COST DRIVER

July 8, 2025

TO: Members, Senate Judiciary Committee

SUBJECT: AB 446 (WARD) SURVEILLANCE PRICING
OPPOSE/COST DRIVER – AS REVISED MAY 6, 2025
SCHEDULED FOR HEARING – JULY 15, 2025

The California Chamber of Commerce and the undersigned respectfully **OPPOSE AB 446 (Ward)** as revised on May 6, 2025, as a **COST DRIVER** because it will outlaw existing consumer-friendly discounts 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. Moreover, *none of our members utilize any such targeted price increases*. However, we are very concerned that **AB 446** will place civil penalties on non-problematic and widely-accepted practices (such as membership rewards programs or local discounts) 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 consumers. However, 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 prohibits "surveillance pricing," which it broadly 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** then 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 Outlaws Consumer-Friendly Discounts–and Will Hurt Affordability Across California by Forcing Any Businesses Who Offer Discounts to Face a New Private Right of Action and Litigation Costs.**

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

- Step (1) - Any difference[2] 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[3] listed exceptions in order to be offered (Section 7202(b)(2)); and
- 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).)

We are greatly concerned that California businesses will be sued because of **AB 446**'s presumptive outlawing of all discounts, limited exceptions, and private right of action. Forcing companies to litigate their ability to offer discounts seems unlikely to improve affordability in California.

Following the three-step process above: Step 1 outlaws all changes to price based on personal information, meaning that any businesses attempting to offer targeted discounts (such as for local residents or former subscribers) will always start on the defensive in any shakedown lawsuit pursuant to **AB 446**.

Then, under Step 2, employers will need to consider whether their present discounts fit into the listed permissible exceptions and–even if they believe that their discounts could qualify–the company still has to weigh the costs and risks of litigation to defend their discounts. We expect this to cause many businesses to: (a) stop offering discounts which do not fit **AB 446**'s terms; (b) choose to cancel even potentially compliant discounts because the cost of potential litigation and shakedown demand letters is too great.

These litigation risks are particularly significant when the applicable language is vague, and therefore harder to ensure compliance with. 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 Claims Act[4], and the Uniform Trade Secrets Act[5]. Importantly, those two statutes *have different caselaw interpreting the term.* This vagueness (the same term with two different interpretations at law) means that even employers who attempt

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[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.

[2] Though the bill appears to limit itself only to price changes (including discounts) that are "based, in whole or in part, on [personal] information collected through electronic surveillance technology", the bill has no definition of what is considered to be "collected through electronic surveillance technology." Because this term is undefined, and because the bill is enforced by a private right of action, we do not see these terms as effectively limiting the bill's reach or the lawsuits employers who offer discounts will face.

[3] The fourth exception – 7202(b)(1) – "different in price based on cost" – is not at issue and is also not traditionally considered a "discount" for consumers.

[4] 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.")

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

to keep their discounts cannot be certain of compliance *until* they get sued and litigate the definition of the term "publicly disclosed."

In addition, we believe that **AB 446**'s allowable exceptions list (Section 7202(b)) ignores many common and consumer-friendly forms of discounts.[6] We do not understand discounts to be a policy problem in California, and particularly do not understand how such lawsuits will improve California's notorious affordability problems.

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 such targeted price increases should be (and usually already are) 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.

2) **AB 446's Penalty Provisions Will Encourage Shakedown Lawsuits and Discourage Employers from Attempting to Offer Discounts.**

AB 446's penalty provisions are shockingly harsh in light of the relatively low-cost transactions being covered, and the volume of sales at issue–and will function to push businesses away from even attempting to offer discounts.

First let's consider the value of a discount for the business and consumer. A small grocer might put a discount (50 cents off) on various fruits to encourage their sale before a new shipment arrives–and might sell 4000 fruits under that discount in one week.[7] That is a saving for consumers of $2000, and the retailer is giving up $2000, but the inventory is moving more quickly and hopefully more fruits will be sold next week, so it is worthwhile to offer the discount.

