

# CCPA AND COMPETITION: THE VALUE OF CONSUMER DATA, PRIVACY, AND PRICING



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## I. INTRODUCTION

With the passage of privacy laws like the EU General Data Protection Regulation and the California Consumer Privacy Act (“CCPA”), there is increasing debate around whether the goals of antitrust and privacy laws are incompatible or complimentary.<sup>2</sup> Privacy laws affect the way firms compete, particularly when consumers are given a choice of opting in or opting out of providing companies with their personal information and when those choices may be affected by the prices charged and the services offered by those companies.

The CCPA, which went into effect on January 1, 2020, is a first-of-its-kind law that requires businesses to calculate the value of consumer data. While it includes several new consumer rights, such as the right to know, right to delete, and a right to opt-out, this article will focus on the right to non-discrimination and the complexities that businesses will face as they navigate three things: the need to ensure consumers’ right to privacy and non-discrimination under the CCPA; the ability to offer competitive prices and marketing incentives to meet consumer demands; and the opportunity to earn revenue from the consumer data they may be able to collect, sell, and retain.

These three interrelated objectives complicate what businesses may have to do to meet one of the fundamental requirements under the CCPA, which is this: if a business offers financial incentives or a price or service difference as compensation for the collection, sale, or retention of consumer data, the business must explain how the incentives or price or service difference are reasonably related to the value of the data to the business. This is uncharted territory; and while we wait to see what enforcement actions the California Attorney General brings under this law, which began on July 1, 2020, we cannot underestimate the lasting impact the law may have on the global privacy discourse and how regulators view the respective rights and powers the consumers and businesses have in controlling the use of personal data that is collected about individuals.

<sup>2</sup> There was debate in the past on whether the goals of antitrust and intellectual property law were incompatible or complimentary. See U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovation-andcompetitionrpt0704.pdf>.

## II. THE RIGHT TO NON-DISCRIMINATION UNDER THE CCPA

One of the most groundbreaking aspects of the CCPA is the notion that consumers have a right to non-discrimination, under which businesses are prohibited from discriminating against consumers who exercise their privacy rights, such as the right to know, delete, or opt-out of the sale of their personal information. To comply with the CCPA, businesses must include a statement in their privacy policies informing consumers that they have a right “not to receive discriminatory treatment” for exercising their CCPA rights.

While the CCPA does not define what it means to “discriminate,” it provides a non-exclusive list of practices that may qualify as discriminatory, if the business responds to a consumer who exercised the consumer’s rights under the CCPA by:

- Denying goods or services;
- Charging different prices;
- Providing a different quality of goods or services; and
- Suggesting that the consumer may receive a different price or rate.<sup>3</sup>

Because enforcement of the CCPA has only begun on July 1, 2020, we have yet to see how the Office of the Attorney General of the State of California (“OAG”), which has the sole authority to bring an enforcement action under the law, interprets this provision. According to the Frequently Asked Questions that were published by the OAG, “Businesses cannot deny goods or services, charge you a different price, or provide a different level or quality of goods or services just because you exercised your rights under the CCPA.”<sup>4</sup> This does not mean, however, that consumers have an unlimited right to non-discrimination without consequences.

The OAG provides two examples of potential consequences: (1) “if you refuse to provide your personal information to a business or ask it to delete or stop selling your personal information, and that personal information or sale is necessary for the business to provide you with goods or services, the business may not be able to complete that transaction”;<sup>5</sup> or (2) “[i]f you ask a business to delete or stop selling your personal information, you may not be able to continue participating in the special deals they offer in exchange for personal information.”<sup>6</sup> Not being able to complete the requested transaction or not allowing customers to participate in special deals, however, are often not the desired outcome for businesses, so how can businesses offer promotions, discounts and other deals in exchange for collecting, keeping or selling your personal information?

The CCPA provides certain exceptions to the general prohibition on discrimination. Businesses may charge different prices or offer different levels of service if the difference is “directly related to the value provided to the business by the consumer’s data.”<sup>7</sup> The CCPA also permits businesses to offer financial incentives — including payments to consumers as compensation for the collection, sale, or deletion of personal information — as long as the programs are not “unjust, unreasonable, coercive, or usurious in nature,”<sup>8</sup> and if businesses notify consumers of these financial incentives, obtain opt-in consent prior to enrolling a consumer in a financial incentive program, and provide consumers with the opportunity to revoke consent for such programs at any time.<sup>9</sup>

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<sup>3</sup> See Cal. Civ. Code § 1798.125 (a) (1) (A-D) (2018).

