UPDATED

COST DRIVER

May 2, 2025

TO: Members, Assembly Judiciary Committee

SUBJECT: AB 446 (WARD) SURVEILLANCE PRICING
OPPOSE/COST DRIVER – AS AMENDED MAY 1, 2025
SCHEDULED FOR HEARING – MAY 6, 2025

The California Chamber of Commerce and the undersigned respectfully **OPPOSE AB 446 (Ward)** as amended on May 1, 2025, as a **COST DRIVER** because it will outlaw existing consumer-friendly pricing practices and infringe upon areas already covered in the California Consumer Privacy Act (CCPA).

To be clear: we do not support any targeting of consumers based on protected characteristics. Price changes based on race, religion, sexuality, or political beliefs have no place in our democratic, individual rights-based capitalist system. However, we are very concerned that **AB 446** will place civil penalties on non-problematic and widely-accepted practices (such as membership rewards programs, local discounts, or appropriate advertising) because of its overbroad language.

We have offered amendments to address all our concerns with **AB 446,** while still prohibiting businesses from using the personal identifiable information of a consumer to raise the price of goods for an individual or group of consumer–but, as of the date of this letter, those amendments have not been accepted.

Context: AB 446 Outlaws Offering Different Prices – Including Discounted Prices – Based on Any Sort of Data.

AB 446's broad language prohibits "surveillance pricing," which it defines as "offering or setting a customized price for a good or service for a specific consumer or group of consumers, based, in whole or in part, on covered information …" **AB 446** uses civil penalties and a private right of action to enforce this prohibition. Notably, **AB 446**'s broad definition of surveillance pricing prohibits not just cost increases, but also *any discounts offered to consumers* based on any aggregate or personal data.[1]

1) **AB 446 Contradicts California's Landmark Privacy Law–the California Consumer Privacy Act–by Treating Aggregate Data as if it Were Personally Identifiable Information.**

[1] Our coalition has offered amends to clarify that the bill should prohibit *price increases* based on personal data, but they have not been accepted.

The California Consumer Privacy Act[2] is the definitive statute related to consumers' privacy and their personal data–whether that data is collected online, discount in brick-and-mortar stores, by technological means, on paper, or by powers of observation. In other words, it is a broad, technology-neutral, industry-neutral, and comprehensive consumer data protection law, which was also voter-approved via Proposition 24 in 2020. Substantively, the CCPA governs how a company may collect data related to a customer's behavior (buying certain products, for example) and utilize that data. The CCPA also already addresses permissible and impermissible business uses of consumer data for activities such as targeted advertising, loyalty and rewards programs, and the like. In fact, the CCPA places limits on the sharing of customers' data, allowing customers to opt-out of allowing a business to share such data.[3]

AB 446 contradicts the CCPA in two key ways: (1) **AB 446** treats aggregate data as if it were personal information, whereas the CCPA treats aggregate data as non-problematic because aggregate data does not reasonably identify a person or household; (2) **AB 446** re-writes the standards for consent and opt-in applicable to personally identifiable information.

a. AB 446 Conflicts with the CCPA Because it Treats Aggregate Data as if it Were Personal Data.

AB 446 conflicts with the approach of the CCPA because it treats "aggregate consumer information" as if it were "personal information," in explicit contradiction of Civil Code 1798.140. As a policy matter, we believe this is incorrect; information that has been deidentified and aggregated is *not* personal information under the CCPA, nor should it be here. Such data is not a risk of individual profiling or discrimination–exactly because it *is deidentified or aggregated*. That is why, as a matter of public policy, aggregated data and personal data are not treated the same–because they neither implicate the same rights for consumers nor pose the same risks in the event of a data leak.

An example helps illustrate how "aggregate consumer information" is used, and how non-problematic it is. Supermarket #1, who is planning on selling pumpkin pie mix in October, is concerned they may have too much pumpkin pie mix on hand in late September, and they have a new shipment coming on October 1. Under present law, they can look at their past aggregate purchase history of all their consumers from last year during October (from which all their customer names and other identifying data has been removed) to see how much pumpkin pie mix was purchased last October (which would qualify as aggregate data under the CCPA and does not require consumer opt-in to utilize) to determine whether they are overstocked and should offer a sale this year. After reviewing their supply, and last year's aggregate sale volume, they can decide whether to offer a quick sale to get rid of soon-to-be-excess inventory. However, under **AB 446**, Supermarket #1 could not review last year's sales data because it would qualify as "covered information"–and Supermarket #1 had not met the new consent requirements that **AB 446** will require *for every customer who shopped at their store last year*. Without such consent from *every shopper*, even totally anonymous data–such as the date, items, and price of their purchases–would necessitate opt-in by consumers. Because **AB 446** treats personal data and aggregate data the same, merging them as "covered information," the same onerous (and CCPA-conflicting) disclosure requirements applicable to personal information would apply to aggregate data.

