



COST DRIVER

DATE: August 8, 2025
TO: Members, Senate Appropriations Committee
SUBJECT: **AB 446 (WARD) SURVEILLANCE PRICING**
OPPOSE/COST DRIVER – AS AMENDED JULY 17, 2025
SCHEDULED FOR HEARING – AUGUST 18, 2025

The California Chamber of Commerce and the undersigned respectfully **OPPOSE AB 446 (Ward)** as amended on July 17, 2025, as a **COST DRIVER**. This measure will outlaw a vast range of existing consumer-friendly discounts and conflicts with California's existing law on data collection and usage, the California Consumer Privacy Act (CCPA), as well as the CCPA's implementing regulations. Moreover, **AB 446** uses undefined and ambiguous terms, meaning it will be difficult for employers to ascertain whether they are in compliance with its language without litigation. Because **AB 446** is enforced via legal action by private citizens or by state and local prosecutors, we expect it to add considerable court costs for the state while its ambiguities are litigated.

To be clear: we do not support any targeted price increases 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 and litigation on non-problematic and widely-accepted practices (such as

membership rewards programs or local discounts) because of its overbroad language, while banning permissible uses of data under the CCPA.

We have offered amendments to address 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. Regrettably, those amendments were rejected.

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

AB 446 prohibits “surveillance pricing,” which it loosely defines as “offering or setting a customized price¹ for a good or service for a specific consumer or group of consumers, based, in whole or in part, on personally identifiable information collected through electronic surveillance technology.²” Importantly, **AB 446**’s definition of surveillance pricing prohibits not just cost increases, but also any discounts offered to consumers based on any personal data.³ To enforce its provisions, **AB 446** then relies on litigation (by individuals, the attorney general, or local prosecutors).

1) AB 446 Outlaws Consumer-Friendly Discounts—and Will Hurt Affordability Across California by Creating Litigation Risks for Businesses That Offer Discounts.

AB 446’s most recent amendments create the following three-step process:

- Step (1) - Any difference⁴ in price (including discounts) is presumptively banned as “surveillance pricing” (Section 7200(c));
- Step (2) – Companies must prove that their discount meets one of four⁵ 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 ability for private or local prosecutorial enforcement. 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. This means 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**.

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.

¹ “Customized price” is undefined in **AB 446**.

² “Electronic surveillance technology” is also undefined in **AB 446**. Though **AB 446** contains an attempt to define “surveillance technology”, the definition fails to *describe* what would qualify as “surveillance technology.” Instead, it provides only examples of what it might “include.” Without a clear definition, employers across California will be left guessing as to whether **AB 446**’s provisions are even triggered.

³ Our coalition has offered amends to clarify that the bill should prohibit *price increases* based on personal data, but they have not been accepted.

⁴ Though the bill claims to limit itself only to price changes (including discounts) that are “based … on [personal] information collected through electronic surveillance technology”, the bill has no definition of what is considered to be “collected through electronic surveillance technology,” as noted above. As a result, we view the bill as applying to all price changes based on individual data.

⁵ The first exception – 7202(b)(1) – “different in price based on cost” – is not at issue and is also not traditionally considered a “discount” for consumers, as it is just a different cost based on the retailer’s cost. In other words, it might cover a price difference between two stores due to one being close to shipping lanes, and one being very remote. This price difference is not a “discount” in any traditional sense.

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 four 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 Act⁶, and the Uniform Trade Secrets Act⁷. 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 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.⁸ 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 individuals or groups being targeted, based on personal information with price *increases*, we completely understand and agree that such targeted price increases should be (and usually already are) illegal. In its current format **AB 446** goes far beyond that noble goal. As noted above, we have offered amendments 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 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 will function to push businesses away from even attempting to offer discounts.

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.⁹ 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* locality 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 lawsuits likely adds costs in the tens of thousands for the business. 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 litigation risks of doing so.

3) AB 446 Contradicts California’s Landmark Privacy Law – the California Consumer Privacy Act – by Creating New Consent and Disclosure Requirements, as Well as New Limitations on Data Usage.

⁶ 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.”)

⁷ Civil Code 3426.1(b)(2).

⁸ 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.

