



May 29, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Submitted via Regulations.gov

Re: Comments on Bringing Dark Patterns to Light: An FTC Workshop, FTC-2021-0019

Consumer Reports¹ thanks the Federal Trade Commission (“FTC” or “Commission”) for the opportunity to submit comments on dark patterns pursuant to the recent workshop, *Bringing Dark Patterns to Light*.² This request for comment is timely: dark patterns—deceptive interfaces that push consumers to take actions that they did not intend, such as spending additional money, sharing personal data, or spending more time online—are particularly prevalent in light of the COVID-19 pandemic. The shutdown has caused people to spend more time online, including to work, shop, and learn, where they are more likely to encounter these interfaces.³ Further, it is especially important for the FTC to take action because of the disproportionate impact that certain dark patterns have on vulnerable populations, including the less educated.⁴

Dark patterns are pervasive. Sites often make it much easier to agree to a potential transaction than to say no, relying on consumers’ limited attention span and the habit of clicking “OK.” In

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers’ interests, including their interest in securing effective privacy protections.

² *Bringing Dark Patterns to Light: An FTC Workshop*, FED. TRADE COMM’N (April 29, 2021), <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop>.

³ Michael J. Wolf, *How Covid-19 Has Transformed the Amount of Time We Spend Online*, WALL ST. J. (Aug. 7, 2020), <https://www.wsj.com/articles/how-covid-19-has-transformed-the-amount-of-time-we-spend-online-01596818846>; Ella Koeze and Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (April 7, 2020), <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html>.

⁴ Jamie Luguri and Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 JOURNAL OF LEGAL ANALYSIS 43 at 70 (March 29, 2021), University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 879, U of Chicago, Public Law Working Paper No. 719, <https://ssrn.com/abstract=3431205>.

response to Europe’s recent General Data Protection Regulation (GDPR) privacy law, many websites forced users through confusing consent dialogs to ostensibly obtain consent to share and collect data for any number of undisclosed purposes.⁵ And researchers increasingly have been paying attention to manipulative dark patterns as well. A 2019 Princeton University study of 11,000 shopping sites found more than 1,800 examples of dark patterns, many of which clearly crossed the line into illegal deception.⁶ Consumer Reports research has also identified numerous dark patterns, including in smart TV’s, food delivery apps, social media, and resort fees.⁷ And, Consumer Reports is helping to identify dark patterns through the Dark Patterns Tipline, a project to crowdsource examples of these deceptive interfaces to help advocate for reform.⁸

The FTC can—and has—taken action against dark patterns under its Section 5 unfairness and deception authority⁹ and the Restoring Online Shoppers’ Confidence Act (ROSCA).¹⁰ The FTC should use its full authority to go after these deceptive interfaces. But the persistence of dark patterns demonstrates that the FTC needs more power to effectively address them, especially after the recent Supreme Court decision, *FTC v. AMG Capital Management*, that will make it harder for the FTC to obtain redress for consumers. The FTC should:

- Step up enforcement under its Section 5 authority to police unfair and deceptive acts and practices (UDAP), and under ROSCA;
- Pursue a rulemaking prohibiting dark patterns under its existing Section 18 authority, or take steps in that direction by banning hidden fees charged by hotels, event ticket sellers, and others;
- Update the .com disclosures to be more precise and prescriptive;

⁵ *Most Cookie Banners are Annoying and Deceptive. This Is Not Consent*, PRIVACY INTERNATIONAL (May 21, 2019),

<https://privacyinternational.org/explainer/2975/most-cookie-banners-are-annoying-and-deceptive-not-consent>.

⁶ Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, PROC. ACM HUM.-COMPUT. INTERACT. (2019), <https://webtransparency.cs.princeton.edu/dark-patterns/>.

