Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Ed Chau, Chair
AB 846 (Burke) – As Amended April 12, 2019

SUBJECT: Customer loyalty programs

SUMMARY: This bill would replace the "financial incentive programs" provisions in the non-discrimination statute of the California Consumer Privacy Act of 2018 (CCPA) with an authorization for offerings that include, among other things, gift cards or certificates, discounts, payments to consumers, or other benefits associated with a loyalty or rewards program, as specified. Specifically, **this bill would**:

1) Repeal provisions authorizing certain financial incentive programs (including an offer by a business of different price, rate, level, or quality of goods or services to the consumer if the price or difference is related to the value provided by the consumer's data, as specified) within the CCPA's non-discrimination statute ensuring a consumer's right to equal service and price. In doing so, this bill would also repeal the CCPA's prohibition against using financial incentive practices that are unjust, unreasonable, coercive, or usurious.

2) Revise the non-discrimination statute to, instead, provide that nothing in the statute prohibits a business from offering a different price, rate, level, or quality of goods or services to a consumer, including offering goods or services for no fee, if any of the following are true:

    - The offering is in connection with a consumer's voluntary participation in a loyalty, rewards, premium features, discount, or club card program.

    - That difference is reasonably related to the value provided by the consumer's data.

    - The offering is related to a specific good or service whose functionality is reasonably related to the collection, use, or sale of the consumer's data.

3) Revise the CCPA's prohibition on discrimination against a consumer for exercising any of the consumer's rights to, instead, specify that a business shall not engage in such discrimination by, among other things: (a) charging higher (as opposed to "different") prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties; or, (b) providing a lower (as opposed to "different") level or quality of goods or services to the consumer.

4) Define "loyalty, rewards, premium features, discount, or club card program" to include an offering to one or more consumers of lower prices or rates for goods or services or a higher level or quality of goods or services, including through the use of discounts or other benefits, or a program through which consumers earn points, rewards, credits, incentives, gift cards, or certificates, coupons, or access to sales or discounts on a priority or exclusive basis.

EXISTING LAW:

1) Establishes the CCPA and provides various rights to consumers pursuant to the act. Subject to various general exemptions, a consumer has, among other things:

- the right to know what PI a business collects about consumers, as specified, including the categories of third parties with whom the business shares PI, and the specific pieces of information collected about the consumer;

- the right to know what PI a business sells about consumers, as specified, including the categories of PI that the business sold about the consumer and the categories of third parties to whom the PI was sold, by category or categories of PI for each third party to whom the PI was sold;

- the right to access the specific pieces of information a business has collected about the consumer;

- the right to delete information that a business has collected from the consumer; and

- the right to opt-out of the sale of the consumer's PI if over 16 years of age, and the right to opt-in, as specified, if the consumer is a minor; and,

- the right to equal service and price, despite exercising any of these rights. (Civ. Code Sec. 1798.100 et seq.)

2) Generally requires under the CCPA that a business subject to the CCPA do all of the following, among other things: comply with the above requirements, provide various notices to those ends, and execute various requests upon receipt of a verifiable consumer request, as specified; and provide certain mechanisms for consumers to make their lawful requests, including a clear and conspicuous link titled "Do Not Sell My Personal Information" on the business's internet homepage to enable consumers, or a person authorized by the consumer, to opt-out of the sale of the consumer's PI. (Civ. Code Sec. 1798.100 et seq.)

3) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the CCPA, including, but not limited to, by:

   - Denying goods or services to the consumer.

   - Charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties.

   - Providing a different level or quality of goods or services to the consumer.

   - Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services. (Civ. Code Sec. 1798.125(a)(1).)

4) Specifies that nothing in the CCPA's anti-discrimination statute prohibits a business from charging a consumer a different price or rate, or from providing 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. (Civ. Code Sec. 1798.125(a)(2).)

