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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Retail Loyalty Programs Will Survive Calif. Privacy Law

By **Seamus Duffy, Meredith Slawe, Diana Schaffner, Marie Bussey-Garza and Julie Busta** (September 26, 2019, 2:44 PM EDT)

As the final 2019 amendments to the California Consumer Privacy Act were winding their way through the legislative process in Sacramento early this month, the retail industry watched A.B. 846 with special interest. This bill, originally touted as saving retail loyalty programs from the reach of the CCPA's nondiscrimination prohibition, had morphed into a complicated safe harbor saddled with limitations.

Some in the retail business community questioned whether the final version of the bill would truly save loyalty programs from the CCPA. But all of this begs the question, did loyalty programs need saving in the first place? And with the failure of A.B. 846 to pass, will loyalty clubs survive the CCPA?

Retail Loyalty Clubs — History and Recent Trends

Among marketers, it is an oft-told anecdote that loyalty programs date back to the early 18th century when retail merchants began giving their customers copper coins that could be exchanged for merchandise with future purchases. These early programs were focused on the first rule of retail marketing — get the customer back in the door. And in truth, the loyalty program model has not changed much in the past 300 years. For example, you may still have a punch card that earns you a free coffee on your tenth visit to your local coffee shop.

But while the fundamentals have remained constant, retailers in today's digital marketplace have seriously upped their loyalty program game. In this fiercely competitive environment, these programs remain effective mechanisms for retaining and engaging consumers. And, in addition to serving that first rule of retail marketing, these programs are now one of many means by which retailers collect and use customer data to grow and enhance relationships.

Today, sophisticated retailers are focused on building trusted and enduring relationships with their customers by providing curated experiences. The level of personalization that many retailers provide to their loyalty club members is unprecedented. While exclusive discounts and promotions remain a core part of many programs, they also seek to leverage technology and make the shopping experience as convenient and user-friendly as possible.

For example, many programs offer perks like free shipping and no-receipt returns. Some are supported by integrated mobile apps that seamlessly track member points, customer rewards, purchase history and payment preferences to make transactions frictionless. While these conveniences are invaluable to busy consumers, today's loyalty programs go even further and seek to build relationships and a sense of community among their members.

For example, the Nordy Club, Nordstrom Inc.'s rewards program, offers consumers exclusive access to interactive style workshops and curbside pick-up benefits. Sephora SA offers rewards points and members-only events for its Beauty Insiders, but it also has taken its community online by creating a unique social platform for its loyalty club members to interact with other members and discuss all things related to beauty and skincare.

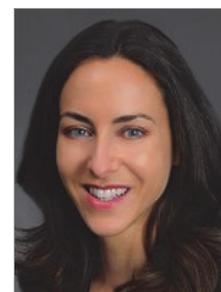
And Recreational Equipment Inc.'s lifetime membership loyalty co-op program, which costs \$20, not only includes 10% back on purchases, but it gives insiders access to classes, events, hikes and "REI Adventures," as well as the REI "Garage Sale" events



Seamus Duffy



Meredith Slawe



Diana Schaffner



Marie Bussey-Garza

where customers can purchase returned outdoor gear at steep discounts.

By getting to know their customers through these ever-improving loyalty platforms, retailers are able to add significant value to their customers' shopping experiences. Beyond the benefits and discounts discussed above, retailers can help connect customers with the products and information they covet.

Meaningful interactions through which both the retailer and the customer benefit is at the heart of today's loyalty programs, and these interactions are fueled by and create vast amounts of data. And so, like everything else in our economy, loyalty clubs have come to be viewed as a source of data. This is perhaps why they became a focus of discussion in the CCPA amendment drama.



Julie Busta

Loyalty Clubs and the CCPA — A False Conflict

It should be emphasized that the CCPA flatly prohibits any contractual waiver of its newly created rights. Section 1798.192 states plainly that any provision of an agreement that "purports to waive or limit in any way a consumer's rights under this title ... shall be void and unenforceable."^[1] So, subject to federal preemption and other arguments that might limit this prohibition, if a loyalty program agreement were to include an express waiver or limitation of CCPA rights, the waiver would likely be ineffective.^[2]

Section 1798.125 of the CCPA goes a step further and prohibits in the broadest terms discrimination against consumers "because the consumer exercised any of the consumer's rights under this title."^[3] Indeed, Section 1798.125 goes so far as to prohibit the mere "[s]uggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services" because the consumer exercised a right under the CCPA.^[4]

In the wake of the CCPA's passage, concerns were expressed that Section 1798.125 might be read to limit, or even prohibit, retail loyalty programs. The idea was that these programs might be viewed as offering consumers discounts and other benefits in return for data and, conversely, denying these same benefits to consumers unwilling to share their data.