⁷ *Samsung and Roku Smart TVs Vulnerable to Hacking, Consumer Reports Finds*, CONSUMER REPORTS (Feb. 7, 2018), <https://www.consumerreports.org/televisions/samsung-roku-smart-tvs-vulnerable-to-hacking-consumer-reports-finds>; *Collecting #Receipts: Food Delivery Apps and Fee Transparency*, CONSUMER REPORTS (Sept. 29, 2020), https://digital-lab-wp.consumerreports.org/wp-content/uploads/2020/09/Food-delivery_-Report.pdf; Consumers Union Letter to Fed. Trade Comm’n (Jun. 27, 2018), <https://advocacy.consumerreports.org/wp-content/uploads/2018/06/CU-to-the-FTC-Facebook-Dark-Patterns-6.27.18-1-1.pdf>; *Consumer Reports Calls On FTC to Take Tougher Action to Stop Hidden Resort Fees*, CONSUMER REPORTS (Aug. 6, 2019), https://advocacy.consumerreports.org/press_release/consumer-reports-calls-on-ftc-to-take-tougher-action-to-stop-hidden-resort-fees/.

⁸ Dark Patterns Tipline, <https://darkpatternstipline.org/>.

⁹ 15 U.S.C. § 45(a).

¹⁰ 15 U.S.C. § 8403; *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

- Push Congress to expand the Commission’s authority, including by expanding resources for staffing, allowing the FTC to issue civil penalties for first-time violations and obtain equitable relief, and empowering the Commission to pursue APA rulemaking; and
- Support legislative efforts targeting dark patterns, including effective privacy legislation and laws to prohibit hidden fees.

Market self-regulation and naming and shaming has not been enough to prevent companies from using dark patterns. By their very nature, dark patterns are difficult for consumers to identify, and companies have extremely strong incentives to continue to use them. Shame is not adequate deterrence when the use of these deceptive interfaces can bring in billions of dollars. Instead, consumers need clearer standards, more prescriptive guidance from the FTC, and more aggressive enforcement.

The FTC should step up enforcement under its UDAP and ROSCA authority.

The FTC has taken action against dark patterns under its Section 5 unfairness and deception authority and the Restoring Online Shoppers’ Confidence Act (ROSCA). But the prevalence of these dark patterns shows that more needs to be done to rein them in.

Section 5 gives the FTC the ability to police unfair and deceptive acts and practices, which can include dark patterns. An unfair practice has to: (1) cause substantial injury, (2) be reasonably unavoidable by consumers, and (3) not be offset by countervailing benefits. The deception authority encompasses material practices that are likely to mislead a consumer acting reasonably.¹¹

The FTC also has authority to take action against certain dark patterns under ROSCA. This statute prohibits Internet sellers from using so-called “negative option” techniques, in which the seller views the consumer’s failure to take action as an agreement to be charged for a good or service.¹² Instead, the company must provide clear notice of the terms prior to collecting their payment information, obtain meaningful consent from the consumer prior to billing, and provide an opportunity to opt out.¹³

For example, the FTC recently took action against children’s online learning service ABC Mouse—and reached a \$10 million settlement—for the way they tricked customers into signing

¹¹ Timothy E. Deal, *Moving Beyond “Reasonable”: Clarifying the FTC’s Use of Its Unfairness Authority in Data Security Enforcement Actions*, 84 FORDHAM L. REV. 2227 at 2233-2234 (2016), <https://ir.lawnet.fordham.edu/flr/vol84/iss5/14>.

¹² *Negative Options: A Report by the Staff of the FTC’s Division of Enforcement*, FED. TRADE COMM’N at 2 (Jan. 2009), <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>.