5) Expressly authorizes a business to offer financial incentives, including payments to consumers as compensation, for the collection of PI, the sale of PI, or the deletion of PI. Further authorizes a business to offer a different price, rate, level, or quality of goods or

services to the consumer if that price or difference is directly related to the value provided to the consumer by the consumer's data. (Civ. Code Sec. 1798.125(b)(1).)

6) Specifies that a business that offers any such financial incentives shall notify consumers of the financial incentive, as specified. (Civ. Code Sec. 1798.125(b)(2).)

7) Provides that a business may enter a consumer into a financial incentive program only if the consumer gives the business prior opt-in consent, as specified, which clearly describes the material terms of the financial incentive program, and which may be revoked by the consumer at any time. (Civ. Code Sec. 1798.125(b)(3).)

8) Prohibits a business from using financial incentive practices that are unjust, unreasonable, coercive, or usurious in nature.

9) Provides that, in order to comply with the various consumer rights provisions under the CCPA, a business subject to the CCPA must, in a form that is reasonably accessible to consumers, do the following, among other things:

   - Disclose certain information in its online privacy policy or policies if the business has an online privacy policy or policies and in any California-specific description of consumers' privacy rights, or if the business does not maintain those policies, on its internet website, and update that information at least once every 12 months. This includes a description of a consumer's rights pursuant to the non-discrimination provisions, above, and one or more designated methods for submitting requests.

   - Ensure that all individuals responsible for handling consumer inquiries about the business's privacy practices or the business's compliance with the CCPA are informed of all requirements in various provisions of the CCPA enumerating consumer rights, as well as the provision prohibiting discrimination against consumers exercising those rights, and how to direct consumers to exercise their rights under those provisions. (Civ. Code Sec. 1978.130.)

10) Provides various definitions under the CCPA. The CCPA, of particular relevance for this bill, defines the following terms:

   - "Business" means a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' PI, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' PI, that does business in California, and that satisfies one or more of the following thresholds:

     - Has annual gross revenues in excess of $25,000,000, as adjusted as specified.

     - Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the PI of 50,000 or more consumers, households, or devices.

     - Derives 50% or more of its annual revenues from selling consumers' PI.

- "PI" means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. PI includes certain specific types of information, if that information identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household. These include, for example:

    - Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers.

    - Characteristics of protected classifications under California or federal law.

    - Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

    - Geolocation data.

    - Inferences drawn from any of the information identified in the definition of PI to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

    PI does not include publicly available information, as specified. Among other things, specifies that for these purposes, "publicly available" means information that is lawfully made available from federal, state, or local government records, as specified. Information is not "publicly available" if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained.

- "Sell," "selling," "sale," or "sold," means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's PI by the business to another business or a third party for monetary or other valuable consideration. For purposes of the CCPA, a business does not "sell" PI when, among other things:

    - A consumer uses or directs the business to intentionally disclose, as specified, PI or uses the business to intentionally interact with a third party, provided the third party does not also sell the PI, unless that disclosure would be consistent with this Act.

    - The business uses or shares an identifier for a consumer who has opted-out of the sale of the consumer's PI for the purposes of alerting third parties that the consumer has opted-out of the sale of the consumer's PI.

    - The business uses or shares with a service provider PI of a consumer that is necessary to perform a business purpose if both of the following conditions are met: (i) the business has provided notice that information being used or shared in its terms and conditions, as otherwise specified under the bill; and (ii) the service provider does not

further collect, sell, or use the PI of the consumer except as necessary to perform the business purpose. (Civ. Code Sec. 1798.140.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Purpose of this bill**: This bill seeks to revise the CCPA to allow for business practices that involve the selling of consumers' PI for the purpose of loyalty rewards programs. This is an author-sponsored bill.