⁹ 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.

The California Consumer Privacy Act¹⁰ 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. 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 (such as buying certain products) 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.¹¹

AB 446 contradicts the CCPA by both re-writing the standards for consumers to share personally identifiable information (including consent and notice requirements), and by regulating how data can be used after it is lawfully acquired.

a. 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. The CCPA 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."¹² 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.¹³ Despite lacking any apparent justification for the change, **AB 446** puts contradictory language¹⁴ into law without amending the terms of the CCPA.

b. AB 446 Conflicts with the CCPA Because it Attempts to Govern How Data Gathered Related to Discounts May be Used.

Multiple provisions of **AB 446** attempt to restrict how data which is lawfully acquired in exchange for a discount can be used. Specifically, Subsection 7202(d)(3) prohibits employers from combining¹⁵ any data gained in exchange for a discount with any other data about a consumer. In addition, subsection 7202(e) expressly states that any data in exchange for a discount cannot be used for any purposes beyond simply awarding the discount.¹⁶ The CCPA already squarely regulates businesses' ability to gather and utilize such data, including notices that must be provided, consumers' rights to request deletion of data, and more. Again, we are unaware of any justification as to why the CCPA's data provisions should be re-written, particularly in a bill which purports to be aimed at fair pricing concerns.

4) AB 446's Undefined terms Will Create Litigation for Employers and Consume State Resources as Courts are Forced to Determine the Bill's Reach.

¹⁰ See Cal. Civil Code Section 1798 *et seq.*

¹¹ See Cal. Civil Code Section 1798.140(e) (defining "Business purpose" use of data and identifying specific uses of data as acceptable).

¹² See Cal. Civil Code Section 1798.125(b)(3).

¹³ 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.

¹⁴ To be specific: **AB 446**'s creates new requirements of disclosure prior to collecting any data from the consumer related to a discounts (such as verifying their home address for a "local customers" discount) in 7202(d)(1).

¹⁵ The bill technically prohibits any business from "augment[ing] or supplement[ing]" data, but we read this as functionally prohibiting any verification, comparison, or combination of the gained data with any other data about the customer that the business has lawfully obtained.

¹⁶ The operative language here is: "Any personally identifiable information collected pursuant to [a permitted discount] shall be used solely for the purpose of ... administering the applicable discount ... and shall not be used for any other purpose, including, but not limited to ... targeted advertising ..."

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.

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.¹⁷

In addition, **AB 446** fails to define its central concept – changes to prices based on data acquired via “*electronic surveillance technology*.” We have similar concerns that, without a definition of this term, it remains unclear what data is covered by the bill’s prohibitions and limited exceptions to allow some discounting, and what data is not covered at all.

Despite these definitional concerns being raised for the majority of this year, they remain unfixed. If **AB 446** passes into law, we expect litigation costs as individual businesses’ practices are evaluated to determine: (a) what data is considered gathered via “electronic surveillance technology”; (b) whether that company’s individual discount practices fit **AB 446**’s exceptions; (c) how conflicts between the CCPA and **AB 446** will be resolved related to disclosures, data gathering, and data usage.

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**.

Sincerely,



Robert Moutrie
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, Skyler Wonnacott
CalBroadband, Amanda Gualderama
California Attractions & Parks Association, Sabrina Demayo Lockhart
California Bankers Association, Chris Schultz
California Business Properties Association, Skyler Wonnacott
California Chamber of Commerce, Robert Moutrie

¹⁷ 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.

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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 Self Storage Association (CSSA), Naomi Padron
California Travel Association, Emellia Zamani
Carlsbad Chamber of Commerce, Bret Schanzenbach
Chino Valley Chamber of Commerce, Zeb Welborn
CTIA – The Wireless Association, Jake Lestock
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
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Rancho Cordova Chamber of Commerce, Diann Rogers
Rancho Mirage Chamber of Commerce, Katie Slimko Stice
San Diego Regional Chamber of Commerce, Justine Murray
San Juan Capistrano Chamber of Commerce, Benjamin Medina
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Santa Clarita Valley Chamber of Commerce, Ivan Volschenk
Self Storage Association (SSA), Naomi Padron
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RM:ldl