<sup>4</sup> California Consumer Privacy Act (CCPA), State of California Department of Justice, <https://oag.ca.gov/privacy/ccpa#sectionf> (last visited Aug. 31, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Cal. Civ. Code § 1798.125 (b)(1) (2018).

<sup>8</sup> See *id.* § 1798.125 (b)(4) (2018).

<sup>9</sup> See *id.* § 1798.125 (b)(2) (2018).

This has generally been interpreted to mean that the CCPA was intended to allow businesses to offer tiered pricing or service levels so long as the financial incentive or price or service difference is reasonably related to the value of the consumer's data. However, any business that is seeking to rely on this exception must first calculate a good-faith estimate of the value of the consumer's data or show that the tiered pricing or service levels are reasonably related to the value of the consumer's data. For example, this means companies need to prepare a good faith estimate of the value of the data that is the basis for the financial incentive, price difference, product difference, or service difference that they may offer to consumers in order to incentivize them to not exercise their right to opt-out from the sale of their personal information. Companies will also need to describe the methodology they are using to calculate that value.

### III. NOTICE OF FINANCIAL INCENTIVE UNDER THE CCPA

Because in a data economy, the volume, accuracy, and integrity of a data set are important drivers for calculating the value of a certain data set, businesses may be motivated to discourage any consumer actions that would result in the data not being as complete as it can be. Once a business identifies a data processing activity that may be a sale under the CCPA, it may incentivize consumers to not exercise his or her consumer rights, including the right to opt-out or the right to delete, by offering a financial incentive.

Although the right to non-discrimination is not solely about the consumer's right to opt-out, much debate about this new privacy right has centered around what it means to "sell" personal information under the CCPA and from what data sets a consumer may opt-out. Under CCPA, "sell," "selling," "sale," or "sold," are defined as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration."<sup>10</sup> Given this broad definition, it is possible that many "use case" scenarios involving the transfer of data from one party to another may constitute a sale, and thus be subject to the consumer's right to opt-out from such sale of personal information.

To incentivize a consumer to not opt-out, businesses may provide financial incentives. A notice of financial incentive must be provided to consumers before they opt-in to any "financial incentive" program, benefit, or other offering that is related to collection, retention, or sale of personal information. For example, businesses that want to incentivize consumers to not opt-out, payment in the form of customer loyalty points, coupons, or discounts may be offered.

The financial incentive notice must include all information a consumer would want to know before consenting to participate in such a program, specifically:

- A succinct summary of the financial incentive or price or service difference offered;
- A description of the material terms of the financial incentive or price or service difference, including the categories of personal information that are implicated by the financial incentive or price or service difference and the value of the consumer's data;
- How the consumer can opt-in to the financial incentive or price or service difference;
- A statement of the consumer's right to withdraw from the financial incentive at any time and how the consumer may exercise that right; and
- An explanation of how the financial incentive or price or service difference is reasonably related to the value of the consumer's data, including:
  1. A good-faith estimate of the value of the consumer's data that forms the basis for offering the financial incentive or price or service difference; and
  2. A description of the method the business used to calculate the value of the consumer's data.<sup>11</sup>

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<sup>10</sup> See Cal. Civ. Code § 1798.140(t)(1) (2018).

<sup>11</sup> Cal. Code Regs. § 999.307(b)(1)-(5).

The requirement that companies explain how the financial incentive or price difference is reasonably related to the value of the consumer's data is an important one. This is for two reasons. First, the explanation is part of the notice requirement, which ensures transparency so that a consumer can make an informed decision about whether to accept the incentive. Second, the explanation is needed to ensure that the company can meet the non-discrimination requirement. Specifically, a company cannot treat a customer differently based on whether he or she is opting in or out of the sale of personal information. Both requirements are met if a company can show that the financial incentive (or the product that has a price or service difference) that is offered for the collection or disclosure of consumer information is reasonably related to the value of the consumer's data.