Notably, proponents of **AB 446** have asserted that such aggregate data must be treated like personal data because, in some way aggregate data *might* be usable to identify a consumer. This assertion is tenuous at best. The bill's own definition makes clear that aggregate data is not linked or reasonably linkable to a consumer. In other words, proponents appear to be legislating on an extremely unlikely situation as if it were commonly occurring. In reality, because it is aggregate data, it is highly unlikely that it could become disaggregated without expending significant time, money, and resources. However, if that is the concern, then the appropriate public policy solution would not be to confuse personal data with aggregate data–instead, it would be to put in safeguards to prohibit disaggregation of data for such uses. In other words: if the concern is aggregate data being converted to personally identifiable information, then the right response is *legislate on that conversion*, not treat two very different types of data as if they were identical.

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[2] *See* Cal. Civil Code Section 1798 *et seq.*

[3] *See* Cal. Civil Code Section 1798.140(e) (defining "Business purpose" use of data and identifying specific uses of data as acceptable).

Furthermore, the CCPA already addresses this concern. The CCPA *already* defines personal data so broadly as to capture even information that on its face does not appear to qualify as personally identifiable information as long as the data "identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, to a particular individual or household."[4] To put it plainly: the CCPA makes clear that any data that can be used to identify a consumer *is already considered personally identifiable information*, making the rights and protections of the CCPA the most expansive under the law–and it does so without having to be so imprecise as to treat "aggregate data" or deidentified data as if it were personally identifiable data. These provisions of the CCPA make a law such as **AB 446**, which treats "aggregate data" the same as personal consumer data, completely unnecessary and contradictory to the CCPA's provisions.

As noted above, we have offered amendments to address this issue–but they have not been taken.

***b. AB 446 Conflicts with the CCPA Because it Re-writes Disclosure and Opt-in Standards that the CCPA Already Covers*.**

AB 446 requires different opt-in consent from the CCPA's provisions that govern all existing loyalty programs. Cal Civil Code Section 1798.125(b)(3) provides that "a business may enter into a financial incentive program only if the consumer gives the business prior opt-in consent ... [the agreement to opt-in must] *clearly describes the material terms* of the [program], and which may be revoked by the consumer at any time." In other words: the CCPA already squarely addresses the consent necessary for a loyalty program–and we are unaware of any justification from **AB 446**'s proponents as to why this consent standard has proved insufficient.[5] Still, despite lacking any apparent justification for the change, **AB 446** puts contradictory language into law without amending the terms of the CCPA.

For these two reasons alone, **AB 446** should be rejected–because employers should certainly not be required to comply with both the voter-endorsed CCPA, *and* contradictory legislation *at the same time*. As noted above, we have offered amendments to address these issues.

2) AB 446 Would Outlaw Normal, Consumer-Friendly Practices Due to its Overbroad Language.

AB 446's May 1st amendments create the following three process:

- Step (1) - any difference in price (including discounts) is presumptively banned as "surveillance pricing", and subject to a private right of action and penalties (Section 7200(e));
- Step (2) – Companies must prove that their price meets one of three[6] listed exceptions in order to be offered (Section 7202(b)(2))
- Step (3) – Each of the three allowable types of discounts must then meet three additional qualifications in order to be acceptable. (Section 7202(d)(1),(d)(2), and (e).)

Speaking broadly, we are greatly concerned with having to go to court to defend discounts offered under a private right of action. Forcing companies to litigate their ability to offer discounts seems unlikely to improve affordability in California and seems like a strange priority for the legislature.

Specifically, we are concerned that **AB 446**'s listed exceptions are vaguely-drafted and will result in litigation for employers as they try to defend their discount programs. One notable example is that two of the three acceptable discounting types (7202(b)(2) & (3)) require that the discount be "publicly disclosed" –but the bill does not define what would be sufficient as "public disclosure." Does a company need to take out advertisements to be able to offer a discount to firefighters, or other local businesses? Quick legal research reveals that California law only uses the term "publicly disclosed" in two statutes – the California False

[4] *See* Cal. Civil Code Section 1798.140(o)(1) (defining "Personal Information")

[5] To the contrary, all publicly provided justifications for **AB 446**–such as the bill's initial legislative findings, which were removed after our prior letter questioned their accuracy–have focused on allegations of secretive pricing targeting individuals … and not criticized consent standards for loyalty programs in any way.

