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Confusion In Calif. Privacy Act's Anti-Discrimination Rule

By **Grant Davis-Denny** (September 5, 2018, 1:49 PM EDT)

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A unique feature of the California Consumer Privacy Act is its provision that expressly prohibits businesses from discriminating against California residents who exercise their new rights created by the CCPA. This article discusses the anti-discrimination provision, its exceptions, and a number of concerns with the provision and its exceptions.

Background on the CCPA's Anti-Discrimination Provision

For readers unfamiliar with the CCPA, you can find an overview of the law and some of its more difficult-to-interpret provisions **here**. For present purposes, it is sufficient to know that the CCPA grants California residents sweeping new data privacy rights found nowhere else in the United States, including a right to:

- Access data about themselves held by a business.
- Advance notice as to how data will be used.
- Be forgotten.
- Opt out of information sales.
- Recover statutory damages in certain circumstances.

Because of its breadth, the CCPA is often compared to Europe's General Data Protection Regulation But that analogy oversimplifies matters, for reasons explained **here**. One key reason why is the CCPA's anti-discrimination provision, which lacks an analogue in the GDPR.

The anti-discrimination provision essentially says: (1) a business cannot discriminate against a California resident for exercising his or her CCPA rights by denying goods or services, providing a different level of goods or services, or charging different prices or rates for goods or services; (2) to suggest (1) is also off limits; however (3) a business can charge different prices or offer different levels or quality of services if it is "reasonably related to the value provided to the consumer by the consumer's data"; and (4) a business can, subject to certain limitations discussed below, incentivize consumers financially to allow the business to collect, sell or not delete their data.

Therefore, a business cannot discriminate against California residents for exercising their CCPA rights except in two circumstances: (1) the reasonable-relationship exception and (2) the financial incentives exception. Unfortunately, both exceptions contain significant ambiguities.

The Reasonable-Relationship Exception

The CCPA's reasonable-relationship exception allows a business to "charg[e] a consumer a different price or rate" or to "provid[e] a different level or quality of goods or services to the consumer, if that difference is reasonably related to the value provided to the consumer by the consumer's data."

In determining whether a reasonable relationship exists between the differential pricing or services, on the one hand, and the value of the data, on the other, the CCPA treats the "value provided to the consumer by the consumer's data" as the yardstick. The test is not the data's value to the business. Nor is it even the value of the service or good to the consumer that the consumer can receive if he or she chooses to share his or her data.

This approach is not consistent with how businesses normally value discounts or different levels of service. When a car dealer assigns a value to a trade-in vehicle, for example, the value of the trade-in to the new car purchaser is at best a secondary concern. The dealer's primary concern is the price at which the dealer will be able to sell that trade-in to others. Sure, the dealer may like to know the extent to which the consumer values his or her trade-in in order to gain some negotiating leverage. But the dealer ordinarily is not willing to pay two radically different prices for the same trade-in based on the fact that two new car purchasers value their trade-ins differently.

By distorting how market actors normally value discounts and tiers of service, the CCPA raises a number of thorny problems for businesses interested in dealing with California residents.

First, most businesses will not have a reliable way of assessing the "value provided to the consumer" by his or her data. Perhaps the business could ask the consumer. But it would not take long for consumers to realize that assigning inflated values to their data would require businesses to respond with more valuable benefits. The problem is even more complicated because the types of personal information subject to the CCPA are varied and will have differing values associated with them. An individual's interaction with one webpage, for example, may have a different value to the consumer than his or her Social Security number.

Second, to utilize the exception, the CCPA appears to require businesses to discriminate among consumers. The exception, after all, refers to the value assigned by "the consumer" to "the consumer's data." If that is what the CCPA's drafters intended, then those consumers who value their data more would have to receive a larger benefit from the business than consumers who assign less worth to their data, even if the data is equally valuable to the business. Assessing data value on a consumer-by-consumer basis and then tailoring pricing or services offered based on the outcome of that valuation would be an extraordinarily challenging task.