2) **Author's statement**: According to the author:

> The CCPA was passed last year with required clean-up legislation later in the session. There was a general understanding from last year that additional clean up measures would be needed to tighten the Act.
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> One of the unintended consequences of the CCPA was the potential elimination of customer loyalty programs. Current law states that a business cannot discriminate against a consumer for exercising their rights under the CCPA by denying goods or services, charging different prices or rates, or providing a different level or quality of goods or services to the consumer.
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> AB 846 will clarify that the nondiscrimination section of the CCPA does not result in the elimination of customer loyalty programs. It still maintains the intent of the law that allows consumers to exercise their right under the CCPA, and does not weaken or dilute the nondiscrimination provision in any way. Privacy advocates and some consumer groups have voiced that they believe these loyalty programs can continue. These programs are offered by a wide breadth of businesses including grocery stores, hotels, drug stores, airlines, and a variety of other companies big and small.

3) **CCPA's non-discrimination statute attempts to strike a balance between protecting consumers against retaliation for the exercise of their rights and certain financial incentive practices that potentially benefit all parties**: Last year, the Legislature enacted the CCPA (AB 375, Chau, Ch. 55, Stats. 2018), which gives consumers certain rights regarding their PI, including: (1) the right to know what PI that is collected and sold about them; (2) the right to request the categories and specific pieces of PI the business collects about them; and (3) the right to opt-out of the sale of their PI, or opt-in in the case of minors under 16 years of age. The CCPA was the byproduct of compromises made between business interests on the one side, and consumer and privacy interests on the other, to provide a legislative alternative to a ballot initiative on the same subject.

   The compromise is evidenced by how the CCPA incorporates increased consumer rights (such as the right of deletion, right to specific pieces of information, and the separate treatment of minors' data through an "opt-in" right) that would not have been in the underlying ballot initiative that served as the impetus and starting point for the final legislation. It is further evidenced by how, in turn, certain items were not included in (such as a whistleblower provision), limited by (such as the private right of action, and a single public enforcement entity as opposed to enforcement by all public prosecutors), or added to (such as the authorization for businesses to seek guidance from the Attorney General) the

CCPA to alleviate certain concerns that businesses had with respect to the ballot initiative. This compromise is perhaps most visible in the CCPA's non-discrimination statute.

Fundamentally, as currently drafted, the CCPA's non-discrimination statute effectively prohibits retaliation (by way of denying goods or services, charging different prices or rates, as specified, or providing a different level or quality of goods or services, among other things) against consumers who exercise their data privacy rights under the CCPA. Ultimately, this particular statute aims to prevent "pay-for-privacy" pricing systems where only consumers who can afford to pay for their privacy rights receive the rights that have been afforded to all Californians under the California Constitution and the CCPA. Stated another way, in a pay-for-privacy framework, privacy becomes cast as a commodity for which companies can charge consumers money in exchange for protecting (or, rather, not monetizing) their privacy for the companies' own profit. The concern with such schemes is that it only widens the gap between socioeconomic classes, where the "haves" can protect their PI from prying eyes and companies who wish to monetize data, and the "have nots" have no choice but to forfeit their privacy rights that should otherwise be ensured to them under the California Constitution and statutory law. Accordingly, the CCPA effectively seeks to guarantee consumers the right to equal service, regardless of whether or not they exercise their right to access their PI in the possession of a business, their right know what PI is collected or sold about them, the right to delete any PI they provide to a business, and/or their right to opt-out of the sale of their PI (or "opt-in," in the case of minors under 16). As a practical matter, this means that a business cannot receive a deletion request, or right to know request, or right to opt-out request, and then turn around charge the consumer more for the same services, suddenly refuse services to them or reduce services to them simply because they opted-out and do not want their information to be shared with third parties, and so forth.

This same statute guaranteeing the consumer's right to not be discriminated against and to receive equal service when exercising their rights, also permits certain financial incentive practices where the incentive offered is reasonably related to the value of the consumer's data. To this end, however, the statute includes certain safeguards: the practice must not be unjust, unreasonable, coercive, or usurious, and the business may only enroll a consumer who has provided prior opt-in consent pursuant to notice requirements that clearly describe the material terms of the program, and the consent may be revoked by the consumer at any time.

