March 11, 2025

TO: Members, Assembly Privacy and Consumer Protection Committee

SUBJECT: AB 446 (WARD) SURVEILLANCE PRICING
OPPOSE – AS INTRODUCED FEBRUARY 6, 2025
SCHEDULED FOR HEARING – MARCH 18, 2025

The California Chamber of Commerce and the undersigned respectfully **OPPOSE AB 446 (Ward)** as introduced on February 6, 2025, because it will outlaw existing, consumer-friendly pricing practices and infringe upon areas already covered in the California Consumer Privacy Act.

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.

Context: AB 446 Outlaws Offering Different Prices – For Virtually Any Reason.

AB 446's broad language prohibits "surveillance pricing," which it defines as "set[ting] a price offered to a consumer based, in whole or in part, upon personally identifiable information gathered through an electronic surveillance technology, including electronic shelving labels." It then defines "electronic surveillance technology" as any "technological method[1] or system of surveillance used to observe, monitor, or collect information related to a person … [including their] actions, habits …residence, preferences … interests … web browsing history, purchase history, financial circumstances, or consumer behaviors … [or] personally identifiable information."

In simpler terms: **AB 446** defines any difference in price based on any consumer's actions, traits, or location as potential "surveillance pricing."[2] **AB 446** then makes it unlawful to engage in "surveillance pricing," and creates significant civil penalties for each occurrence of surveillance pricing.[3]

AB 446 Contradicts California's Landmark Privacy Law – the California Consumer Privacy Act.

The California Consumer Privacy Act ("CCPA")[4] is the definitive statute related to consumers' privacy and their personal data – whether that data is collected online, 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

[1] It is unclear why this particular language ("technological method") was chosen, as it suggests that non-technological methods of gathering information – such as signing up in-person for a rewards program – would be excluded from the bill, but online sign-ups would be covered.
[2] *See* Civil Code Proposed Sections 7200 (a), (d).
[3] *See* Civil Code Proposed Sections 7302, 7204.
[4] *See* Cal. Civil Code Section 1798 *et seq.*

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.[5]

AB 446 also seeks to control how businesses collect and use a consumer's data—an aim that squarely falls under the jurisdiction of the voter-approved CCPA. In doing so, **AB 446** completely *ignores the CCPA's voter-endorsed provisions* and its careful balancing of the complex policy issues around online marketplaces … and simply bans the use of such data in pricing.

Also, as a matter of drafting and legislative clarity, **AB 446** creates ambiguity around what is covered by the CCPA's term of "personal information" by both *relying on that definition* and *ignoring what is covered under it.* In Proposed Section 7200 (a)(4), **AB 446** identifies the types of data that will be unusable in pricing with a list of categories of data. Among that list is "Personally identifiable information," which is defined by reference to the CCPA's similar term, and includes basically *any consumer information* . Despite this broad term already encompassing virtually *all consumer data*, **AB 446** also lists a number of items that are *already implicitly included* in this definition as separate types of data. [6] In other words: **AB 446** suggests that "actions, habits, …web browsing history, purchase history … [and] consumer behaviors" need to be listed separately because they are not already included by the CCPA's definition of "personal information" … when, in fact, they are already included.[7]

In addition, **AB 446** contradicts the approach of the CCPA in that it defines "personal information" to include "deidentified or aggregated consumer 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*.

For these reasons, **AB 446** should be rejected – because California voters have endorsed the CCPA, and employers should not need to comply with both the CCPA, and contradictory legislation placed elsewhere in the California Civil Code without similar voter approval.

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

Putting aside the stated concern of **AB 446**, its broad language would appear to create liability for any company using normal, widely-accepted modern programs, such as the following:

- **Membership discount or rewards program, if signed up online.** These programs would qualify as a "technological method" which "collect[s] information" about a person's shopping "habits" and then offers discounts ("setting a price") to them.
- **Discounts offered because of interest in a similar product.** Companies often offer discounts to a frequent purchaser to incentivize them to try a new product. Here, again, if those purchases are made online,[8] then the company's notation of prior history and offer of a discount would qualify as "surveillance pricing" and trigger civil penalties.
- **Different pricing in a different area.** Because **AB 446** lists "residence" among its broad list of protected areas, it would appear that setting a price differently for customers who are harder to reach (for example, in a remote and hard-to-reach area) would qualify as "surveillance pricing."

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

[6] *See* Proposed Civil Code Section 7200 (a).

[7] Under the CCPA, even information that on its face does not appear to qualify as personally identifiable information becomes "personal information" for purposes of that act 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." To put it plainly: the CCPA's definition does not leave out much information. **AB 446** would – confoundingly – suggest otherwise.

