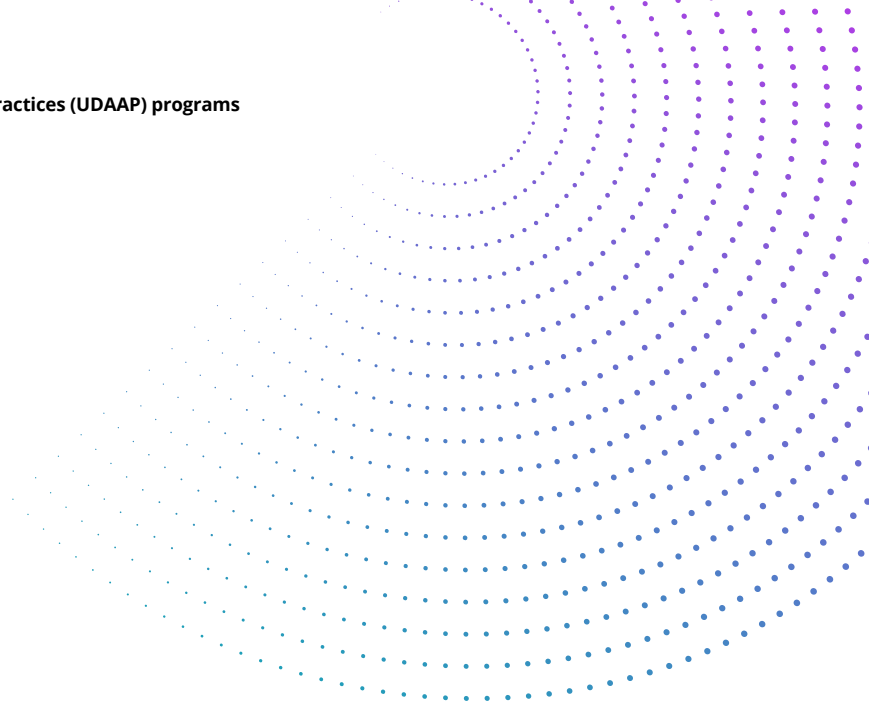


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Dark patterns: Considerations  
for Unfair, Deceptive, or  
Abusive Acts or Practices  
(UDAAP) programs

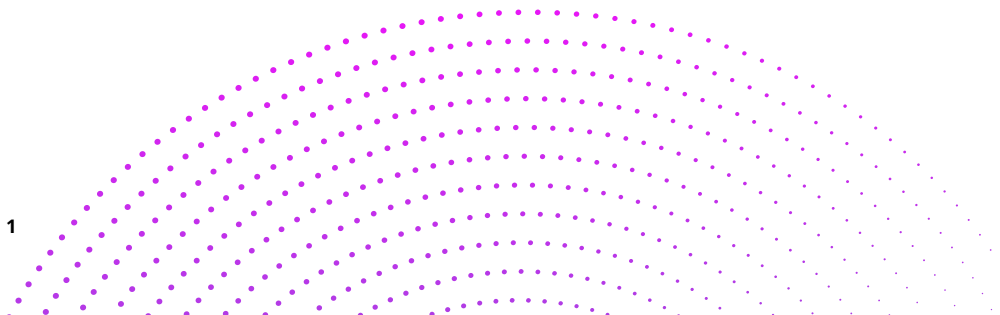
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US**



Over the past two decades, the world has experienced a rapid transformation in how money is transmitted for both business and personal use. Most recently, consumer preferences, fueled by the COVID-19 pandemic, have catapulted growth in online methods of payments. In addition to convenience and ease of use, online methods have proven to be faster, more efficient, and more environmentally friendly for both consumers and businesses. Given this growth, businesses continue to seek ways to compete. One approach has been to offer subscription plans.

Subscription plans have become one of the default forms of payment, allowing businesses to offer more competitive pricing, bundle services, or differentiate themselves from the competition (e.g., monthly/bimonthly/annual access fee for services, membership/digital subscriptions, etc.). However, these potential benefits may come with significant risks for consumers, as bad actors or unethical businesses are taking advantage of this trend. Uninformed consumers may be deceived when they agree to or sign up for unfair or abusive subscription plans. Recent regulatory publications and actions by the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC) indicate increasing scrutiny against businesses using unfair, deceptive, or abusive practices to obtain additional revenue from unknowing or unwilling consumers.

Dark patterns are a type of unfair, deceptive, or abusive practice that companies use to trick or manipulate consumers to generate additional profit.



## Subscription products and the risk of dark patterns

When offering subscription products, companies should consider the potential for consumer harm and how best to mitigate the risk. One example of such being dark patterns risk, which the regulators have highlighted in recent publications. Dark patterns are a type of unfair, deceptive, or abusive practice that companies use to trick or manipulate consumers to generate additional profit. The FTC describes dark patterns as “design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm.”<sup>1</sup> Dark patterns can take a variety of forms, but all share manipulative design techniques as a basis to generate increased revenue. While companies may strive to “do the right thing,” inefficient oversight programs when launching new products and/or services (such as subscription products) may expose a company to undue risk. Types of dark patterns include:

- Hiding or obscuring material information (e.g., lack of disclosing fee increases or extremely complicated subscription cancellation instructions).
- Drip pricing (advertising only part of a product’s price and adding mandatory charges later in the buying process).
- Obscuring or subverting consumers’ data privacy choices.
- Making false claims or employing design elements that create a misleading impression to spur a consumer into making an uncharacteristic purchase.
- Free trials that require cancellation but minimize the customer’s role in cancellation of the subscription.