Since the passage of the CCPA, many stakeholders have indicated that they cannot reconcile the anti-discrimination provision of the statute (subdivision (a) of Section 1798.125) with the provisions allowing financial incentive programs (subdivision (a) of Section 1798.125). As this section was described in this Committee's analysis of AB 375, at the time that bill was heard:

> Similar to the initiative, AB 375 prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the bill. Such discrimination may take the following forms, among other things: (1) denying goods or services to the consumer; (2) charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties; (3) providing a different level or quality of goods or services to the consumer; or (4) suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services. Unlike the initiative however, the bill

specifies that nothing in the above provisions prohibits a business from charging a consumer a different price or rate, or from providing 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 addition, the bill provides that a business may offer consumers financial incentives, including payments to consumers as compensation, for the collection, sale, or deletion of PI. A business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the consumer by the consumer's data. The business, however, is prohibited from using financial incentive practices that are unjust, unreasonable, coercive, or usurious in nature. Additionally, the bill subjects businesses that offer financial incentives to consumers to various notice requirements, and specifies that a business may enter into a consumer into a financial incentive program only if the consumer provides prior opt-in consent which clearly describes the material terms of the program and which may be revoked by the consumer at any time.

Such provisions would authorize a business model by which consumers are allowed to elect to use free subscriptions in exchange for advertising or sign up for a paid subscription, such as with Spotify, for example. Ultimately, the bill anticipates that the AG will develop regulations by the time it becomes operative regarding financial incentive offerings which presumably will help reconcile these provisions to prevent discriminatory pay for privacy regimes.

This bill now seeks to amend that statute to repeal the provisions related to financial incentives, in favor of express authorization for loyalty or rewards programs. According to the California Retailers Association:

While the sponsors of CCPA never intended to interfere with loyalty programs, the current language in Section 1798.125 is confusing and could lead to unnecessary litigation against retailers who offer these popular programs. Such programs help retailers of all sizes – from local coffee shops to national companies – develop lasting relationships with their customers.

Club cards and other similar offerings provide a myriad of benefits for customers who choose to participate. These customers frequently enjoy discounts as well unique services and rewards from the business offering the program. In addition to those benefits, some of the most popular rewards programs give customer reciprocal benefits with other merchants. For example, some supermarket rewards members earn discounts on gasoline. Similarly, hotels and airlines often allow customers to use their frequent flyer miles or points with other travel-related partners. These well-liked affiliations are integral to many programs and should not be jeopardized by CCPA.

4) **Amending the non-discrimination statute to authorize certain "offerings" as opposed to "financial incentives"**: As noted in Comment 3, above, the bill seeks to revise the non-discrimination statute to expressly authorize loyalty or rewards programs.

Notably, the bill largely does not alter the fundamental prohibition against discriminating against a consumer because the consumer exercised any of their rights under the CCPA,

including, but not limited to, by: (1) denying goods or services to the consumer; (2) charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties; (3) providing a different level or quality of goods or services to the consumer; or, (4) suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services. It does, however, revise the law to state "higher prices or rates" and "lower level or quality" as opposed to "different prices or rates" and "different level or quality." As a practical matter, it does not matter if a business were to: (a) charge a higher price or rate in retaliation against a consumer exercising their rights; (b) set a higher base price and revoke discounts previously provided to a consumer because the consumer exercised their CCPA rights; or, (c) restrict the availability of lower prices only to consumers who do not exercise their rights. In any of these situations, the business will arguably have violated this provision, even as amended by AB 846.

Of primary concern, is how this bill seeks to replace the non-discriminatory financial incentive practices permitted under the CCPA, with types of offerings that businesses may present to consumers without running afoul of the non-discrimination provisions.

