

Consent West-Winds: The Dark Cloud of Dark Patterns

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What happened? On September 4, the California Privacy Protection Agency, the agency responsible for enforcing the California Consumer Privacy Act (CCPA), issued an enforcement advisory on “dark patterns” and their inability to constitute valid consent. **Why does it matter?** Any business whose consent is considered invalid would likely face allegations that all processing activities subject to the CCPA (excluding data collected, processed, sold, or disclosed subject to the federal Gramm-Leach-Bliley Act, its implementing regulations, or the California Financial Information Privacy Act) and on which that consent is based are unlawful and subject to civil penalties of up to \$2,500 per violation, and up to \$7,500 for willful violations. Going further, consent is a near-ubiquitous concept, and California’s view of what constitutes valid consent is likely to shift the winds on what constitutes valid consent — and what is conversely considered invalid, deceptive, or unfair — more generally. **What is a dark pattern?** Dark patterns are “choice architectures that have the substantial effect of subverting or impairing a consumer’s autonomy, decision-making, or choice.” Like clouds, this can take many forms, particularly when interpreted by an aggressive regulator. The advisory stressed two important aspects for valid consent (i.e., not being a dark pattern): plain-language explanations and symmetrical choices. A “symmetrical choice” means that consumers can exercise more privacy-protective choices as easily as they can exercise less privacy-protective choices. The advisory provides some examples:

Not Symmetrical or Unequal Choice

When the business's process for opting out of the sale/sharing of their personal information takes more steps than the process to opt back in.

See 11 CCR § 7004(a)(2)(A).

A process to opt in to the sale of personal information that only gives the choice of "yes" and "ask me later."

See 11 CCR § 7004(a)(2)(B).

Symmetrical or Equal Choice

A website banner seeking the consumer's consent to use a consumer's personal information that offers the choices "accept all" and "decline all."

See 11 CCR § 7004(a)(2)(C).

A process to opt in to the sale of personal information that gives the choice of "yes" and "no."

See 11 CCR § 7004(a)(2)(B).

Ultimately, “dark patterns are about effect, not intent,” and identifying them can feel like searching for shapes in the clouds. **What should I consider doing?**

1. Keep an eye on the sky. These consent winds may sweep east.
2. Review consent interfaces and processes for dark clouds the CPPA might call a “dark pattern.”

Ask:

- Is the language easy to read, in plain language, and free of legal jargon?
- Is the path to the less privacy-protective choice longer or more difficult to reach than the more privacy-protective choice?
- Is it more time-consuming for a consumer to make a more privacy-protective choice?

Here’s hoping for sunny, cloud-free days ahead!

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