¹³ 15 U.S.C. § 8403, <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter110&edition=prelim>.

up for their membership-based online learning service for kids. While ABC Mouse advertised a 12-month special offer price, it failed to make clear that the subscription would automatically renew indefinitely. And when a consumer wanted to stop the subscription, ABC Mouse made it hard to do so, by hiding the link to the cancellation option and providing confusing prompts that often prevented consumers from opting out. The FTC relied on a number of authorities to take action, including ROSCA.¹⁴

But the FTC's enforcement actions have not always been effective in changing market practices. In 2012 and 2013, the FTC sent warning letters to 34 hotels and 11 online travel agencies that did not properly disclose fees, including so-called resort fees, informing them that their practices may violate the FTC Act.¹⁵ But these practices persisted. In 2019, Consumer Reports went back to these companies that received the letters to see if they had improved their fee disclosure practices, and found that 31 of the 34 hotels were still charging these resort fees, which were not included in the quoted price. All of the 10 online travel agencies still operating were engaging in the same behaviors.¹⁶ The FTC has the legal authority to pursue and stop the use of hidden resort fees today. Such enforcement is long overdue.

In addition, the FTC's 2017 settlement with smart TV company Vizio made it clear that companies need to obtain meaningful consent for the tracking of consumers' television use through automatic content recognition (ACR), but CR research published in 2018 suggests that companies did not always do so. The FTC's complaint against Vizio held that pop-ups notifying consumers of new updates to install ACR technology did not constitute meaningful consent.¹⁷ But Consumer Reports testers identified dark patterns when evaluating smart TVs with the Digital Standard, the set of criteria used to evaluate the privacy and security of these offerings.¹⁸ For example, CR testers found that for all of the smart TVs examined, a consumer moving

¹⁴ *Children's Online Learning Program ABCmouse to Pay \$10 Million to Settle FTC Charges of Illegal Marketing and Billing Practices*; FED. TRADE COMM'N (Sept. 2, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/childrens-online-learning-program-abcmouse-pay-10-million-settle>; *Statement of Commissioner Rohit Chopra Regarding Dark Patterns in the Matter of Age of Learning, Inc.*, FED. TRADE COMM'N at 2 (Sept. 2, 2020);

Fed. Trade Comm'n v. Age of Learning, Inc., Case No. 2:20-cv-7996, U.S. District Court Central District of California (Complaint) at 1 (Sept. 1, 2020), <https://www.ftc.gov/system/files/documents/cases/1723086abcmousecomplaint.pdf>.

¹⁵ Penelope Wang, *The Sneaky Ways Hotels Are Hiding Their Resort Fees*, CONSUMER REPORTS (Aug. 7, 2019), <https://www.consumerreports.org/fees-billing/the-sneaky-ways-hotels-are-hiding-their-resort-fees/>; Letter from Fed. Trade Comm'n to Atlantis Casino Resort Spa (Nov. 26, 2012), https://www.ftc.gov/system/files/documents/foia_requests/2016-00453_warning_letters_93_pgs.pdf.

¹⁶ Consumer Reports, *Stop Hidden Resort Fees*, *supra* note 7.

¹⁷ Fed. Trade Comm'n, Attorney General of the State of New Jersey, and Director of the New Jersey Division of Consumer Affairs v. Vizio, Inc., U.S. District Court, District of New Jersey Case 2:17-cv-00758 (Complaint) at ¶¶ 20-21 (Feb. 6, 2017), https://www.ftc.gov/system/files/documents/cases/170206_vizio_2017.02.06_complaint.pdf; *VIZIO to Pay \$2.2 Million to FTC, State of New Jersey to Settle Charges it Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent*, FED. TRADE COMM'N (Feb. 6, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it>.

¹⁸ The Digital Standard, <https://thedigitalstandard.org/>.

quickly through the television set-up process will end up providing consent to the tracking of everything they watch through automatic content recognition.¹⁹

The FTC should pursue a rulemaking prohibiting dark patterns under its existing Section 18 authority, or take steps in that direction by banning hidden fees charged by hotels, event ticket sellers, and others.