Under the CCPA, existing law provides that nothing in the anti-discrimination language, above, prohibits a business from charging a consumer a different price or rate, or from providing 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. The CCPA then expressly provides, consistent with that recognition, that a business may offer: (1) financial incentives, including payments to consumers as compensation, for the collection of PI, the sale of PI, or the deletion of PI; and, (2) a different price, rate, level, or quality of goods or services to the consumer if that price or difference is *directly* related to the value provided to the consumer by the consumer's data. Ultimately, no financial incentive practice under the CCPA may be unjust, unreasonable, coercive, or usurious.

In contrast, this bill would, instead, provide that nothing in the anti-discrimination language above prevents a business from offering a different price, rate, level, or quality of goods or services to a consumer, including offering its goods or services for no fee, *if* any of the following are true:

- The offering is in connection with a consumer's voluntary participation in a loyalty, rewards, premium features, discount, or club card program.

- That difference is *reasonably* related to the value provided by the consumer's data.

- The offering is for a specific good or service whose functionality is *reasonably* related to the collection, use, or sale of the consumer's data.

Several concerns arise with respect to the types of offerings that are authorized under AB 846, in comparison to the CCPA. Those concerns relate to: (1) the ability of the business to offer a different price, rate, level, or quality of goods or services as long as the difference is *reasonably* related to the value provided by the consumer's data; (2) the ability of a business to offer a different price, rate, level, or quality of goods or services if the offering is for a specific good or service whose functionality is *reasonably* related to the collection, use, or sale of the consumer's data; and, (3) the removal of the CCPA provision which ensures against any unjust, unreasonable, coercive, or usurious practices by businesses.

5) **The Committee should ensure, at minimum, that basic consumer protections are reinserted into the bill**: Any difference in price, rate, level, or quality of goods or services should arguably be *directly* related to the value provided by the consumer's data (consistent with the current CCPA), not "reasonably related." Under the CCPA, while there is a provision providing recognition that different prices, rates, levels, or quality of goods can be provided where *reasonably* related to the consumer's data in this non-discrimination statute, the very next provision of that statute expressly authorizes business to make offerings of a different price, rate, level or quality of goods or services when they are *directly related* to the value provided by the consumer's data. Removing the second, qualifying statement, and now allowing for differences that are only "reasonably" related to the value provided by the consumer's data potentially creates a significant loophole in the CCPA any time a consumer opts-out of the sale of their PI or deletes their PI.

   Furthermore, if a business's goods or services truly *rely* on the collection, use, or sale of the consumer's data and a consumer opts-out or deletes information in manner that would affect the functionality of that good or service, then presumably the business should be able to show a *direct* relationship between functionality and that data. A *reasonable* relationship undermines the claim of reliance. In both cases, the determinations of "reasonableness" would be largely dependent on the interpretation of the business, and it is foreseeable that a business could use that malleable standard to effectively gut the "equal services and price" guarantees of the non-discrimination statute. As such, the Committee may wish to ensure that both cases rely on a "direct" relationship.

   Also as noted above, this bill reflects a concerning shift in public policy whereby this bill would repeal the CCPA's prohibition against unjust, unreasonable, coercive, and usurious "financial incentive practices." To that end, the Committee may wish to equally ensure that any "offerings" are never unjust, unreasonable, coercive, or usurious. The implication, otherwise, is that where California law previously prohibited such unjust, unreasonable, coercive, or usurious business practices in the form of financial incentives under the CCPA, California law could now be interpreted to allow them in the form of these specific offerings pursuant to AB 846. It is equally unclear why the programs cannot abide by a requirement that they be just, reasonable, non-coercive, and non-usurious. To that end, the Committee may wish to also consider reinstating this provision for any offerings made by businesses under this bill.

   Echoing these concerns, Californians for Consumer Privacy writes in opposition to this bill that "[t]here is nothing in the [CCPA] that prevents an entity from providing a loyalty or reward program, if that program operates in accordance with the CCPA. In fact, the CCPA expressly authorizes a business to provide financial incentives for a consumer to share and authorize the sale of their data so long as those incentives are directly related to the value provided to the business by the consumer's data. Moreover, the CCPA provides important protections that ensure that incentives offered cannot be unjust, unreasonable, coercive or usurious. It is clear that loyalty programs are permitted by the CCPA."

