

Subject: RE: ACTION REQUIRED: CPPA Stakeholder Session Confirmation
Date: Friday, May 6, 2022 at 1:36:08 PM Pacific Daylight Time
From: O'Neill, Julie
To: Regulations
Attachments: CPPA_Comments_(O_Neill).pdf

WARNING: This message was sent from outside the CA Gov network. Do not open attachments unless you know the sender: [REDACTED]

Dear CPPA Staff:

My comments below are also in the attached document.

Best regards,
Julie

JULIE O'NEILL

Partner | Morrison & Foerster LLP
200 Clarendon St. | Boston, MA 02116

[REDACTED]
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From: O'Neill, Julie
Sent: Friday, May 6, 2022 3:56 PM
To: Regulations <Regulations@coppa.ca.gov>
Subject: RE: ACTION REQUIRED: CPPA Stakeholder Session Confirmation

Dear CPPA Staff:

Following up on my message below, I write to respectfully request clarification as to what constitutes a "financial incentive" under the California Consumer Privacy Act (CCPA). In particular, it would be very helpful for businesses subject to the CCPA to understand whether a benefit or program (such as a loyalty program) is a "financial incentive" if a consumer does not have to forfeit a CCPA right in order to receive the benefit or participate in the program.

A. The CCPA's Anti-Discrimination and Financial Incentive Provisions

The CCPA generally prohibits a business from discriminating against consumers for exercising their access, deletion, and/or opt-out-of-sale rights. Cal. Civ. Code § 1798.125(a)(1). Discrimination could include, for example, a denial of services, charging different prices, or providing a different level or quality of services. Id. The CCPA permits a business, however, to offer a "financial incentive," but only if the financial incentive is reasonably related to the value of the consumer's personal information and the business complies with certain notice and choice requirements. Id. at § 1798.125(a)(2), 1798.125(b)(1).

Based on the CCPA regulations and the Initial and Final Statements of Reasons for those regulations, I understand a benefit to constitute a "financial incentive" only if the benefit requires consumers to waive their CCPA rights. Sections 999.336(a) and (b) of the regulations provide:

- *A financial incentive or a price or service difference is discriminatory, and therefore prohibited by Civil Code section 1798.125, if the business treats a consumer differently because the consumer exercised a right conferred by the CCPA or these regulations.*
- *A business may offer a financial incentive or price or service difference if it is reasonably related to the value of the consumer's data.*

Based on the examples provided in the regulations (copied below), I read the above two provisions together to mean that, to be lawful, a benefit:

- Must not result in discrimination against consumers who exercise their CCPA rights because: (1) the business honors rights requests without impact on the consumer's participation, or (2) the CCPA permits the business to deny the request, such as based on an exception; or
- May require a consumer to waive a CCPA right or rights in order to receive the benefit, but only if the benefit reasonably relates to the value of the consumer's personal information to the business.

Imposition of the "financial incentive" notice and choice requirements only where consumers waive CCPA rights in order to receive the incentive is logical: they give consumers information about the value of their personal information so that they can make an informed choice as to whether to give up their CCPA rights and participate. The Attorney General made this point in his Initial Statement of Reasons for the Draft Regulations, tying financial incentives to a consumer's rights under the CCPA. Specifically, he explained that Section 1798.125 of the Act

. . . prohibits a business from discriminating against a consumer for exercising their rights under the CCPA, but allows the offering of financial incentives if they are directly related to the value of the consumer's personal information. In order to assist the consumer in evaluating the trade-off provided by a financial incentive, subdivision (b) requires the notice of financial incentive to provide an explanation of why the incentive is permitted under the CCPA. This explanation must include both a description of the business's good-faith estimate of the value of the data that forms the basis for offering the incentive and a description of the method the business used to calculate the value of the data. . . . The elements required by the subdivision are essential to further the CCPA's purpose of prohibiting discrimination based on a consumer's exercise of privacy rights. Without knowing the categories of personal information involved and how the business values them, a consumer would not be in a position to make informed decisions on whether to opt-in to the offered financial incentives. Requiring this information gives consumers a full picture of the costs and benefits of the incentive . . .

