Testimony of Gavin Boyles, DFR Assistant General Counsel
January 19, 2018

**Vermont Department of Financial Regulation**

*Testimony to House Committee on Commerce & Economic Development regarding draft Committee Bill concerning data brokers and other topics*

As DFR testified a couple of weeks ago, this is an important area but a complex and difficult one — one in which if the State proceeds, it should do so cautiously. It's a minefield.

The child-protection provisions have already been dropped due to litigation risk. That was the right decision in DFR's view.

There are also substantial legal risks to two of the other items in the draft bill: data broker security breach and data-broker security requirements. The report identified these — along with the child-protection piece — as areas of substantial litigation risk that, while worthy of consideration, were not necessarily recommended for action.

One fundamental concern is that the bill would treat defined "data broker" companies differently from other companies (e.g. Google, Facebook) that hold large volumes of sensitive information and are not currently regulated either. The committee should strive to regulate fairly and DFR is concerned that this provision would be open to challenge on that basis.

Both of those provisions also raise other serious constitutional questions.

First, they raise dormant Commerce Clause issues in that they arguably impose state-specific burdens on entities operating outside of Vermont in interstate commerce.

Simply put, the Clause protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state. *American Booksellers* case is a Second Circuit example of this.

The critical considerations there are (1) whether the law shifts the cost of regulation into other states or has impacts that fall exclusively or more heavily out-of-state, (2) whether it effectively requires out-of-state commerce to be conducted at the regulating state's direction; or (3) alters the interstate flow of goods. Legislation that does those things is *per se* invalid (meaning that the courts do not balance benefits versus burdens, but rather strike the law down).

So DFR is concerned that the breach-notice and data-security provisions would both face very close scrutiny under the Dormant Commerce Clause. The Second Circuit Court of Appeals has held that it is difficult, if not impossible, for a state to regulate internet activities *without* projecting its legislation into other states.

That may be particularly so here, where the transactions involve data *about* Vermonters but most of them very likely occur outside of Vermont.

Second, the First Amendment: Recall that in *IMS* the Supreme Court held that sales of information are speech. The sales and other transfers of data are therefore protected by the first Amendment.

The data-security provision might be construed as imposing limits on that speech by certain speakers (data brokers) and not imposing those limits on the same speech by others.

The breach-notice provision also raises First Amendment issues, because it arguably compels or may compel a particular set of speakers to say or do particular things that other speakers are not compelled to do or say.

The First Amendment analysis would focus on the definition of that set of speakers and the type of speech that is regulated: "Rules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech."

So the definitions of both "data broker" and "personal information" would be closely scrutinized to determine whether they precisely fit specific legitimate state interests beyond a general desire to help consumers. Not simply whether the definitions are narrow, but whether they are *correct*. This is a high bar.

This is an area of real litigation risk, particularly with respect to the data-security and data-broker security breach provisions.