   If this Committee were to approve this bill, it may wish to amend the bill, at minimum to address these concerns by: (1) replacing references to "reasonably related" with "directly related; (2) prohibiting businesses from engaging in any offerings that are unjust, unreasonable, coercive, or usurious:

Suggested amendment:

(1) On page 3, lines 33 and 36, replace references to "reasonably related" with "directly related"

(2) On page 3, line 6, strike "Nothing" and insert "*Except as provided in paragraph (3), nothing*" before "in this subdivision prohibits a business from"

On page 3, after line 37, insert "(3) A business shall not offer a different price, rate, level, or quality of goods or services that is unjust, unreasonable, coercive, or usurious."

That being said, Committee staff notes that the current CCPA language regarding permissible financial offerings, in the construct of a non-discrimination statute, was heavily nuanced. As such, there remains a broader question as to whether, in attempting to expressly authorize activity that is arguably already allowed under the CCPA, the bill has now created a new structure that undermines the equal service and price guarantees of this section by forcing consumers to choose between participation in their loyalty and rewards programs and protecting their data. Under the CCPA, those loyalty programs could exist, but a consumer could arguably still participate in those programs even if they opted-out of their PI being sold. (*See* Comment 6, for more.)

6) **Other arguments in opposition**: In its letter of opposition, Californians for Consumer Privacy (CCP) writes:

> The amendments proposed to Civil Code Section 1798.125 would create an unfortunate choice for consumers: participate in loyalty programs that, in many cases, are almost mandatory from a financial savings perspective, and allow data about your most intimate and personal purchases to be sold; or don't participate in the program, and pay much more for your food or medicine. CCP does not believe that personal information collected from consumers via their participation in a loyalty program should be treated differently than other personal information. Data collected pursuant to a loyalty program contains some of the most specific data about a consumer, i.e. where you travel, where you stay, and what you eat, among other items. This data can be used to create profiles that can be used for targeting or discrimination. Moreover, increasingly there are concerns that data about, say, your food choices, will end up in the hands of health or life insurance companies and be used to make decisions about how much you are charged for health and life insurance.
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> Please note that if loyalty programs offered consumers the right to participate in the loyalty program, and not have their personal information sold, then such loyalty program would be in compliance with CCPA. Also, it is important to remember that deidentified and aggregate data are not defined as personal information under CCPA. So, a loyalty program would be able to sell information such as how many male customers buy Pop-Tarts in a given store, and the retailer would be able to send coupons to those customers, all within the legal bounds of CCPA. Because of this wide latitude, it appears that AB 846 is aimed at allowing loyalty programs to sell personal information, which we think is a bad outcome for consumers, given that in many cases loyalty programs are almost financially mandatory for any rational consumer.

CCP also believes that concerns with respect to loyalty programs can and should be addressed in regulations promulgated by the Attorney General.

A coalition of consumer and privacy organizations, including Common Sense Kids Action, Electronic Frontier Foundation, and the American Civil Liberties Union among others, writes that it opposes the most recent version of this bill (though the subject of their letter reflects an "oppose unless amended" position) because "AB 846 would excessively allow businesses to force consumers to pay for their CCPA rights." Specifically, they write:

> The "loyalty club" exception contains virtually no limitations on when a business may charge a higher price or provide a lower quality because consumers exercise their privacy rights. Most importantly, this bill would allow a company to discriminate against a consumer, by charging a higher price, if the consumer opted-out of the sale of their personal information to another business.
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> The "reasonably related in value" exception is a continuation of a similar existing CCPA exception, which we hope will be removed by AB 1760. But AB 846 would make this exception worse, by eliminating the existing bar on pay-for-privacy rules that are "unjust, unreasonable, coercive, or usurious."
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> The "reasonably related functionality" exception would seem to authorize sharing of personal information throughout the adtech ecology, on the supposed grounds that behavior-based advertising is functionally related to collection and use of consumer's personal information. We oppose such dissemination of personal information.

