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INFORMATIONAL HEARING

THE SENATE COMMITTEE ON JUDICIARY
AND

THE SENATE SELECT COMMITTEE ON WOMEN, WORK & FAMILIES

CO-SPONSORED BY THE CALIFORNIA LEGISLATIVE WOMEN'S CAUCUS

*The 'Pink Tax':
How Gender-Based Pricing Discrimination Undermines Women's
Economic Opportunity and What to Do About It*

February 18, 2020
Upon Adjournment of Session
State Capitol, Hearing Room 4203

BACKGROUND PAPER

I. Introduction

Many legitimate factors influence price: materials, labor, research and development costs, marketing, distribution, and, of course, the classic economic laws of supply and demand. When a business charges higher prices based on the customer's gender, however, those price disparities constitute discrimination. This form of discrimination is often referred to as a "gender tax" because, although it is not actually a surcharge imposed and collected by the government, gender-based pricing discrimination acts like a tax by imposing extra costs on consumers. Unlike an ordinary tax, however, revenue from gender-based pricing discrimination does not accrue to the community chest, but instead expands the profit margins of private companies. Since gender-based price discrimination disproportionately impacts women and because a common example of this phenomenon involves turning a product pink and then charging more

for it on that basis alone, gender-based price discrimination is also often known as “the pink tax.”¹

Evidence from many sources – government, academic, and media – suggests that the pink tax is no trifle. Studies have shown that, year after year, a typical California woman pays about \$2,381 more for the same goods and services than her male counterpart.² If that estimate is accurate, then the average California woman pays pink tax of approximately \$188,000 over the course of her lifetime³ and, in aggregate, the pink tax penalizes women across California to the tune of roughly \$47 billion each year.⁴ Combined with other forms of financial discrimination – such as the pay gap – the pink tax helps to form a set of insidious and systematic barriers against equal economic opportunity for women, barriers that are even higher for women of color.

This joint informational hearing will provide evidence of the existence and nature of pink tax and lay out the economic and cultural harm that it does to women and girls. The hearing will set forth what California has already done to address gender-based price discrimination and enter into a conversation about the work that remains to be done. In particular, the hearing will examine whether and how California should explicitly add consumer goods to the list of things for which businesses may no longer charge a gender-driven or ‘pink’ tax.

II. A Brief History of Consumer Civil Rights Protections in California

Since as far back as 1959, California has made a legislative point of protecting the civil rights of its consumers. In that year, the state passed the Unruh Civil Rights Act. The Unruh Act declares that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information,

¹ The phrase “pink tax” is also sometimes employed in reference to actual, government-imposed taxes on products that women need or purchase far more often than men. Charging sales tax on tampons is a quintessential example of this form of “pink tax.” Though both forms of the pink tax have discriminatory effects on the lives of women, this hearing will focus predominantly on the gender-based pricing discrimination by businesses, rather than gender-based tax discrimination by governments.

² Sen. Judiciary Com., analysis of AB 1100 (1995-1996 Reg. Session), Aug. 22, 1995, p. 5. The figure cited in the analysis refers to evidence presented at a 1994 interim hearing on gender discrimination in the pricing of products and services conducted by the Assembly Consumer Protection, Governmental Efficiency & Economic Development Committee. That figure was \$1,351 annually in 1994, or \$2,381 adjusted for inflation.

³ Based on the current female life expectancy in the United States: 79 years.

⁴ Based on July 2019 U.S. Census population in California of 39,512,223, of which slightly over half were female.

marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civ. Code § 51(b).)

Beyond the categories explicitly referenced in the Unruh Act, the California courts have interpreted it to prohibit all forms of “arbitrary discrimination” in the provision of goods and services as well as the offering of accommodations. (*O’Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790; *Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142.) In general, “[t]he Unruh Civil Rights Act [...] is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice.” (*Rotary Club of Duarte v. Board of Directors* (1986), 178 Cal. App. 3d 1035, 1046, cert. den. (1987), 481 U.S. 537.)

