannot promulgate a regulation that adds a requirement which does not exist under the statute. An agency cannot create, remove, or limit substantive rights granted in the enabling act." https://administrativelaw.uslegal.com/administrative-agency-rulemaking/limits-on-authority-to-make-rules/

See also: https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf which also reinforces provides guidance that echoes the black letter law.

See also Oregon Law below with the relevant sections underlined:

"183.400 Judicial determination of validity of rule.

(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

(2) The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 or upon enforcement of such rule or order in the manner provided by law.

(3) Judicial review of a rule shall be limited to an examination of:

(a) The rule under review;

(b) The statutory provisions authorizing the rule; and

(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

(4) The court shall declare the rule invalid only if it finds that the rule:

(a) Violates constitutional provisions;

(b) Exceeds the statutory authority of the agency; or

(c) Was adopted without compliance with applicable rulemaking procedures."

We understand restating the requirement of statutory authority is stating the obvious, but some of the positions advocated at the first stakeholders meeting would, in our view, clearly go beyond the statutory grant of authority. We therefore wanted to make our concerns in that regard and what we understand the law to be a part of the record.

(B) Suspends or revokes a license or registration; or

COMMENT 4: Same comment as Comment 2 above and noting that it involves suspension of any license or registration and suffers from the same defect as being beyond the scope of the statutory requirements stated for a business to get and keep a registration.

(C) Constitutes any other formal or informal regulatory action against the data broker registrant;

COMMENT 5: Same comment as Comments 2 and 3 and noting that it also is overly broad

in that it includes any kinds of actions against a registrant and there is no authority in the statute to use this kind of data in the implementation of the act.

(d) The data broker registrant ceases doing business; or

(e) Any change in assumed business name registered with Secretary of State.

(2) A licensee must notify the director within 30 days following:

(a) Any changes in the information required on the data broker registration application form under OAR 441-830-0020 or 441-830-0040, including, but not limited to address changes, phone number changes, e-mail addresses, consumer opt-out procedures and other contact information;

(b) Any other material changes to information submitted in registration application under OAR 441-830-0020 or 441-830-0040.

(3) The director may request additional information regarding any of the occurrences outlined in this rule. (4) Failure to disclose significant developments will result in the termination of the data brokers registration.

COMMENT 6: There is no authority to terminate a registration for reasons other than those stated in the act which would be the truthful and complete provision of the required elements of the registration law. We understand the need to ask that any change in the actual requirements that would have materially affected the applicant's acceptance may be needed, but the parts of this section that go well beyond those elements are unauthorized.

441-830-0090 Data Broker Duty to Protect Personal Information

(a) A data broker has a duty to make all reasonable efforts to secure consumers information pursuant to ORS Chapter ORS 646A. oregonlegislature.gov/bills_laws/ors/ors646a.html

COMMENT 7: We do not see a problem in cross referencing the other relevant statutes and rules on data protection and breach notice so long as they are not imposing new unique requirements but rather are merely offering a handy way to better know the applicable law and rules.

OR

(a) Duty to protect personally identifiable information.

(1) A data broker shall develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to:

(A) the size, scope, and type of business of the data broker obligated to safeguard the personally identifiable information under such comprehensive information security program;

(B) the amount of resources available to the data broker;

(C) the amount of stored data; and

(D) the need for security and confidentiality of personally identifiable information.

(2) A data broker subject to this subsection shall adopt safeguards in the comprehensive security program that are consistent with the safeguards for protection of personally identifiable information and information of a similar character set forth in other State rules or federal regulations applicable to the data broker.

COMMENT 8: See Comment 1 above. As was noted in the stakeholders meeting, the definition of data broker as a data managing entity was an arbitrary distinction that was created to narrow the focus of data broker registration laws to reduce opposition to those laws by the many similarly situated data users who did not want to be regulated or required to register. There is no authority or reason to extend that arbitrary distinction here.

441-830-0100 Investigation and examinations by director

(1) For discovering violations of this chapter and ORS ??? and securing information required by the Director of the Department of Consumer and Business Services under this chapter, the director at any time may investigate or examine the business, including the books, accounts, records, files and software used in the business, of every person registered or required to be registered under ORS?:

COMMENT 9: Under a very broad reading of the inherent authority of the Director to implement the act, this entire section could be justified if its applicability were limited to non-registrants to determine if they should be registered. There is no grant of investigative powers over registered data brokers as they have met their requirement to register. They have declared themselves to be a data broker and provided the necessary documents, data, and fees to be granted a registration. Investigating them seems to serve no authorized purpose as they have declared themselves subject to the law. We acknowledge that if an entity fails to provide a material update on a required statutory item necessary for registration, that is ground for administrative actions. Any review of any registered private company information must be limited to only verifying the facts submitted in an application. Any review of non-registered private company information should be relevant to determining whether they are subject the law and their failure to register is a violation of that law.

(2) For purposes of subsection (1) of this section:

(a) A person registered or required to be registered under this chapter shall give the director free access to the person's place of business, books, accounts, safes and vaults.

COMMENT 10: Same as Comment 9 with the suggested addition of some safeguards of probable cause to initiate an investigation into a non-registered company.

(b) The director may:

(A) Make an investigation or examination without prior notice.

(B) Compel the attendance of witnesses and examine the witnesses under oath.

(C) Require the production of documents or records.

(D) Have free access to the place of business and to the books, accounts, safes and vaults of the licensee.

(3) Each person examined under this section shall pay the actual cost of an investigation or examination to the director, including an hourly rate of $75 an hour for each person used in performance of the investigation or examination.

441-830-0110 Termination or suspension of data broker registration

(1) Data broker registration may be terminated or suspended based on any of the following:
COMMENT 11: We suggest that this read: "An unregistered data broker may be subject to fines based on any of the following:"

There is no statutory authority to terminate a registration for the reasons stated here. The only possible authority we see would be failure to update registration data but even that is covered by the statute with the renewal requirement. If the data is not accurate or complete at that point, the registration can be denied. We would also note that when the actions of a non-registered company thwart the state's efforts to ensure that all data brokers are registered, then such a company would be subject to any sanctions and fines authorized by law.

a. Failure to respond to a director's inquiry for data;
b. Failure to cooperate during an investigation or examination;
c. Failure to pay any fees invoiced by the director;
d. Engaged in dishonest, fraudulent or illegal practices or conduct in a business
   COMMENT 12: This kind of failure, no matter how condemnable, is not one of the registration requirements. But it is worth noting that this condemnable behavior has many adequate civil and criminal remedies in Oregon law.
e. Any violation of the statute or rule in OAR: 441-830-0010 to 441-830-0130
f. The data broker registrant receives notice of a final order issued in this or another state that:
   i. Demands that the data broker registrant cease and desist from any act;
   ii. Suspends or revokes a license or registration; or
   iii. Constitutes any other formal or informal regulatory action against the data broker registrant;

COMMENT 13: See Comments 3-5 above