#### **IV. THE TERMS OF THE FINANCIAL INCENTIVE AND THE PRICE OR SERVICE DIFFERENCE OFFERED FOR THE DISCLOSURE OF CONSUMER DATA**

Once a business has determined that it seeks to provide a financial incentive for the collection and use of personal information, the incentive offered can be structured in a number of different ways. For example, a company could offer a premium service for \$5 per month where users who elect to pay the \$5 premium would be able to opt-out from the sale of their personal information, as long as the business can show that the \$5 per month payment is reasonably related to the value of the consumer's data to the business. Another type of incentive is a loyalty program where a company might offer a \$5 coupon or discount for purchases of \$100 or more. The coupon or discount could be expressed as a percentage discount (e.g. a five percent discount off the price paid) or a dollar amount (\$5 off of a \$100 purchase). For consumers who join a loyalty program where the personal information is necessary in order for the consumers to enjoy the benefits (e.g. email address and transaction history to provide loyalty benefits), the consumer's request for deletion maybe denied by the business, as long as the information is necessary for the business to provide the loyalty program requested by the consumer and is reasonably anticipated within the context of the business's ongoing relationship with the consumer. Indeed, these are two of the examples that appear in the regulation itself.<sup>12</sup> Complying with the regulation will be no easy task for businesses.

Even if it is relatively easy for a company to describe the terms of the financial incentive initially, changes in the marketplace or consumer behavior may make it difficult for the company to describe specifically what those terms are, particularly given certain unknowns. A company may not know in advance how many coupons or discounts it will offer, how many consumers will redeem those coupons or take advantage of those discounts, what types of discounts or coupons are most attractive to consumers, and whether and by how much the coupons and discounts were successful in generating new sales and ultimately, where and how much new revenue was generated by the sale of that data. Moreover, depending on the volume, accuracy and integrity of the data set at large, the value of the individual consumer's data to the business also may change as a result of market dynamics. Yet the regulation appears to require the company to describe with some reasonable certainty how the financial incentives and any price and service difference offered might be related to the value of the consumer's personal information that the company may collect, sell, or retain.

To estimate the value of any proposed financial incentives and price or service differences, companies may need to draw on market studies, their prior experience with coupons, and other market data that may shed light on the effectiveness of discounts in promoting sales and the use of coupons by consumers of similarly-situated companies, as well as any revenues and expenses related to the collection and sale of personal information.

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<sup>12</sup> See Cal. Code Regs. § 999.336(d).

## V. ESTIMATING THE VALUE OF CONSUMER DATA

The regulations offer a number of considerations that a company may use to calculate the value of consumer data to the company. These factors include:

- The marginal, average, or aggregate value to the business of the data collected, sold, or deleted;
- The revenue generated by the business from the sale, collection, or retention of consumers' personal information;
- The expenses that the business may incur in connection with the sale, collection, or retention of the data or with the offer or provision of any financial incentive or price or service difference; and
- The profit generated by the business from the sale, collection, or retention of consumers' personal information.<sup>13</sup>

While these factors may appear straightforward at first blush, there are a number of considerations that may come into play as previewed above. First, the value of an individual consumer's personal information may depend on what other data are being collected. For example, if the data are being sold, the value of an individual's personal information may not be all that important by itself, but important when aggregated with other individuals' data. It is also important to think about the different types of data that could be collected. The collection of email addresses is likely to be more valuable if there is associated data on consumers' home or work zip code location, income category, or age, but less valuable without such data. Thus, it may not be enough for businesses to consider the value of the specific piece of personal information that will be collected by this one particular data processing activity. Businesses also may need to think about how this specific piece of data will be combined with other databases, either internally to be used by the same business or transferred to a third party to be used for a different purpose.

This brings us to our second point. The value of having the data will depend on how the data are used. For example, if the data collected are to be sold to an advertiser, the value may well depend on the value of the data to that advertiser, and the company selling that data may not know this value at the time of data collection. The value of the data to be sold could easily vary from one advertiser to another, based on which other sources of data are available to the advertiser at the time of the sale and which other advertisers are in the market for the company's consumer data, among other factors. How much an advertiser is willing to pay for the company's data will affect the price that the company will be able to charge for access to its data, and as the questions above indicate, determining the revenues that the company may earn from selling or licensing its personal data may involve an inquiry into the nature of the personal data being sold and the market in which its buyers of the company's data may operate.

Third, the regulation asks for the value of the data to the business from selling, collecting, or deleting the data. Consider, for example, the value associated with collecting personal information on one more consumer versus the value associated with deleting that consumer's personal information. These values may be the same if the individual's data are sold to an advertiser with many other consumers' data. But if the company is in the business of selling a product or service to the consumer, it is possible that the added value of obtaining a new consumer's information is higher than the loss in value associated with deleting that consumer's information. In the case of gaining consumer information, the company could well be gaining a new customer. In the case of deleting consumer information, the company may have lost that person's data, but there may be no loss in sales if the expectation is that the consumer is likely to continue purchasing products or services from the company.