Acting Chairwoman Slaughter has highlighted underused tools that the FTC should use to more effectively fulfill its mission, including its rulemaking authority under Section 18.²⁰ To incentivize companies to follow the law, the Commission should take advantage of these powers, including by pursuing a rulemaking under Magnuson-Moss to issue rules prohibiting dark patterns, or at the very least, to ban hidden fees.

The Magnuson-Moss rulemaking procedures are onerous; they require, for example, multiple rounds of comment, which is far more extensive than the APA's notice and comment rules.²¹ As a result, the FTC has finalized very few Mag-Moss rulemakings over the last forty years.²² However, many of the regulatory hurdles to Section 18 rulemaking are self-imposed. The agency has the broad ability to streamline the Section 18 process as it sees fit. In any event, the FTC should take advantage of its existing authority to issue rules around dark patterns. As Acting Chairwoman Slaughter has pointed out, they provide useful guidelines for companies that can help protect consumers, and they give the Commission the authority to seek penalties for first-time violations.²³

Pursuant to those rules, the FTC should also develop standardized disclosures, so that companies have more clarity about appropriate interfaces and design choices. For example, the California Consumer Privacy Act directs the Attorney General to propose a uniform Do Not Sell logo²⁴—this standardization could help companies avoid dark patterns, especially if research indicates that specific designs lead to good outcomes for consumers.²⁵ This could also be helpful in better ensuring fee transparency. For example, last year, CR's investigation of food delivery apps

¹⁹ Consumer Reports, *Samsung and Roku Smart TVs Vulnerable to Hacking*, *supra* note 7.

²⁰ *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group*, FED. TRADE COMM'N (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

²¹ Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, GEORGE WASHINGTON L. REVIEW at 1982-5 (2015), https://digitalcommons.wcl.american.edu/facsch_lawrev/1082.

²² Mike Swift, *FTC's 'Mag-Moss' Rulemaking Authority Could Break Logjam on US Privacy Legislation*, MLEX (March 8, 2021), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/ftcs-mag-moss-rulemaking-authority-could-break-logjam-on-us-privacy-legislation>.

²³ *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group*, *supra* note 20.

²⁴ Cal. Civ. Code § 1798.185(a)(4)(C).

²⁵ See, for example, Cranor et al., *Design and Evaluation of a Usable Icon and Tagline to Signal an Opt-Out of the Sale of Personal Information as Required by CCPA* (Feb. 4, 2020), <https://cups.cs.cmu.edu/pubs/CCPA2020Feb04.pdf>.

uncovered that these companies often hid fees behind confusing interfaces.²⁶ The DC Attorney General has also taken action against Instacart for tricky fees that appear to be tips, but actually go directly to the company.²⁷

At the very least, a rulemaking should include a ban on hidden fees. Hidden fees are common in hotel and travel pricing and in online ticketing. In 2018, more than 6,000 consumers submitted comments to the Commission, outlining the hidden fees and lack of transparency in online ticketing services. For example, consumers shared that, when attempting to buy tickets online, they could not figure out the full price of the ticket until they were deep into the purchasing process. By that point, they are afraid to cancel for fear of not getting any tickets at all.²⁸ Further, according to a 2019 CR survey, at least 85 percent of Americans experienced an unexpected or hidden fee in the prior two years—and 96 percent found those hidden fees annoying.²⁹

The FTC should update the .com disclosures.

Additionally, the FTC should update the .com disclosures. This document provides guidance on how the FTC's rules with respect to advertisements apply to online activities—including noting that disclosures should be located as close as possible to the claim to which they apply.³⁰ These guidelines have the potential to help address dark patterns by providing specific design directives.

Given the Commission's constrained resources and capacity for enforcement, the revised .com disclosures should err strongly on the side of clear, simple, bright-line rules instead of vague, debatable standards that could afford bad faith actors too much wiggle room to justify deceptive behavior. At the margins, clear mandates could rule out defensible practices, but given the abuses we have seen and the inability of the FTC to iterate on the disclosures in a routine fashion, more stringent guidance is clearly called for (the .com disclosures were last published eight years ago, in 2013).³¹ Clear, bright-line rules will also decrease compliance costs and increase certainty for companies.