As further argued by the coalition, there are different types of rewards programs:

- Repeat patronage loyalty clubs where the "loyalty clubs pay customers for their repeat patronage. They say to customers: 'Every Nth purchase with us will be free.' These can include punch cards at a coffee shop, and frequent flier accounts with airlines. These clubs generally do not involve the collection, use, or sale of personal information. So the CCPA does not affect them.

- Internal-use loyalty clubs are those clubs that "pay customers for their personal information, but keep that information inside the business. These internal-use clubs say to customers: 'If you join our loyalty program, we will give you a discount, we will track your shopping with us, and we will use your behavior with us to send you targeted ads – but, we will not give data about your shopping with us to anyone else.' While privacy advocates have concerns about such pay-for-privacy programs, these concerns are partly mitigated by the non-dissemination of the personal information. The CCPA does not apply to such internal-use loyalty clubs, because the CCPA generally does not limit a business' collection and use of consumer personal information.

- External-transfer loyalty clubs are those clubs that "pay customers for their personal information, and disseminate that information outside the business. These external-transfer clubs say to customers: 'If you join our loyalty program, we will give you a discount, we will track your shopping with us, we will use your behavior with us to send you targeted ads – and, we will transfer data about your shopping to other businesses.' The CCPA applies to such clubs. A business cannot sell a consumer's personal

information if the consumer opts-out from such sale. If the consumer does opt-out, then the business can charge a higher price, but only up to the lost value of the consumer's data.

7) **Related legislation**: AB 25 (Chau) seeks to clarify the CCPA's definition of consumer and how businesses may comply with a consumer's request for specific pieces of information in a privacy protective manner under the CCPA. This bill is pending hearing in this Committee.

AB 288 (Cunningham) seeks to establish laws governing "social media privacy" separate and apart from the CCPA's existing requirements for such companies that meet the "business" definition thresholds identified in the CCPA. Specifically, the bill would require a social networking service, as defined, to provide users that close their accounts the option to have the user's "personally identifiable information" permanently removed from the company's database and records and to prohibit the service from selling that information to, or exchanging that information with, a third party in the future, subject to specified exceptions. The bill would require a social networking service to honor such a request within a commercially reasonable time. The bill would authorize consumers to bring private right of action for a violation of these provisions, as specified. This bill has been referred to this Committee.

AB 523 (Irwin) seeks to address the sale of geolocation information by certain businesses, separate and apart from the CCPA's existing requirements and restrictions governing companies that meet the "business" definition thresholds identified in the CCPA and seek to sell their consumers' PI (which the CCPA defines to include geolocation information). This bill is pending hearing in the Assembly Communications and Conveyance Committee.

AB 873 (Irwin) seeks to narrow the CCPA's definitions of "PI" and "deidentified" and to revise the CCPA's existing provision that prohibits the act from being construed to require a business to reidentify or otherwise link information that is not maintained in a manner that would be considered PI. This bill is pending hearing in this Committee.

AB 874 (Irwin) seeks to broaden the definition of "publicly available" for purposes of the PI definition, which excludes "publicly available" information. The bill would also correct a drafting error in the definition of "PI" to clarify that PI does not include deidentified or aggregate consumer information. This bill is pending hearing in this Committee.

AB 981 (Daly) would add numerous privacy protections to the Insurance Information and Privacy Protection Act (IIPPA), to reflect the CCPA. The bill would exempt entities subject to the IIPPA, as specified, from the CCPA, with the exception of the CCPA's data breach section. This bill is pending hearing in this Committee.

AB 1035 (Mayes) seeks to require, under the Data Breach Notification Law, a person or business, as defined, that owns or licenses computerized data that includes PI to disclose any breach of the security of the system within 72 hours following discovery or notification of the breach, subject to the legitimate needs of law enforcement, as provided. This bill is pending hearing in this Committee.