See <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-isor-appendices.pdf>, at 12. The Attorney General's Final Statement of Reasons for the regulations also supports this reading. The final regulations had revised the definition of a financial incentive from "a program, benefit, or other offering, including payments to consumers as compensation, *for the disclosure, deletion, or sale of personal information*" to "a program, benefit, or other offering, including payments to consumers, *related to the collection, retention, or sale of personal information.*" (Emphasis added.) In addressing these changes, the Attorney General explained:

The term “collection,” which replaces “disclosure,” more closely aligns with the language and activities described in Civil Code section 1798.125, subdivision (b)(1), which allows a business to offer a financial incentive to consumers (under specified conditions) for “the collection of personal information[.]” The word “deletion” was replaced with “retention” to provide greater clarity and to better describe the activity for which a financial incentive is likely to be offered— i.e., a consumer forgoing the right to delete. “Retention,” as used here, is the opposite of what a business would do to incentivize a consumer to forego a request for “deletion” and is the correct word in this context. ***This change will benefit businesses and consumers by clarifying what is considered a “financial incentive,” and thus, what business practices are governed by Civil Code section 1798.125 and the regulations regarding non-discrimination and financial incentives.***

See <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor.pdf>, at 3. (Emphasis added.) Moreover, the regulations provide examples that strongly suggest that compliance with the requirements for a financial incentive is required only where a consumer is required to waive a CCPA right in order to receive a benefit. Specifically, each of the examples, set out below, involves either: (1) a scenario where consumers may exercise their rights, or have their rights requests lawfully denied under the CCPA, with no obligation to provide a statement of the value of the consumers’ personal information (Example 2); or (2) a scenario where a business may require consumers to waive their rights under the CCPA but only if the business can show that the value of the consumers’ personal information to the business is reasonably related to the benefit (Examples 1, 3, 4). Cal. Code Regs., tit. 11, § 999.336(d).

- *Example 1:* A music streaming business offers a free service as well as a premium service that costs \$5 per month. If only the consumers who pay for the service are allowed to opt out of the sale of their personal information, then the practice is discriminatory, unless the \$5 per month payment is reasonably related to the value of the consumer’s personal information to the business.
- *Example 2:* A clothing business offers a loyalty program whereby customers receive a \$5-off coupon to their email address after spending \$100 with the business. A consumer submits a request to delete all personal information the business has collected about them but also informs the business that they want to continue to participate in the loyalty program. The business may deny their request to delete as to their email address and the amount the consumer has spent with the business because that personal 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 them pursuant to § 1798.105(d)(1) (exceptions to deletion requests).
- *Example 3:* A grocery store offers a loyalty program whereby consumers receive coupons and special discounts when they provide their phone numbers. A consumer submits a request to opt out of the sale of their personal information. The retailer complies with their request but no longer allows them to participate in the loyalty program. This practice is discriminatory unless the store can demonstrate that the value of the coupons and discounts are reasonably related to the value of the consumer’s personal information to the business.

Example 4: An online bookseller collects personal information about consumers, including their email addresses. It offers discounts to consumers through browser pop-up windows while the consumer uses its website. A consumer submits a request to delete all personal information that the bookseller has collected about them, including their email address and their browsing and purchasing history. The bookseller complies with the request but stops providing the coupons to the consumer. The bookseller's failure to provide coupons is discriminatory unless the value of the coupons is reasonably related to the value provided to the business by the consumer's personal information. The bookseller may not deny the consumer's request to delete as to the email address because the email address is not necessary to provide the coupons or reasonably aligned with the expectations of the consumer based on their relationship with the business.