²⁶ Consumer Reports, *Collecting #Receipts*, *supra* note 7.

²⁷ Megan Rose Dickey, *Instacart Faces Lawsuit from DC Attorney General Over 'Deceptive' Service Fees*, TECHCRUNCH (Aug. 27, 2020), <https://techcrunch.com/2020/08/27/instacart-faces-lawsuit-from-dc-attorney-general-over-deceptive-service-fees/>.

²⁸ Consumer Reports Letter to the Fed. Trade Comm'n, Re: Online Event Ticket Sales Workshop (Dec. 5, 2019), <https://advocacy.consumerreports.org/wp-content/uploads/2018/12/Consumer-Reports-comment-on-Online-Ticketing-120518.pdf>.

²⁹ Penelope Wang, *Protect Yourself from Hidden Fees*, CONSUMER REPORTS (May 29, 2019), <https://www.consumerreports.org/fees-billing/protect-yourself-from-hidden-fees/>.

³⁰ *.com disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N at 6 (March 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

³¹ *Id.*

The FTC should push Congress to expand the Commission’s authority, including by providing penalty authority, APA rulemaking, and staffing resources.

While there are certainly steps the FTC should take today to rein in the pervasive use of dark patterns, the FTC obviously needs more authority, including first-time penalty authority to sufficiently disincentivize company misbehavior, and more staff to bring more cases.³² The FTC also needs APA rulemaking authority, which will be especially useful with respect to dark patterns, since standardization of user interfaces may be necessary to acclimate users to what they are being asked for, to limit bad behavior, and to empower the FTC to obtain civil penalties for violations.

Additional authority is particularly important in light of the FTC’s series of no-payment settlements, such as for Sunday Riley’s clearly fraudulent actions to direct their employees to create fake online profiles to write positive reviews of their skincare products on Sephora’s website;³³ and for companies making false “Made in America” claims.³⁴ Under these settlements, these companies will face no real consequences for their misbehavior. The FTC merely asks that they no longer break the law.³⁵

Consumers rely on the FTC to police the marketplace and ensure that companies do not engage in deceptive behavior. Allowing companies to engage in and profit from egregious behaviors with merely a prospect of penalties if caught a second time and some limited recordkeeping responsibilities will hardly strike fear in the heart of potential fraudsters. Given the Commission’s limited staff and capacity to police an \$18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do should not get what amounts to a “Get Out of Jail Free” card for their first offense.

Further, given that the Supreme Court has dealt a major blow to the FTC’s 13(b) authority to seek refunds for consumers in the *AMG Capital Management* case, it is likely that it will be even harder to bring effective cases.³⁶ Without this authority, which the FTC has relied on for decades

³² See, Comments of Consumers Union, Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P1812201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0052-d-0018-154961.pdf.

³³ In the Matter of Sunday Riley Modern Skincare, LLC, Fed. Trade Comm’n at ¶ 8 (Complaint), https://www.ftc.gov/system/files/documents/cases/192_3008_sunday_riley_complaint_0.pdf.

³⁴ In the Matter of Sandpiper/PiperGear, Fed. Trade Comm’n (Decision and Order), https://www.ftc.gov/system/files/documents/cases/sandpiper_order_4-17-19.pdf; In the Matter of Patriot Puck, Fed. Trade Comm’n (Decision and Order), https://www.ftc.gov/system/files/documents/cases/patriot_puck_order_4-17-19.pdf.

³⁵ *Id.*; In the Matter of Sunday Riley Modern Skincare, LLC, Fed. Trade Comm’n (Decision and Order), https://www.ftc.gov/system/files/documents/cases/192_3008_c4729_sunday_riley_order.pdf.