[8] Interestingly, the exact same conduct would not create liability in-person – so a retail seller who observed a frequent customer and said "Oh, you like that? I bet you'd like these. Take this one as a sample!" would face no liability because it did not involve any "technological method."

- **Needs-based discounts.** A consumer's financial ability to pay would fall under the CCPA's broad definition of "personal information," which **AB 446** includes under "electronic surveillance technology" – making any discount based on their financial situation similarly impermissible.
- **Lending or other consumer-specific transactions.** Lending transactions are inherently based on a consumer's unique information, including financial loans or insurance rates, and would seem to therefore qualify as "surveillance pricing."

All of these normal practices would face legal liability because of **AB 446**'s incredibly broad definition of what constitutes "surveillance pricing".

AB 446's Legislative Findings are Out-dated, Inaccurate, and Should Be Removed.

AB 446 takes the relatively unprecedented step of including allegations against a range of specific companies as findings of the California legislature – which is bizarre and inappropriate. Legislative findings are not a press release – they are intended to assist future courts in interpreting legislation and its intent. It is inappropriate to include inaccurate allegations against specific companies in such a forum.

Moreover, these allegations appear[9] either incorrect or out-dated. **AB 446**'s legislative findings vaguely refer to "a recent study"[10] that claims to show misconduct … then repeats allegations about conduct from more than a *decade ago,* without any reference to any recent conduct.[11] Other allegations imply racially-biased actions,[12] but the underlying reporting (again from a decade ago) actually fails to show any racial targeting.[13]

As an example of these inaccurate "findings": **AB 446** includes an allegation that "[h]otel booking sites charged people in certain ZIP Codes more money to stay at hotels than other ones [sic] across the country. … [A] person from the bay area was charged … more … than someone browsing for the same room in Kansas City."[14] This discrepancy is *because California law recently changed to require all included fees for any hotel rooms to be included in the up-front price*. AB 537 (Berman)[15] compelled online travel sites to list their prices including all fees up front – and Cal Chamber (along with other opposition groups) repeatedly testified that such a process would confuse consumers by making it *appear* that prices were actually different for California consumers and out-of-state consumers. Now, it appears consumer groups are indeed confused and are alleging that businesses' appropriate compliance with recent law is actually something nefarious.

We strongly object to including allegations against specific companies as part of legislative findings, particularly when there appears no evidence that such conduct is ongoing, if it was even accurate at the time.

AB 446's Broad Language is Contradictory to Fundamental Rules of Supply and Demand.

Finally, **AB 446** seems somewhat at odds with the very idea of supply and demand - which is fundamental to our economic system. If a good or service is highly desired, and a purchaser has more resources to buy it, then they are free to spend those resources to purchase it. All transactions in a capitalist system are

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[9] "Appear" is used here only because of the early date of this bill's legislative hearing, and the commensurately short timeline for research we have been afforded. We hope, in the future, to be able to state this conclusion without such a qualifier.

[10] It appears this "study" is a December 2024 document from Consumer Watchdog which has no scientific methodology or verification of its allegations – and is better understood as a summary of the organization's positions.

[11] Allegations against Orbitz and Staples appear based on allegations reported in 2012. Princeton Review's alleged conduct took place prior to 2015.

[12] To be clear, race-based pricing *is already clearly illegal*.

[13] The findings imply that Princeton Review was making race-based changes to pricing, but a closer review of the 2015 underlying article suggests no such race-based pricing (in fact noting that any such effect appeared "not intentional". *See* article here: https://www.propublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review,

[14] This allegation seems to be copy-pasted into both the legislative findings and the fact sheet without any critical review of its accuracy.

[15] The same year, Dodd's SB 478 (2023) also required similar disclosure, but was not industry specific. In addition, SB 683 (Glazer – 2023) also pushed the topic – but was dropped in favor of ASM Berman's bill.

fundamentally influenced by this basic relationship. A consumer who wants to pay for fresh groceries to be delivered to a hard-to-reach location, or to purchase a scarce good (such as flowers on Valentine's Day) can do so – but it may cost more. A supplier of goods is free to say, "I'm busy in the next few months, and your worksite is far away, so the price will be higher." Or, conversely, "your worksite is close and easily accessible—and you've always been a good business partner—so we can do this one cheaper." **AB 446** seems to be looking for malice in this basic part of capitalism – which deeply concerns California's business community.

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.

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

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 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

cc: Legislative Affairs, Office of the Governor
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RM:ldl