Third, because the lawfulness of a discount turns on the consumer's subjective valuation of her data, differently situated businesses apparently would need to offer discounts of similar value to the same consumer. An e-tailer in the Italian handbag market would likely be willing to offer a high-income purse buyer greater discounts to keep that buyer's email address on file than would a discount sleeping bag seller. But because it is the consumer's and not the business's valuation of her data that matters, the CCPA would appear to require both retailers to offer similar discounts.

The Financial Incentives Exception

The CCPA's financial-incentives exception allows a business to "offer financial incentives, including payments to consumers as compensation, for the collection of personal information, the sale of personal information, or the deletion of personal information." Although differential pricing or services may create incentives to give up CCPA rights, the CCPA appears to treat the financial-incentives exception as separate and distinct from the reasonable-relationship exception (see Section 1798.125(b)(1), which first states that "[a] business may offer financial incentives" and then in the next sentence provides that "[a] business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or differences is directly related to the value provided to the consumer by the consumer's data"). If this is right, and here too the CCPA is less than perfectly clear, then the financial-incentives exception is not subject to the reasonable-relationship test, but has its own set of requirements.

The financial-incentives exception's first requirement is that a business provide notice to consumers of the incentive. The relevant provision, Section 1798.125(b)(2), contains obvious drafting errors that make it difficult to understand the nature of the notice that must be provided. That provision states that "[a] business that offers any financial incentives pursuant to subdivision (a), shall notify consumers of the financial incentives pursuant to Section 1798.135." Subdivision (a), however, does not refer to "financial incentives"; it instead refers to differential pricing and goods and services. More importantly, the notice required — notice "pursuant to Section 1798.135" — is unclear because 1798.135 does not set forth general, easily translatable notice procedures. That statute's notice requirements are that businesses:

- Include a "Do Not Sell My Personal Information" link on their homepages.
- Incorporate a description of data sales opt-out rights in their online and California-specific privacy policies.
- Ensure that their relevant employees are trained on the opt-out right and how consumers can exercise it.

It is unclear whether the CCPA's drafters intended businesses to include links to their incentives on every homepage (keep in mind that the way CCPA defines "homepage," every webpage arguably qualifies as a homepage, even if it is multiple layers deep inside a website's structure). Nor is it clear whether those drafters planned to have businesses' privacy policies detail the financial incentives that are being offered.

A second requirement of the financial-incentives exception — that "the consumer gives the business prior opt-in consent pursuant to Section 1798.135 which clearly describes the material terms of the financial incentive program, and which may be revoked by the consumer at any time" — is both unclear and problematic. It is unclear because Section 1798.135 does not address opt-in consent; it grants consumers the right to opt out of having their data sold by a business. How the opt-in requirement incorporates Section 1798.135 is a mystery. Moreover, the ability of consumers to revoke consent at any time creates a potential problem for businesses. A business could choose to pay a consumer to be able to keep the consumer's data for three years. But the time period would be meaningless in light of the consumer's right to revoke consent. A consumer could thus accept the payment and the following day revoke consent and demand deletion of her data. It is unclear if the business would have any recourse to recover the payment it had made.

A final requirement for the financial-incentives exception is that the incentives not be "unjust, unreasonable, coercive or usurious in nature." The CCPA does not define any of these terms. They are amorphous, flexible, fact-sensitive concepts that will frustrate businesses seeking clarity about whether a bold incentive designed to encourage participation in a data-sharing program rises to the level of being an unlawful inducement to forfeit CCPA rights.

Conclusion

Although the California Legislature just passed the first CCPA fix-it bill, Senate Bill 1121, that legislation does not amend the CCPA's anti-discrimination provision or the exceptions to that provision. It remains to be seen whether the Legislature or the California attorney general, who is charged with adopting implementing regulations, will clarify the scope of this provision and its exceptions before the CCPA takes effect. If not, expect to see significant litigation over their proper interpretation.

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