It may very well be the case, therefore, that the Unruh Act itself has long prohibited California businesses from charging their customers a pink tax for both services and goods. The text of the statute directly mentions services and, while there does not appear to be a recorded case that is directly on point, at least two of the cases interpreting the Unruh Act suggest that goods or products are covered as well. (See, *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, “there is no indication that the Legislature intended to broaden the scope of CC § 51, requiring equal accommodations in all business establishments, to include discriminations other than those made by a business establishment in the course of furnishing *goods*, services or facilities to its clients, patrons or customers”; see also, *Surrey v. TrueBeginnings, LLC* (Cal. App. 4th Dist. Nov. 18, 2008), 168 Cal. App. 4th 414, 416, “a person must tender the purchase price for a business’s services or products in order to have standing to sue it for alleged discriminatory practices relating thereto.” Emphasis added.)

In spite of the Unruh Act, however, gender-based pricing discrimination persisted. In the mid-1990s, under the leadership of then-Assemblymember Jackie Speier, the Assembly Consumer Protection, Governmental Efficiency & Economic Development Committee undertook a statewide survey of price disparities. The survey uncovered widespread examples of gender-based pricing discrimination and famously calculated that the average woman in California was paying \$1,351 more each year in 1994 than her male counterparts for the same goods and services.⁵ Adjusted for inflation, that figure today is \$2,381.

⁵ Sen. Judiciary Com., analysis of AB 1100 (1995-1996 Reg. Session), Aug. 22, 1995, p. 5.

To address the problem, Assemblymember Speier introduced new legislation elaborating on the Unruh Act. Initially, through AB 2418 in 1994, Assemblymember Speier sought to prohibit gender-based pricing discrimination for both consumer services and goods. That bill cleared the Legislature, but then-Governor Pete Wilson vetoed it.

Undeterred, Assemblymember Speier reintroduced a narrower version of the bill the following year. Governor Wilson signed that bill, the “Gender Tax Repeal Act of 1995” (Speier, Ch. 866, Stats. 1995), and it has remained the law in California, codified at Civil Code Section 51.6, ever since, with just two refinements. First, in 2001, then-Assemblymember Hannah-Beth Jackson endeavored to increase awareness and heighten enforcement of Civil Code Section 51.6 by adding a requirement that certain types of consumer service providers – tailors, dry-cleaners, and hair salons, in particular – post both a price list and a notice advising customers of their right not to be charged differently on the basis of gender. (AB 1088, Jackson, Ch. 312, Stats. 2001.) Then, in 2019, with the backing of the California Chamber of Commerce, Assemblymember Tasha Boerner-Horvath authored a bill designed to further increase awareness about the prohibition on gender-based pricing discrimination for services by directing local jurisdictions, every time they issue a business license, to accompany it with a document detailing the business’ rights and responsibilities under Civil Code Section 51.6. (AB 1607, Boerner-Horvath, Ch. 293, Stats. 2019.)

As a result of these legislative efforts, California is one of only a handful of jurisdictions throughout the country where gender-based pricing discrimination for services is explicitly banned by law. At the same time, however, because that existing law only explicitly applies to *services*, there remains an open question as to whether California law permits gender-based pricing discrimination in relation to the sale of consumer goods.

III. Evidence of Gender-Based Pricing Discrimination in the Sale of Consumer Goods

In the time since the California State Assembly first documented the widespread existence of a gender tax on goods and services in California in 1994, a number of studies by government agencies, academics, and members of the media have confirmed the ongoing prevalence of the problem.

In 2011, researchers at the University of Central Florida (UCF) undertook a large scale survey of gender-based price disparities in the markets for personal care products and services. With regard to the consumer goods side of the equation, the researchers recorded prices for 538 products across four major U.S. retailers, including 199 deodorants, 89 shave gel/creams, 204 razors, and 46 body sprays. They concluded that

“although the differences are not uniform across types of services or products, women do tend to pay more than men for items such as deodorant, haircuts, and dry-cleaning.” The UCF team made clear that it could not positively conclude that their results established “absolute price discrimination” on the basis of gender. However, they wrote, “it stands that women do in fact spend more than men for certain comparable goods and services in the personal care industry, and this has important implications for women’s daily lives.”⁶

In 2014, the Canadian Broadcasting Corporation (CBC) aired a segment on its Marketplace program featuring a “Battle of the Sexes” that compared prices for numerous equivalent men’s and women’s consumer goods at three major retailers, including Walmart and Target. In nearly every instance, the men’s products were found to be cheaper. Even when the prices initially appeared to be the same, the CBC report frequently found that, upon closer inspection, the men’s version of the product was larger.⁷