Fourth, the regulation suggests that the company may consider the costs incurred by the company to collect, sell, or retain the data, or to offer the financial incentive or price or service difference when estimating the value of consumer data. For many companies, these costs are likely to be comprised of IT, marketing, and other fixed costs that do not significantly vary depending on how many consumers are served by the company and how many consumers opt-in or opt-out of providing consumer information. In these circumstances, costs may not be useful in determining the value of the consumer's information to a company, particularly when thinking about the value of any particular individual's data. However, it may be useful to consider the incremental cost associated with collecting and selling a larger increment of personal data (e.g. data on consumers in a new city or state or new data that had not been collected before), the incremental cost associated with generating an appropriate incremental increase in sales, and/or the incremental cost associated with producing the content that may be available in a premium content offering.

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<sup>13</sup> See *id.* § 999.337(a).

The profit generated by holding or selling consumer data is another factor that may be useful in calculating the value of consumer information. In addition to the complexities associated with estimating the incremental sales revenue associated with collecting or selling the data or the revenue associated with offering the incentive, consideration should be given to the complexities that can arise when assessing the relationship between terms of a financial incentive and profitability.

The relationship may be straightforward in certain cases. Suppose a consumer pays \$5 per month for a premium product in order to opt-out of the sale of personal information. This would generate an incremental profit of \$5 per month to the company if there is little or no marginal cost associated with serving that one additional consumer. The \$5 per month fee for the premium product might make sense if the company is able to sell access to its consumer data for \$5 per consumer per month, so the justification for the \$5 fee would be the opportunity cost of not being able to sell that consumer's data. However, the scenarios below highlight some of the issues are likely to complicate the justification for the \$5 fee:

- Scenario 1: Suppose the company faces competition from a new rival that is also selling its consumer data. As a result, the company discovers that it cannot continue selling its data at a price of \$5 per consumer per month. Instead, the company has to lower the price to \$3 per consumer per month. But the company continues to charge consumers \$5 per month for its premium product because the value of the premium product and the cost of producing content for the premium product has not changed. In other words, will businesses be expected to have dynamic pricing where the cost of a premium service to consumers change based on the ups and downs of the cost to purchase that piece of personal information in the data marketplace? Is it sufficient if that change in price is reflected after periodic review (i.e. annually) or will consumers be able to make a claim that businesses need to offer real-time pricing?
- Scenario 2: Suppose a company that offers a free product decides to introduce a premium product for \$5 per month. However, after it introduces its premium product, the company discovers that many of the consumers who were using the free product begin purchasing the premium product. As a result, the company has less data to sell because more of its consumers are buying the premium product and opting out of disclosing their personal information. Because fewer consumers are opting into disclosing their data, advertisers are only willing to pay \$3 per consumer per month for the data. With the reduction in the price that the company can charge for its data, is the \$5 fee for the premium product still reasonably related to the value of the data collected and sold? What analyses would the company need to do to assess this question?

Complexities also may arise in the situation where a business may have to change the terms of the financial incentives that it offers to its consumers. For example, consider a company that is offering a five percent discount to consumers who are members of its loyalty program (for which they have agreed to disclose their personal information).

- Scenario 3: Suppose the company faces additional competition from the entry of a new rival. In response to that entry, the company decides its best approach is to increase the percentage discount that it offers to its loyalty program members from five percent to ten percent. Suppose, however, that the revenues that the company can generate by selling its consumer data has not changed — the number of loyalty members did not change and the amount and type of data collected by the company did not change. The only change was the increase in the financial incentive that the company is offering its members. After the increase in the percentage discount offered to consumers, is the financial incentive still reasonably related to the value of the data collected and sold?
- Scenario 4: Suppose a retail store discovers that its loyalty program customer retention rates and purchase volume per person over a three-year period are not much different from the customer retention rates and purchase volume per person that the retailer experienced before introducing its loyalty program. As a result, the retailer decides that it may be able to improve customer retention rates by offering additional financial incentives. However, because the data collected and sold by the retailer has not changed, the revenues generated by the retailer for its data has not changed. With the introduction of the new financial incentive, is the amount of the financial incentive still reasonably related to the value of the data?

