April 17, 2019

The Honorable Autumn Burke
California State Capitol, Room 5150
Sacramento, CA 94249-0024

Re: AB 846 – as amended 04-12-19
OPPOSE UNLESS AMENDED

Dear Assemblymember Burke:

As organizations dedicated to protecting consumer data privacy, we write to inform you that we must regrettably oppose AB 846. We would change our position to neutral if the bill were amended to restore the original February 20 language. We do not object to a properly tailored exception to the California Consumer Protection Act's (CCPA) non-discrimination rule for certain kinds of "loyalty clubs," but AB 846 would excessively allow businesses to force consumers to pay for their CCPA privacy rights.

1. Our strong opposition to "pay for privacy"

A necessary ingredient of any consumer data privacy law is a bar on discrimination by businesses against consumers who exercise their privacy rights. Otherwise, companies could defeat the law by discouraging consumers from enjoying its benefits. Worse, if businesses can force consumers to "pay for privacy," the result will be privacy "haves" and "have nots," because lower-income people will not be able to pay. Yet privacy is a fundamental human right, protected by the California Constitution. It should not be a luxury that only the wealthy can afford.

The CCPA contains a non-discrimination rule. *See* Section 125. Specifically, it bars a business from discriminating against consumers that exercise their privacy rights by denying the goods or services, charging different prices, or providing different quality. However, the law exempts price and quality differences that are "reasonably related" and "directly related" to the value provided by the consumer's personal information, and this could unfortunately be construed by businesses to enable pay-for-privacy schemes. We support AB 1760 (Wicks), which would amend CCPA Section 125 to remove the "pay for privacy" exceptions from the non-discrimination rule.

2. Our general views of "loyalty clubs"

To best explain our position on AB 846, we will present a taxonomy of three different kinds of loyalty clubs, and explain their different interactions with existing CCPA and proposed AB 1760.

a. Repeat patronage loyalty clubs

Some 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.

b. Internal-use loyalty clubs

Some loyalty clubs 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.

Under AB 1760, such internal-use clubs would need to be transparent and consensual. Specifically, AB 1760 would limit a business' collection and use of a consumer's personal information to that which is "reasonably necessary to provide a service or conduct an activity that a consumer has requested." This would allow internal-use loyalty clubs, provided the consumer requested it.

c. External-transfer loyalty clubs

Some loyalty clubs 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.

AB 1760 would further restrict such clubs. A business would be barred from sharing a consumer's personal information unless the consumer opted-in to such sharing. If the consumer did not opt-in, then the business could not charge them a higher price.

Some independent businesses form partnerships that link together their respective loyalty clubs. For example, an airline company and a hotel company might allow a consumer to move "points" across a linked loyalty club. Any sharing of personal information between these independent companies would be subject to the same CCPA and AB 1760 rules discussed above. Customers would be free to opt-in to such sharing, if they felt it was in their interest to do so.

3. Our position on the three versions of AB 846

a. Neutrality on the original February 20 version

In its original form on February 20, AB 846 would have made legislative findings that California consumers enjoy customer loyalty programs, and that 87% of participants are "open to sharing personal information about their activity and behavior in order to receive more personalized rewards." It also would have declared the legislature's intent to clarify that the CCPA does not prohibit customer loyalty programs that "offer incentives" such as discounts, and that the CCPA allows a business to operate such programs in a manner that is "reasonably anticipated within the context of a business's ongoing relationship with a consumer."

If AB 846 were amended to restore this original February 20 language, we would be neutral. This language does not have any tendency to promote external-transfer loyalty clubs absent the kinds of consent and non-discrimination rules that we support.

b. Opposition to the March 25 amendments

The CCPA limits the pay-for-privacy exceptions from the non-discrimination rule by barring incentives that are "unjust, unreasonable, coercive, or usurious." The March 25 version of AB 846 would have cut the first two adjectives from this clause (which are broader) and left just the latter two adjectives (which are narrower). We oppose this change, which would expand the CCPA's pay-for-privacy exception.

The CCPA allows "financial incentives." The March 25 version would cut the adjective from this clause, thus allowing all incentives, whether or not financial. We oppose this change, which would expand the CCPA's pay-for-privacy exception.

c. Opposition to the April 12 amendments

The April 12 amendments would create three broad new exceptions to the CCPA's non-discrimination rule, under which a business could offer consumers a different price or quality if they exercise their privacy rights. Specifically, such pay-for-privacy would be allowed:

A. In connection with a "loyalty program," broadly defined as an offering of lower price or higher quality, including but not limited to discounts, points, rewards, credits, incentives, gift cards, certificates, coupons, and priority or exclusive access.

B. When the price or quality difference is "reasonably related" to the value of the consumer's data.

C. When the functionality of the specific good or service is "reasonably related" to collection, use, or sale of the consumer's data.

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.

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."

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.

For these reasons we must oppose this measure. However, we would change our position from oppose to neutral if the bill were amended to restore its original February 20 language.

Sincerely,

Sean McLaughlin, Executive Director, Access Humboldt
Kevin Baker, Legislative Director, ACLU of California
Katharina Kopp, Ph.D. Deputy Director, Director of Policy, Center for Digital Democracy
Ariel Fox Johnson, Senior Counsel for Policy and Privacy, Common Sense Kids Action
Susan Grant, Director of Consumer Protection and Privacy, Consumer Federation of America
Matthew Erickson, Executive Director, Digital Privacy Alliance
Lee Tien, Senior Staff Attorney and the Adams Chair for Internet Rights, Electronic Frontier Foundation
Tracy Rosenberg, Executive Director, Media Alliance
Lou Katz, Member, Oakland Privacy
Emory Roane, Policy Counsel, Privacy Rights Clearinghouse

Cc: Members and Committee Staff, Assembly Privacy and Consumer Protection Committee