In 2015, the New York City Department of Consumer Affairs published findings from its examination of the frequency of gender-based pricing discrimination. Entitled “*From Cradle to Cane: The Cost of Being a Female Consumer*,” the resulting report looked at nearly 800 products with clear male and female versions from more than 90 brands sold at two dozen New York City retailers, both online and in stores. It concluded that 42 percent of the time, women’s products cost more than similar products for men and on average cost 7 percent more. Specifically:

- 7 percent more for toys and accessories
- 4 percent more for children’s clothing
- 8 percent more for adult clothing
- 13 percent more for personal care products
- 8 percent more for senior/home health care products.

In all but five of the 25 product categories analyzed, products for female consumers were priced higher than those for male consumers.

Some of the highest price differences were for products that are arguably necessities. Women’s shampoo and hair conditioner cost an average of 48 percent more. Supports and braces cost 15 percent more, personal urinals cost 21 percent more, and canes cost 12 percent more. Often times the price differences were egregious. A red scooter labeled

⁶ Duesterhaus, M., Grauerholz, L., Weichsel, R. et al. *Gend. Issues* (2011) 28: 175. <https://doi.org/10.1007/s12147-011-9106-3> (as of Feb. 12, 2020).

⁷ *Marketplace: Battle of the Sexes* (Nov. 21, 2014) Canadian Broadcasting Corporation <https://www.youtube.com/watch?v=vKvHB5RLf3Q> (as of Feb. 12, 2020).

for boys was \$25, while an identical pink scooter labeled for girls was double that amount.⁸

Finally, in 2018 the federal Government Accountability Office (GAO) studied the issue. Out of 10 categories of personal care products that the GAO studied, it found significantly higher prices for women in five of those categories, higher prices for men's goods in just two others (shaving gel and non-disposable razors), and mixed results or no difference for the remainder.⁹ The GAO concluded that "the target gender for a product is a significant factor contributing to price differences identified." The GAO stopped short of concluding that it had uncovered clear evidence of gender-based pricing discrimination, however, writing that it "did not have sufficient information to determine the extent to which these gender-related price differences were due to gender bias as opposed to other factors, such as different advertising costs."¹⁰

Taken together, these studies and reports strongly suggest that, far from abating, the pink tax has persisted across the decades and remains a common phenomenon today.

IV. Challenges and Solutions for Addressing the Pink Tax on Consumer Goods

In light of the forgoing – the ongoing prevalence of the pink tax, its detrimental effects on equal economic opportunity, and the lack of legal clarity about whether existing California law prohibits gender-based pricing discrimination with respect to goods – the key questions are whether the Legislature should now take new steps to address the issue and, if so, what those steps should be.

According to one line of thinking, there is no need for a legislative response to the pink tax, since market forces should act to eliminate it on their own. This theory posits that, given a choice between substantially similar products, informed consumers will select the cheaper version. Thus, any product marked up with a pink tax will quickly be outsold by its competition. Similarly, companies trying to charge pink taxes will soon find themselves out of business as customers migrate to the businesses that do not charge a pink tax.

In practice, however, there are problems with this theory. For one thing, it assumes that consumers can easily compare and contrast male and female product versions when

⁸ *From Cradle to Cane: The Cost of Being a Female Consumer* (Dec. 2015) New York City Department of Consumer Affairs <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf> (as of Apr. 28, 2019).

⁹ *Gender-Related Price Differences for Goods and Services* (Aug. 2018) U.S. Government Accountability Office <https://www.gao.gov/assets/700/693841.pdf> (as of Apr. 27, 2019).

¹⁰ *Ibid.*

making a purchase. In fact, however, the substantially similar products may be in entirely different aisles or departments of a store. In the case of online businesses, consumers may be routed directly to products associated algorithmically with whatever gender the business believes the customer to be. In such a case, the customer has little or no way of knowing that a virtually identical, but cheaper, version of the product exists. For another thing, gendered products may be deliberately packaged to give the impression that they are different, when in fact they are not. There are reports, for example, that medications sold as an antidote to menstrual pain cost more than medications that provide pain-relief more generally, when in fact both contain the same active ingredient.¹¹ Ultimately, the most powerful argument for why the market is unlikely to address the pink tax is that it has not. The market has been around for centuries giving it ample time to have eliminated the problem, yet examples of the pink tax abound.