These scenarios illustrate how competition and market dynamics may make the relationship between the financial incentive (or price and service difference) offered and the value of the data more complex. Scenarios 1 and 2 highlight situations where a company has not lowered the price that it is charging its premium service customers, even though the personal data of these customers has become less valuable to parties interested in purchasing or getting access to the company's data. Scenarios 3 and 4 highlight situations where the company may appear to be offering greater discounts to encourage consumers to disclose their personal data when, in fact, the change was motivated by competitive

reasons. In all four scenarios, it was a change in market conditions that led to either a change in the value of the data or a change in the terms of the financial incentive (or price or service difference) offered. Indeed, because competitive conditions in the market for the consumer data sold by the company may not be linked to competitive conditions in the company's product or service market, complying with the regulation may require the company to explain the nature of competition and pricing in multiple markets — the market(s) for which the data may be used and the market(s) in which the company competes.

On the surface, explaining how a financial incentive or price or service difference is related to the value of the consumer's data may seem complex, but it is similar to economic and business analyses that companies undertake in the ordinary course of business. Companies set and adjust the prices of their various products all the time. A company that sells a low-end, mid-range, and high-end product will have to choose the price of each product based on costs, supply, demand, and other competitive market conditions. Companies also study the relationship between their marketing incentives and outcomes all the time. When complexities arise, evidence from these economic and market studies may be more important as part of the compliance process.

## VI. CONCLUSION

The CCPA is new and compliance with the regulation raises complex legal and economic issues. This is particularly true with respect to the non-discrimination requirement in the law, which allows companies to offer tiered pricing or service levels along with the opportunity to opt-in or opt-out of providing consumer information as long as they can explain how the financial incentive or price or service difference is reasonably related to the value of the consumer's data.

The regulation recognizes the basic issues that companies have to address, which is that companies have to (a) explain the terms of the financial incentive or price or service difference; (b) calculate the value of the consumer's data; and (c) explain how the two are reasonably related. On the surface, this may seem straightforward, but in practice, the terms of the financial incentive may not be easy to explain, particularly if there are unknowns that relate to how often the incentives will be given, how much the incentive will be, how frequently a discount or coupon will be redeemed, or what data the business is collecting and what it's worth.

There are challenging economic issues that companies must address when they explain how the financial terms that are being offered relate to the value of the consumer data collected. First among these issues is the need to consider the effect of market conditions and competition on the value of the data to the company, the financial terms offered to consumers, and the revenues that a company may earn from the data they collect. Value and price are complex economic concepts and they are central to the compliance process. For example, there is the price of the data sold and the price of a premium product that a company may charge consumers along with the option to opt in or opt out of disclosing personal information. The regulation would seem to require that these two elements be reasonably related, yet the underlying factors that determine the price at which a company may be able to sell its data may be quite different from the factors that determine the price that the company may have to charge its consumers for opting into a loyalty program or some premium product. These are challenging issues because in today's competitive, dynamic, and fast-moving markets, market changes could easily affect both the value of the data to the company and the financial terms that a company may need to offer consumers who want to participate in a loyalty program or purchase a premium product. As the CCPA has become law, these are issues that companies must be prepared to navigate.

More broadly, these pricing-related data issues will only broaden the intersection of privacy law and antitrust law. For example, questions related to nascent competition, the acquisition of data in adjacent markets, data grabs, and the role of data in potentially facilitating collusion are all examples of ways the lines between antitrust and privacy objectives and thus enforcement are increasingly becoming blurred.<sup>14</sup>

California Attorney General Xavier Becerra stated in his press release while announcing the approval of the Final Regulations that “privacy is an inalienable right” and “Californians should control who possesses their personal data and how it's used.”<sup>15</sup> By requiring businesses to provide notice and obtain opt-in consent if they wish to offer a different price, rate, level, or quality of goods or services to the consumer based on the collection and use of personal information, the CCPA in essence becomes a first-of-its-kind law that requires businesses to calculate and disclose the value of the consumer's data. This step of calculating the value of the consumer's data is an important one, but it will be a complex

<sup>14</sup> See generally Alyse F. Stach, Ann M. O'Brien & Jeewon Kim Serrato, *The thin line between privacy and antitrust*, THE PRIVACY ADVISOR, IAPP (June 23, 2020), <https://iapp.org/news/a/the-thin-line-between-privacy-and-antitrust/>.

<sup>15</sup> Press Release, State of California Department of Justice, Attorney General Becerra Announces Approval of Final Regulations under the California Consumer Privacy Act (Aug. 14, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-approval-final-regulations-under-california>.



undertaking due to the interrelationships that touch on consumers' right to privacy and non-discrimination under the CCPA, the need for businesses to compete and to be able to price and market their products in response to market conditions, and the revenues that a company may be able to earn by collecting, selling, and retaining consumer data. The first step to interrogating the value of consumer's data may need to begin with the businesses understanding what data they collect, retain or sell.



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