Dark patterns manifest across industries and contexts but are most often found in e-commerce platforms, cookie consent banners, applications targeted toward children, and subscription products.

While these practices benefit the companies, they are often harmful to consumers. Users typically do not realize that they are being manipulated or misled because dark patterns are covert and deceptive in nature.

Companies will often implement multiple dark patterns typologies at the same time to increase the likelihood of customers selecting the product. This method of combining dark patterns has a compounding effect that significantly increases the likelihood of consumer harm in the form of financial losses and breaches of personal privacy.



## Regulatory focus: Federal Trade Commission Act (FTC Act) and Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

To combat the proliferation of dark patterns, regulators are speaking up. Below are several regulatory developments related to dark patterns:

- **The FTC hosted a workshop** on April 29, 2021, in which it educated the public on the different types of dark patterns and how different companies manipulate user interfaces to obscure the decision-making of consumers.<sup>2</sup> This workshop consisted of a variety of different speakers, including legal experts, industry professionals, and politicians. The FTC also highlighted its capabilities to go after the companies who use dark patterns through various statutes and regulations. The FTC's posture suggests increasing activity over dark patterns is forthcoming.
- **The CFPB published a strong opinion (Circular 2023-01)** against the practice of negative opinion marketing, a type of dark pattern, as a violation of the prohibition on unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act (CFPA).<sup>3</sup>
- **The CFPB has focused on Regulation E's** prohibition on preauthorized electronic fund transfers from a consumer's bank account as a way to go after companies using digital dark patterns for subscription products.<sup>4</sup>
- **The CFPB published a Statement of Policy** on April 3, 2023, regarding the prohibition on abusive conduct in which dark patterns are specifically mentioned as a material interference with consumer's understanding of terms and conditions.<sup>5</sup> Material interference consists of deploying physical or digital methods to impede a person's ability to see, hear, or understand the terms and conditions that they are presented prior to purchasing a service or good. This leads to the consumer's lack of understanding of important information pertaining to pricing, costs, and other details.

The CFPB enforces UDAAP under the CFPA, which is part of the Dodd-Frank Act of 2010. UDAAP violations may lead to significant civil monetary penalties (up to \$1 million per day), reputational damage, remediation costs, and payments to consumers. For businesses that want to be proactive and establish robust UDAAP programs, identifying deceptive, unfair, and abusive acts is not always simple. Regulatory guidance states "what not to do"; however, operationalizing an effective UDAAP program is not a one-size-fits-all approach. Companies must establish programs that align with the size and complexity of their operations and should keep the following considerations in mind:

- **Unfair practices:** A practice is unfair when it causes or is likely to cause substantial injury to consumer and it is not reasonably avoidable. The injury would not be outweighed by any countervailing benefits that could result from the unfair practice (e.g., high overdraft fees or late penalty fees).
- **Deceptive practices:** A practice is deceptive when there has been a representation, omission, act, or practice that misleads or is likely to mislead the consumer; would be misleading to a reasonable consumer; and the representation, omission, act, or practice is material (e.g., unclear or confusing consumer disclosures or account terms).
- **Abusive practices:** A practice is abusive when it materially interferes with a consumer's ability to understand the terms or conditions of a product or service, or it takes unreasonable advantage of a consumer's lack of understanding of the material risks, costs, or conditions of a product or service; the inability of a consumer to protect their interests; or the reasonable reliance of a consumer on the business to act in the consumer's interest (e.g., automatically enrolling in bundled services that are misrepresented).

## Considerations for a UDAAP program

As a next step, companies should consider dark patterns as part of their UDAAP compliance programs as an emerging risk factor. Any company offering subscription products should include dark patterns risk as a core regulatory risk. Institutions can address dark patterns risk through the following:

- Evaluate and enhance existing policy and procedures to demonstrate considerations of dark patterns risk for products and consumer impact.
- Enhance and implement controls around dark patterns risk as part of a larger UDAAP compliance program.
- Assess and enhance processes related to reviewing advertising and promotional materials of any products leveraging a subscription model as a form of payment.

Through a proactive approach, companies can assess, identify, and develop the controls to mitigate dark patterns risk and stay compliant in a more stringent regulatory environment.

# Endnotes

1. Federal Trade Commission (FTC), [Bringing dark patterns to light](#), September 2022.
2. FTC, "[Dark Patterns Workshop](#)," April 29, 2021.
3. Consumer Financial Protection Bureau (CFPB), "[Circular 2023-01: Unlawful negative option marketing practices](#)," January 19, 2023.
4. Ibid.
5. CFPB, "[Policy Statement on Abusive Acts or Practices](#)," April 3, 2023.

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