To assuage these fears, in February 2019, Assembly Members Autumn Burke, Evan Low and Kevin Mullin introduced A.B. 846. In its initial form, it was a simple amendment to "clarify" that the CCPA's anti-discrimination provision does not "prohibit a consumer from choosing to participate in a customer loyalty program that offers incentives such as rewards, gift cards or certificates, discounts, or other benefits and [to] further clarify that a business that offers a customer loyalty program may continue to offer rewards, gift cards or certificates, discounts, or other benefits associated with a customer loyalty program in a manner that is reasonably anticipated within the context of a business's ongoing relationship with a consumer."^[5]

When introduced, A.B. 846 was a prophylactic amendment, perhaps unnecessary but also harmless. It simply made clear that the provision of discounts and other benefits under a loyalty program would not constitute unlawful "discrimination" under the CCPA. At the time, A.B. 846 was sponsored by the California Retailers Association and supported by retailers.

A.B. 846 percolated through the legislative process through the summer and, six amendments later, it had morphed from a simple clarification that CCPA's anti-discrimination provision did not apply to loyalty programs into a complete rewriting of the CCPA's anti-discrimination provision, creating new rights specific to loyalty programs and flatly prohibiting (opt out or no) the sale of Personal Information collected in connection with any loyalty program.^[6]

Hitting just the highlights, in the legislative process A.B. 846 gained a provision prohibiting businesses from offering loyalty programs that are "unjust, unreasonable, coercive, or usurious in nature," a general regulation seemingly divorced entirely from consumer privacy altogether.^[7]

The final iteration of A.B. 846 expanded far past clarifying and into prohibiting businesses from selling the Personal Information of consumers collected as part of loyalty programs to third parties — an unnecessary and redundant provision in light of the CCPA's opt-out provision in Section 1798.20. In the end, A.B. 846 lost the support of many retailers and industry groups, and did not advance out of the Senate.

Will Loyalty Clubs Survive the CCPA?

And so now, with A.B. 846 having failed, will loyalty clubs survive the CCPA? The answer to this question is actually quite simple: Yes. Loyalty clubs are not about data. They are about loyalty. The clubs create data to be sure, and this is valuable for both the retailer and the customer who benefits from the retailer's targeted use of the data. But the data isn't the point, it is incidental. The loyalty is the point.

There is no reason to believe that existing loyalty programs will run afoul of Section 1798.125. In the context of a typical retail loyalty program, a consumer can absolutely enjoy and exercise all of her newly-created rights under the CCPA. These programs' terms of service typically incorporate the company's privacy policy, and they do not require the transfer or forfeiture of data or data privacy rights.

The rights to disclosure and access are all perfectly compatible with the typical structure and operation of a loyalty club program. The right to opt out of the sale of personal information is also easily accommodated. And in the unlikely event a loyalty club member were to seek the deletion of his or her data while demanding continued loyalty club membership (an odd request to be sure), the exceptions in Section 1798.105(d) would permit the company to retain the data necessary to service the loyalty club relationship.

In short, A.B. 846 was a solution in search of a problem. In any event, loyalty programs as they currently exist in the retail marketplace will undoubtedly survive the CCPA. What is necessary from a compliance standpoint is simply to ensure that your program can accommodate, and does not limit, California residents' rights under the CCPA. There is nothing inherent in the concept of a loyalty club that would suggest an irreconcilable conflict with CCPA rights. Most loyalty clubs will require no adjustment for CCPA compliance.

In the unlikely event that a loyalty program does limit CCPA rights, expressly or by virtue of its structure, then it must satisfy the requirements for a "financial incentives" program under Section 1798.125(b). To qualify as a permissible "financial incentives" program, the loyalty club must meet three requirements.

First, the program benefits must be "directly related" to the value of the CCPA rights the consumer is asked to trade.[8] Second, the program sponsor must provide proper notice of the incentives program to consumers and obtain opt-in consent to the terms, which can be revoked at any time.[9] And finally, the loyalty program must not be "unjust, unreasonable, coercive, or usurious in nature." [10] Such is the price of a safe harbor in the CCPA.

The good news is that retail loyalty and rewards programs should be able to find a natural home under the CCPA. As they did in the European Union leading up to the General Data Protection Regulation, retailers will simply modify their programs, if necessary, to ensure consumers are able to exercise their rights under the CCPA. A.B. 846 may be dead, but California loyalty and rewards programs are still very much alive.

Seamus Duffy and Meredith Slawe are partners, Diana Schaffner is counsel, and Marie Bussey-Garza and Julie Busta are associates at Akin Gump Strauss Hauer & Feld LLP.

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[1] Cal. Civ. Code § 1798.192. This non-waiver provision is consistent with the notion, deeply embedded in the CCPA, that privacy is among the "inalienable" rights of all people. See Legislative Findings accompanying the CCPA, (a).

[2] Note also that the safe harbor for "financial incentives" in Section 1798.125(b), discussed below, seems to contemplate at least some permissible limitations on consumers' CCPA rights in the context of such financial incentives.

[3] Cal. Civ. Code § 1798.125(a)(1).

[4] *Id.* § 1798.125(a)(1)(D) (emphasis added).

[5] AB 846 (as introduced Feb. 20, 2019).

[6] AB 846 (as amended Sept. 6, 2019).

[7] *Id.*

[8] Cal. Civ. Code § 1798.125(b)(1).

[9] *Id.* § 1798.125(b)(2)-(3).

[10] *Id.* § 1798.125(b)(4).