Thus, it seems unlikely that the market alone will be sufficient to eliminate the pink tax. If legislative action is warranted to address the pink tax, however, that still leaves the question: how should the Legislature go about it? There are at least three mechanical issues raised: (a) how to distinguish when a product is being marketed and priced based on gender; (b) how to determine when two products are substantially similar; and (c) what enforcement regime and remedies would best ensure compliance? Each of these topics is discussed, in turn, below.

a. Distinguishing when products are being marketed and priced based on gender

Legislative solutions to the pink tax are predicated on the idea that some products are marketed to women and others are marketed to men. This is a simple enough concept in easy cases. If a pair of socks is otherwise identical, but one pair is labeled “men’s socks” while the other pair says “women’s socks” and comes with a higher price tag, the case is relatively simple. Similarly, if the same product sells at one price in an area of the store designated as the “men’s department” and sells for another price in the area marked “women’s department,” the matter would also be clear. However, if the only difference between two products is their color, their scent, their packaging, or other features that are only subjectively associated with a particular gender, figuring out whether the product is designed or intended for a man or a woman may be more difficult to ascertain.

Because of longstanding – if outdated and repressive – associations between gender and color preference, there is a general societal understanding that products in pinks, reds, and purples are being marketed to women and girls, while products in blues, blacks,

¹¹ See, e.g., *How the Pink Tax Is Ripping Off Women* (Mar. 31, 2019) The Daily Show <https://www.youtube.com/watch?v=As2p2vsdrfk> (as of Feb. 12, 2020).

and greens are targeted at men and boys. Similarly, people generally know that businesses use floral fragrances in products they are aiming at female customers, while the men's versions trend more toward things like "cool wave," "after hours," or "swagger." At the margins, however, these lines may blur. Is a red and white bicycle helmet with a picture of a dog on it marketed to boys, girls, or both? If it is sold next to an otherwise identical, but more expensive, helmet in purple and green with a picture of a cat on it, is this an example of gender-based pricing discrimination?

Existing legislative proposals for banning the pink tax on consumer goods¹² do not address this question directly, thus deferring it to their respective enforcement regimes to sort out. One possible alternative might be to provide a list of evidentiary factors, in statute, that should be considered in determining whether a product is being marketed to a particular gender. Such a list might include things like product placement (was it found in the men's department?); product labeling (does the tag or package indicate it is for a particular gender?); product marketing (does the package or advertisements for the product feature one gender exclusively?); as well as the use of colors, fragrances, or vocabulary commonly associated with traditional gender norms. The virtue of such a list is that, while it would not completely resolve the cases at the margins, it might provide some guidance for identifying obvious cases.

A burden-shifting framework could provide another potential mechanism for determining whether products are being marketed or priced based on gender. Similar to California's existing Fair Pay Act provisions (Lab. Code § 1197.5), such a framework might require an initial showing that two products are substantially similar or like but priced differently. The burden would then shift to the business to show that a bona fide factor other than gender justifies the price disparity.

b. Determining when products are substantially similar

Another potentially challenging aspect of the bill is how to determine when two products are "substantially similar or like." One approach would be to define substantially similar to mean that there are no material differences in the content of the products, the function of the products, and the functional design or features of the products, while clarifying that differences in color or packaging are not, by themselves, substantial differences between two products. Where products are nearly identical in all but color or packaging, such a distinction would be clear. Some other instances could be harder to decipher, however. Would a difference in fragrance constitute a substantial difference, for example?

¹² There are at least two bills currently pending outside of California, at the state or national level, that would prohibit gender-based pricing discrimination in relation to the sale of consumer goods: H.R. 2048, a bill by U.S. Representatives Jackie Speier and Tom Reed currently pending in the U.S. Congress; S. 2679, a bill by New York State Senator Shelley Mayer currently pending in that state's legislature.