Under **AB 446**, the retailer faces potential litigation costs and liability that dwarfs the value of the discount and any related savings by far. **AB 446** creates potential damages of $12,500 *per discounted transaction*, with a potential 3x multiplier for discounts that "intentionally violate this part." So, with just *one* customer filing a lawsuit about *one transaction* and alleging that a discount was not **AB 446** compliant, the potential penalty already outstrips the entire value of the discount for customers. Moreover, the cost of an attorney to respond to these shakedown lawsuits likely adds at least $1000 in costs for the business.[8] Small businesses (and even larger businesses on tight margins) are going to look at these costs and make the rational decision to no longer offer discounts at all if **AB 446** is passed, given the risks of doing so.

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

The California Consumer Privacy Act[9] 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,

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[6] For example, certain discounts may be inherently impossible to post publicly without inviting abuse. A discount of 20% to entice former subscribers to re-subscribe would be functionally impossible to publicly post because posting such a discount would cause all present subscribers to cancel-and-resubscribe repeatedly in order to then get the 20% re-subscribing discount. As a result, companies will just cease to offer these discounts if **AB 446** goes into effect.

[7] In reality, a range of goods would likely have different discounts, but any potential demand letter and litigation would likely allege violations across various goods – making a larger scale comparison more apt.

[8] Assuming that attorneys bill at $100 per hour (which is low for most private firms), and take 10 hours to review the alleged letter, review the alleged discount data, and formulate a response.

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

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.[10]

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.

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."[11] 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

[10] *See* Cal. Civil Code Section 1798.140(e) (defining "Business purpose" use of data and identifying specific uses of data as acceptable).
[11] *See* Cal. Civil Code Section 1798.140(o)(1) (defining "Personal Information")

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.

Again–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.[12] 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.

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

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.[13]

AB 446 fails to clearly explain how "customized price" will be applied and, because it is enforced by a private right of action, private companies will need to litigate to justify even normal differences in price.[14] As noted above, we have shared amendments to address the issue while still prohibiting price increases on any particular consumers.

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

[12] 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.

[13] Outlet malls are a great example: different prices are offered, despite the goods being largely the same - and consumers are aware of that distinction between a prime location and an outlet.

[14] By "normal differences in price", we mean differences in the price of a good between different locations, or on different days - such as when produce is more or less ripe, or when a retailer is over-supplied at one location.

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.**

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
Brea Chamber of Commerce, Lacy Schoen
Building Owners and Managers Association of California, Sklyer Wonnacott
CalBroadband, Amanda Gualderama
California Attractions & Parks Association, Sabrina Demayo Lockhart
California Bankers Association, Chris Schultz
California Business Properties Association, Skyler Wonnacott
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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
Carlsbad Chamber of Commerce, Bret Schanzenbach
Chino Valley Chamber of Commerce, Zeb Welborn
Corona Chamber of Commerce, Bobby Spiegel
Cupertino Chamber of Commerce, Deborah L. Feng
Folsom Chamber of Commerce, Bill Romanelli
Greater Conejo Valley Chamber of Commerce, Danielle Borja
Greater High Desert Chamber of Commerce, Mark Creffield
Greater San Fernando Valley Chamber of Commerce, Nancy Hoffman Vanyek
La Cañada Flintridge Chamber of Commerce and Community Association, Pat Anderson
Lake Elsinore Valley Chamber of Commerce, Kim Joseph Cousins
Long Beach Area Chamber of Commerce, Celeste Wilson
Mission Viejo Chamber of Commerce, Dave Benson
NAIOP California, Skyler Wonnacott
National Association of Mutual Insurance Companies, Christian Rataj
National Federation of Independent Business, Tim Taylor
Newport Beach Chamber of Commerce, Steve Rosansky
Orange County Business Council, Jeffrey Ball
Palm Desert Area Chamber of Commerce, Alisa Williams
Paso Robles and Templeton Chamber of Commerce, Amy Russell
Personal Insurance Federation of California, Allison Adey
Rancho Cordova Chamber of Commerce, Diann Rogers
Rancho Mirage Chamber of Commerce, Katie Slimko Stice
San Juan Capistrano Chamber of Commerce, Benjamin Medina
Santa Ana Chamber of Commerce, David Elliott
Santa Clarita Valley Chamber of Commerce, Ivan Volschenk
Simi Valley Chamber of Commerce, Anthony Angelini
Software Information Industry Association, Abigail Wilson
TechNet, Jose Torres
The Travel Technology Association, Laura Chadwick

Torrance Area Chamber of Commerce, Donna Duperron
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