B. The CCPA's Definition of a Financial Incentive

A "financial incentive" is "a program, benefit, or other offering, including payments to consumers, related to the collection, deletion, or sale of personal information." Cal. Code Regs., tit. 11, § 999.301(j). While many companies *necessarily* collect consumers' personal information in order to offer a benefit, the benefit itself may bear absolutely no relation to the collection, deletion, or sale of a consumer's personal information. I assume that the CCPA does not intend to encompass within the definition of a financial incentive any offering of a benefit that involves the provision of personal information. To do so would have an absurd result: virtually any business with a mailing list would have to ensure that, by permitting a consumer to sign up for, *e.g.*, a white paper or marketing emails, the offering (*i.e.*, the white paper or marketing emails) is reasonably related to the value of the consumer's personal information. Cal. Code Regs., tit. 11, § 999.336(b). The business would also have to disclose an estimate of that value to consumers. *Id.* at 999.307(b)(5). In many cases, the value-related disclosure would be meaningless, given the lack of any relation between the benefit(s) and a participating consumer's personal information.

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The applicability of the CCPA's financial incentive provisions is unclear and, absent guidance, subject to an extreme interpretation. Companies are striving to comply with the law but need clarity. I appreciate being able to comment on this topic and would welcome the opportunity to discuss it with you.

Best regards,
Julie

JULIE O'NEILL

Partner | Morrison & Foerster LLP
200 Clarendon St. | Boston, MA 02116

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From: O'Neill, Julie [REDACTED]
Sent: Thursday, April 28, 2022 1:46 PM
To: Regulations <Regulations@coppa.ca.gov>
Subject: RE: ACTION REQUIRED: CCPA Stakeholder Session Confirmation

Hello, CCPA Staff,

I will plan to send you my comments on financial incentives by email, rather than by participating in the Zoom meeting.

Thank you, and best regards,
Julie

JULIE O'NEILL

Partner | Morrison & Foerster LLP
200 Clarendon St. | Boston, MA 02116

[mofo.com](#) | [LinkedIn](#) | [Twitter](#)

My pronouns: she/her

From: Regulations <Regulations@coppa.ca.gov>
Sent: Tuesday, April 26, 2022 10:21 PM
To: Regulations <Regulations@coppa.ca.gov>
Subject: ACTION REQUIRED: COPPA Stakeholder Session Confirmation

External Email

Dear Stakeholder,

Thank you for signing up to speak at the California Privacy Protection Agency's 2022 Pre-Rulemaking Stakeholder Sessions. The Stakeholder Sessions will be held over Zoom video- and teleconference on **May 4, 5, and 6.**

Please read the following information carefully and confirm or cancel your speaking slot by replying to this email.

We are pleased by the high level of interest in the Stakeholder Sessions, with approximately 140 stakeholders requesting to speak.

In order to accommodate everyone, stakeholders are generally being scheduled for their first-choice topics. However, you did not rank the suggested topics, but requested to speak about an Additional Topic which you specified. We will be pleased to hear about this topic during the **"Additional Topics"** session. This session is scheduled for **May 6 from approximately 2:30pm to 3:30pm.** Please note that these times are approximate and please log into the session well before the approximate start time of your session. We will not be able to wait if you miss your slot.

Speakers will be called on in alphabetical order by last name during this window. You will have 7 minutes to speak. In order to accommodate everyone, we will be strictly keeping time and speaking for

a shorter length of time is just fine. We encourage everyone to plan on speaking for 5 to 7 minutes.

Please plan to focus your remarks on your main topic. However, if you'd like to say something about other topics of interest at the end of your remarks, you are welcome to so. You are also welcome to raise your hand during the portion of each day set aside for general public comment. Finally, you may also send us your comments via physical mail, or email them to regulations@coppa.ca.gov if you cannot attend.

California law requires that the CPPA refrain from using its prestige or influence to endorse or recommend any specific product or service; consequently, during your presentation we ask that you also refrain from recommending or endorsing any specific product or service.