³⁶ *AMG Capital Management, LLC, et al., v. Fed. Trade Comm’n* (April 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf; *FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from*

in order to obtain injunctive and equitable relief, it will be left to order relief under its Section 19 authority. This process can be extremely slow, making it more likely that fraudsters will have already spent their ill-gotten gains before victims are able to recover any of their losses.³⁷

CR supports the recently-introduced Consumer Protection and Relief Act to restore the FTC's authority, and better enable the FTC to make victims of unfair and deceptive acts and practices whole again and obtain timely relief.³⁸ The FTC needs the full range of remedies at its disposal in order to protect consumers. A statute clarifying its ability to obtain disgorgement and other equitable remedies should be uncontroversial; the FTC should also continue to call for more expansive powers to at least put the Commission on the same legal footing as many state Attorneys General.

In addition, Congress needs to dramatically increase the FTC's funding for it to fulfill its mission.³⁹ The FTC also needs to hire more technologists to study these dark patterns. The Office of Technology Research and Investigation (OTech) currently only has a handful of technologists to support the Consumer Protection Bureau; the Bureau of Competition has no analogous office to assist it. The Chairman should reinstitute the position of Chief Technologist to advise Commissioners on novel technology issues, including dark patterns, and Commissioners should be encouraged to appoint their own technologist advisors.

The FTC should support legislative efforts to specifically target dark patterns.

Additionally, legislation targeted to addressing dark patterns, for example, to protect consumer data privacy and security or to protect consumers from hidden fees, can also expand the FTC's authority to act to rein in these deceptive practices.

Consumer Reports has long called for a comprehensive federal privacy law. To help prevent dark patterns, we recommend that a privacy law not be based on an opt-in or opt-out model—instead, that it limit companies' collection, use, sharing, and disclosure of personal data to what is reasonably necessary to operate the service, consistent with our model privacy act.⁴⁰ By protecting consumer privacy by default, this would help protect consumers from consent pop-ups that trick consumers into providing consent to unwanted data sharing.

Reoccurring, FED. TRADE COMM'N (April 27, 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority>.

³⁷ Statement of Jessica Rich before the Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives, on *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic* at 5 (Feb. 4, 2021), <https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-RichJ-20210204.pdf>.

³⁸ H.R. 2668 (2021), <https://docs.house.gov/meetings/IF/IF17/20210527/112717/BILLS-1172668ih.pdf>.

³⁹ *Consumer Reports Letter to the House Appropriations Committee Urging Increased Funding for the Federal Trade Commission* (May 25, 2021), <https://advocacy.consumerreports.org/research/cr-letter-to-house-appropriations-committee-urging-increased-funding-for-the-ftc/>.

⁴⁰ *Model State Privacy Act*, CONSUMER REPORTS (Feb. 23, 2021), <https://advocacy.consumerreports.org/research/consumer-reports-model-state-data-privacy-act/>.

If a bill is based on user consent, however, it is important to have a strong definition of consent that explicitly prohibits dark patterns. Under the EU’s General Data Protection Regulation (GDPR), users are inundated with constant and confusing consent dialogs that do not provide meaningful information or choice to consumers. The law needs to be more precise about how consent may be obtained and backed up by robust enforcement.⁴¹ Proposition 24, a measure to strengthen the CCPA which was ratified by Californians last fall and fully goes into effect in 2023—expands on the CCPA by specifically prohibiting dark patterns in obtaining consent, such as in opting back into the sale or sharing of data.⁴²

Privacy bills based on an opt-out model should also prohibit dark patterns. For example, the CCPA, which gives consumers the right to access, delete, and stop the sale of their information and opt-in consent to the sale of the information of children 16 and under, is the first privacy law in the United States that explicitly prohibits dark patterns. Through the rulemaking process, earlier this year, the AG established that companies’ opt-out processes cannot contain dark patterns: “designed with the purpose or has the substantial effect of subverting or impairing a consumer’s choice to opt-out.”⁴³ While enforcement will be key, this is a promising approach to make it easier for consumers to stop the sale of their information.