[6] Notably, I am excluding the fourth exception – 7202(b)(1) – "different in price based on cost" – because it is not at issue and is also not traditionally considered a "discount" for consumers.

Claims Act[7], and the Uniform Trade Secrets Act[8]. Importantly, those two statutes *have different caselaw interpreting the term.* This vagueness (the same term with two different interpretations at law) means that **AB 446** will force employers to litigate to defend whether their discounts were sufficiently "publicly disclosed".

In addition, we believe that **AB 446**'s exception list (the "allowable forms of surveillance pricing," for the bill's purposes) is too broad and ignores many common and consumer-friendly forms of discounts that will now cause businesses to face liability. Due to the recency of the amendments, we are not able to list all such discounts in this letter, but one obvious example is discounts offered to encourage lost customers to return to a platform, subscription, or product.

To the extent the author intends to prevent targeting of individuals or groups based on personal information with price increases–we completely understand and agree that should be (and likely already is) illegal … but **AB 446** goes far beyond that noble goal. As noted above, we have offered amends to clarify that the bill is intended to prevent businesses from targeting individual consumers with higher prices, but they have not been taken.

3) AB 446's Concept of a "Customized Price" Creates Potential Liability Based on Geography.

As noted above, **AB 446** fails to define what price might be considered "customized" and therefore be considered an example of "surveillance pricing." We are concerned that this is further litigation bait, as companies will need to defend perfectly normal differences in price across our great state.

By way of example: California's Central Valley produces more fresh fruits and vegetables than almost anywhere in the world–and this fresh produce is sold across the state. However, these fruits and vegetables are not necessarily sold for the same price everywhere, as a myriad of factors will influence price. An incomplete list of obvious factors would include: supply (was the harvest plentiful), transportation cost (farther away stores might need to charge more to justify the cost of transport), freshness of the product, present demand (whether consumers have been buying it or not), anticipated demand (built on aggregate data from last year's consumers), when the next shipment is due to arrive (might lower price if need to clear inventory) … and more. With all these factors in mind, even a single chain of stores might have different prices on a particular good across the state. Also notably: many of these factors would apply to non-perishable goods just the same as produce–meaning that prices may differ in different locations.[9]

AB 446 does not clearly address this reality–and, because it is enforced by a private right of action, private companies will need to litigate to justify any difference in price.

As noted above, we have shared amendments to address the issue.

Conclusion

While we appreciate and support the intention of this bill—to ensure California consumers are treated fairly and without discrimination—we are very concerned by its infringement upon the CCPA, and the collateral damage that its broad language will have for California businesses. We have shared amendments to address our concerns, while maintaining the core of the bill (prohibiting the use of personal information to target prices at consumers), but they have not been accepted as of the date of this letter.

Though we look forward to working with the author to address these concerns, for these reasons, we must **OPPOSE AB 446 (Ward)** as a **COST DRIVER.**

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[7] CA Gov Code 12652(d)(3)(B). *See* State of California v. Pac. Bell Tel. Co., 142 Cal. App. 4th 741, 749–50, 433 (2006), as modified (Sept. 12, 2006) ("While plaintiff's alleged conversations might suggest that the issue was plainly in the public domain, conversations, even in very public venues, do not satisfy the public disclosure requirements of the statute.")

[8] Civil Code 3426.1(b)(2).

[9] Outlet malls are a great example: different prices are offered, despite the goods being largely the same - and consumers are aware of that distinction.

Sincerely,

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Senior Policy Advocate
on behalf of

American Property Casualty Insurance Association, Laura Curtis
Associated Equipment Distributors, Jacob Asare
Association of National Advertisers, Christopher Oswald
CalBroadband, Amanda Gualderama
California Attractions & Parks Association, Sabrina Demayo Lockhart
California Bankers Association, Chris Schultz
California Chamber of Commerce, Robert Moutrie
California Grocers Association, Daniel Conway
California Hotel & Lodging Association, Alexander Rossitto
California New Car Dealers Association, Kenton Stanhope
California Retailers Association, Ryan Allain
California Travel Association, Emellia Zamani
National Association of Mutual Insurance Companies, Christian Rataj
National Federation of Independent Business, Tim Taylor
Personal Insurance Federation of California, Allison Adey
Software Information Industry Association, Abigail Wilson
TechNet, Jose Torres
The Travel Technology Association, Laura Chadwick
USTelecom-The Broadband Association, Yolanda Benson

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RM:ldl