Seeking to draw a brighter line about what are substantially similar products, a legislative proposal pending in New York State takes a different approach to this issue. Under that proposal, products are substantially similar if they: (i) share the same brand; (ii) share the same functional components; and (iii) share ninety percent of the same materials or ingredients. The mathematical precision of this formula has appeal. At the same time, it may have limitations since even minimal ingredients can have major impacts on a product. As an example, chocolate chips may make up less than 10 percent of the batter, for example, but replace them with peppercorns and you end up with a very different cookie.

c. Remedies and enforcement

Another key question for any legislative approach to combatting the pink tax is what enforcement regime should be used and what remedies should be available in the event that a violation is found. In opposing legislative efforts to address the pink tax, business associations have argued that robust remedies could stifle product innovation or invite abuse, particularly if enforcement is entrusted to individual consumers, rather than being restricted to public agencies. On the other hand, weak enforcement or meager remedies are unlikely to deter the pink tax; after all, it generates additional revenue for businesses, so there is an incentive to continue charging it.

There are a range of different approaches that could be taken to enforcement and remedies. One proposal currently pending at the federal level would leave enforcement exclusively to public agencies: the Federal Trade Commission (FTC) and state attorneys general, specifically. Absent action by the FTC or one of the state attorneys general, however, individual consumers would have no recourse in the face of gender-based pricing discrimination.

By contrast, another approach might permit enforcement by both by a public agency and by individual consumers. In California, such an approach would be consistent with existing remedies and enforcement for consumer civil rights under the Unruh Act. It would also be identical to the remedies available for violations of the existing prohibition on gender-based pricing discrimination with respect to services: aggrieved consumers may sue to recover their actual damages, a penalty of up to three times the actual damages but in no event less than \$4,000, and attorney's fees. (Civ. Code § 52(a).)

Still other variations are possible. For example, under existing law in California, the Department of Fair Employment and Housing (DFEH) is empowered to receive and investigate complaints of violations of the Unruh Act. (Gov. Code § 12930(f)(2).) Yet, DFEH holds no similar authority over gender-based pricing discrimination claims made under Civil Code Section 51.6. Giving an administrative agency jurisdiction to respond

to and investigate complaints of gender-based pricing discrimination – for both services and goods – might achieve some hybrid between exclusively public and predominantly private enforcement.

Regardless of what entity does the enforcing, appropriate remedies will be needed to encourage compliance. A proposal now under consideration in New York State would provide that:

Any business that violates the provisions of this section shall, upon a determination thereof, pay a civil penalty of not more than two hundred fifty dollars for the first violation and for each succeeding violation a civil penalty of not more than five hundred dollars. For the purpose of this section, all identical items priced on the basis of gender shall be considered a single violation.

It can be questioned whether such relatively minor civil penalties would have much deterrent effect, however, particularly on bigger companies. Where the pink tax results in a significant revenue windfall, such companies might be tempted to view the potential fines as little more than a cost of doing business. On the other hand, imposing large penalties for violations could be seen as unduly harsh when applied to small businesses. One possible compromise might be tiered or sliding-scale penalties. It is important to note, however, that in the context of California civil rights law, such a system would be an anomaly. In most instances, the remedies for civil rights violations do not depend upon the size or revenues of the business, employer, or housing provider in question.

V. Informational Hearing Overview

This joint informational hearing will explore all of the topics set forth above in greater detail. Congresswoman Jackie Speier will lead off the hearing with an explanation and examples of the pink tax. She will then describe some of the history behind California's previous legislative efforts to address the pink tax – efforts in which Congresswoman Speier played a central role – and also speak about her current federal legislation intended to ban the pink tax nationally.

Next, the hearing will turn its focus on to the pink tax's impact on women. Professor Elizabeth Sweet of San Jose State University will describe some of her scholarship regarding the increasing genderization of children's toys and how these trends reinforce outdated and potentially harmful gender norms and stereotypes. Then, Surina Khan of the Women's Foundation of California will discuss the financial impact that the pink tax has on women and how that fits into broader systematic barriers to equal economic opportunity.

The hearing will conclude with a panel representing perspectives from the business community. Hilary Lentini and Vikita Poindexter of the National Association of Women Business Owners - California Chapter will explain why their organization has elected to support current legislative efforts to prohibit gender-based pricing in relation to consumer goods. Jennifer Barrera of the California Chamber of Commerce and Rachel Michelin with the California Retailers Association will express their organizations' views on gender-based pricing discrimination and how it can best be addressed. Lastly, Nitasha Mehta of Boxed.com will describe the thinking and mechanics behind her company's decision to eliminate the pink tax from the price of goods sold on its site by offering a corresponding discount to the customer.