Such protections are important, because prior to the rulemaking, Consumer Reports testing identified instances of these dark patterns in CCPA opt outs. As part of the study, hundreds of California consumers attempted to opt out of the sale of their information by a data broker on the CA data broker registry, and reported to us their experiences. About 14% of the time, opt-out processes were so onerous that consumers were unable or unwilling to stop the sale of their information. Companies have required consumers to provide information that made them uncomfortable to share, such as government IDs,⁴⁴ and used confusing cookie consent dialogs.⁴⁵ And in a follow-up study, in which Consumer Reports submitted opt-out requests on behalf of about 100 consumers to over 20 companies as an authorized agent, we also identified additional dark patterns, such as buried links, that made it difficult for authorized agents to opt out on consumers’ behalf.⁴⁶

⁴¹ Christine Utz et al., *(Un)informed Consent: Studying GDPR Consent Notices in the Field*, CCS '19: Proceedings of the 2019 ACM SIGSAC Conference on Computer and Communications Security at 985 (Nov. 2019), <https://doi.org/10.1145/3319535.3354212>.

⁴² Cal. Civ. Code § 1798.140(h).

⁴³ Cal. Code Regs tit. 11 § 999.315(h).

⁴⁴ *Consumer Reports Study Finds Significant Obstacles to Exercising California Privacy Rights*, CONSUMER REPORTS at 33-4 (Oct. 1, 2020), https://advocacy.consumerreports.org/press_release/consumer-reports-study-finds-significant-obstacles-to-exercising-california-privacy-rights/.

⁴⁵ *Id.* at 30-31.

⁴⁶ *Consumer Reports Study Finds Authorized Agents Can Empower People to Exercise their Digital Privacy Rights in California*, CONSUMER REPORTS at 13-15 (Feb. 4 2021), https://advocacy.consumerreports.org/wp-content/uploads/2021/02/CR_AuthorizedAgentCCPA_022021_VF_.pdf.

Opt-out legislation should also require that companies honor browser privacy signals so they can opt out of the sale or sharing of their information in a single step, as is required by CCPA regulations⁴⁷ and the pending Proposition 24.⁴⁸ For example, the Global Privacy Control is a CCPA-compliant specification similar to Do Not Track that allows consumers to signal in one step their intention to opt out of the sale of their information at all companies, rather than having to opt out one by one and potentially face dark patterns.⁴⁹

Another tactic to consider in the context of reining in dark patterns is to impose fiduciary duties on companies. Under such a regime, companies would have a legal obligation, such as a duty of fair dealing, to present choices in good faith and to not try to subvert user autonomy.⁵⁰ This could, at the margins, help deter companies from obtaining consent through dark patterns, or using abusive practices to keep consumers engaged on the site.

Finally, Congress should also consider further legislation targeting specific dark patterns, like prohibiting hidden fees. Such legislation would clarify that all fees consumers must pay to get a product or service should be included in the base, advertised price.

Conclusion

We appreciate the opportunity to submit comments on dark patterns. Please do not hesitate to contact us with any questions.

Sincerely,

Justin Brookman
Director, Technology Policy

Maureen Mahoney
Senior Policy Analyst

⁴⁷ *Id.* at § 999.315(c); Cal. Civ. Code § 1798.135(e).

⁴⁸ Cal. Civ. Code § 1798.135(e).

⁴⁹ Global Privacy Control, <https://globalprivacycontrol.org/>.

⁵⁰ See, for example, Jack M. Balkin and Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/>; Jack Karsten and Raj Karan Gambhir, *Proposed New York Bill Expands Scope of Data Privacy Debate*, BROOKINGS (Jun. 24, 2019), <https://www.brookings.edu/blog/techtank/2019/06/24/proposed-new-york-bill-expands-scope-of-data-privacy-debate/>.