AB 1138 (Gallagher) seeks to prohibit a person or business that conducts business in California, and that operates a social media website or application, from allowing a person under 16 years of age to create an account with the website or application unless the website

or application obtains the consent of the person's parent or guardian before creating the account. This bill is pending hearing in this Committee.

AB 1146 (Berman) seeks to expand the CCPA exemptions to expressly exclude from the CCPA vehicle information shared between a new motor vehicle dealer and the vehicle's manufacturer, if the information is shared pursuant to, or in anticipation of, a vehicle repair relating to warranty work or a recall, as specified. This bill is pending hearing in this Committee.

AB 1355 (Chau) seeks to address a drafting error in the definition of PI to clarify that it does not include deidentified or aggregate consumer information. This bill is pending hearing in this Committee.

AB 1395 (Cunningham) seeks to prohibit a smart speaker device, as defined, or a specified manufacturer of that device, from saving or storing recordings of verbal commands or requests given to the device, or verbal conversations heard by the device, regardless of whether the device was triggered using a key term or phrase. This bill is pending hearing in this Committee.

AB 1416 (Cooley) seeks to expand the CCPA exemptions to specify that the act does not restrict a business's ability comply with any rules or regulations. The bill would also expand the CCPA existing exemptions, which already include that the act does not restrict a business's ability to exercise or defend legal claims, to instead specify that the act does not restrict a business's ability to collect, use, retain, sell, authenticate, or disclose PI: (1) in order to exercise, defend, or protect against legal claims; (2) in order to protect against or prevent fraud or unauthorized transactions; (3) in order to protect against or prevent security incidents or other malicious, deceptive, or illegal activity; (4) in order to investigate, report, or prosecute those responsible for protecting against fraud, unauthorized transactions, and preventing security incidents or other specified activities; or, (5) for the purpose of assisting another person or government agency to conduct the aforementioned activities. This bill is pending hearing in this Committee.

AB 1564 (Berman) would revise a requirement in the CCPA for businesses to make available to consumers "two or more designated methods" for submitting requests for information to be disclosed pursuant to specified provisions of the CCPA, including, at a minimum, a toll free telephone number and, if the business maintains an internet website, a website address. This bill is pending hearing in this Committee.

AB 1760 (Wicks) would restate the CCPA rights using similar terminology, expand those existing CCPA rights to include new rights, and replace the "opt-out" rights of consumers 16 years and older with an "opt-in" right, among other things. This bill is pending hearing in this Committee.

8) **Prior legislation**: AB 375 (Chau, Ch. 55, Stats. 2018) *See* Comment 3.

SB 1121 (Dodd, Ch. 735, Stats. 2018) *See* Comment 3. This bill ensured that a private right of action under the CCPA applies only to the CCPA's data breach section on and not to any other section of the CCPA, as specified, corrected numerous drafting errors, made non-controversial clarifying amendments, and addressed several policy suggestions made by the AG in a preliminary clean-up bill to AB 375.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of National Advertisers
California Cable & Telecommunications Association
California Chamber Of Commerce
California Fuels and Convenience Alliance
California Grocers Association
California Hispanic Chambers of Commerce
California Hotel & Lodging Association
California Restaurant Association
California Retailers Association
Computing Technology Industry Association
Consumer Data Industry Association
Consumer Technology Association
CTIA-The Wireless Association
Insights Association
National Association of Theatre Owners of California/Nevada
National Federation of Independent Business – California
Netchoice
Ralphs Grocery Company
Telecommunications Industry Association
Wine Institute

Opposition

Access Humboldt (unless amended)
ACLU of California (unless amended)
Californians for Consumer Privacy
Center for Digital Democracy (unless amended)
Common Sense Kids Action (unless amended)
Consumer Federation of America (unless amended)
Consumer Reports
Digital Privacy Alliance (unless amended)
Electronic Frontier Foundation (unless amended)
Media Alliance (unless amended)
Oakland Privacy (unless amended)
Privacy Rights Clearinghouse (unless amended)

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