Please note, **you'll need to sign into Zoom using the name (or pseudonym) and email you provided when you signed up to request your speaking slot.** If you are participating by phone, please indicate the number you'll be calling from so that we may recognize you during your pre-appointed speaking slot. Note that your name and phone number may be visible to public during the live session and subsequent recording. If you need disability accommodations, please let us know ahead of time.

We will communicate the schedule and meeting logistics for all Stakeholder Sessions soon. Again, please reply to this email to **confirm** or **cancel** your speaking slot by **this Thursday, April 28th, at 5 pm Pacific Time.**

We look forward to hearing from you during the Stakeholder Sessions.

-CPPA Staff

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This message may be confidential and privileged. Use or disclosure by anyone other than an intended addressee is prohibited. If you received this message in error, please delete it and advise the sender by reply email. Learn about Morrison & Foerster LLP's [Privacy Policy](#).

Writer's Contact:



May 6, 2022

VIA EMAIL: Regulations@coppa.ca.gov

Staff
California Privacy Protection Agency

Re: Clarification on “Financial Incentives” under the CCPA

Dear CCPA Staff:

I write to respectfully request clarification as to what constitutes a “financial incentive” under the California Consumer Privacy Act (CCPA). In particular, it would be very helpful for businesses subject to the CCPA to understand whether a benefit or program (such as a loyalty program) is a “financial incentive” if a consumer does not have to forfeit a CCPA right in order to receive the benefit or participate in the program.

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Based on the CCPA regulations and the Initial and Final Statements of Reasons for those regulations, I understand a benefit to constitute a “financial incentive” only if the benefit requires consumers to waive their CCPA rights. Sections 999.336(a) and (b) of the regulations provide:

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... prohibits a business from discriminating against a consumer for exercising their rights under the CCPA, but allows the offering of financial incentives if they are directly related to the value of the consumer’s personal information. In order to assist the consumer in evaluating the trade-off provided by a financial incentive, subdivision (b) requires the notice of financial incentive to provide an explanation of why the incentive is permitted under the CCPA. This explanation must include both a description of the business’s good-faith estimate of the value of the data that forms the basis for offering the incentive and a description of the method the business used to calculate the value of the data. . . . The elements required by the subdivision are essential to further the CCPA’s purpose of prohibiting discrimination based on a consumer’s exercise of privacy rights. Without knowing the categories of personal information involved and how the business values them, a consumer would not be in a position to make informed decisions on whether to opt-in to the offered financial incentives. Requiring this information gives consumers a full picture of the costs and benefits of the incentive . . .

See <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-isor-appendices.pdf>, at 12. The Attorney General’s Final Statement of Reasons for the regulations also supports this reading. The final regulations had revised the definition of a financial incentive from “a program, benefit, or other offering, including payments to consumers as compensation, *for the disclosure, deletion, or sale of personal information*” to “a program, benefit, or other offering, including payments to consumers, *related to the collection, retention, or sale of personal information.*” (Emphasis added.) In addressing these changes, the Attorney General explained:

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discriminatory unless the store can demonstrate that the value of the coupons and discounts are reasonably related to the value of the consumer's personal information to the business.

- *Example 4:* An online bookseller collects personal information about consumers, including their email addresses. It offers discounts to consumers through browser pop-up windows while the consumer uses its website. A consumer submits a request to delete all personal information that the bookseller has collected about them, including their email address and their browsing and purchasing history. The bookseller complies with the request but stops providing the coupons to the consumer. The bookseller's failure to provide coupons is discriminatory unless the value of the coupons is reasonably related to the value provided to the business by the consumer's personal information. The bookseller may not deny the consumer's request to delete as to the email address because the email address is not necessary to provide the coupons or reasonably aligned with the expectations of the consumer based on their relationship with the business.

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The applicability of the CCPA's financial incentive provisions is unclear and, absent guidance, subject to an extreme interpretation. Companies are striving to comply with the law but need clarity. I appreciate being able to comment on this topic and would welcome the opportunity to discuss it with you.

Best regards,



Julie O'Neill