

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL TRADE COMMISSION

Request for Information on Digital Advertising Business Guidance

P114506

August 2, 2022

By notice published on June 3, 2022, the Federal Trade Commission (“FTC” or “Commission”) has requested comment on ways that it can modernize the agency’s business guidance titled “.com Disclosures: How to Make Effective Disclosures in Digital Advertising.”¹ The FTC’s updated guidance would “tackle dark patterns and digital deception, including issuing a click-to-cancel policy statement, proposing strengthened advertising guidelines against fake and manipulated reviews, arming staff with new tools to investigate dark patterns, and authorizing a Notice of Penalty Offense against deceptive reviews.”²

The Electronic Privacy Information Center (“EPIC”) submits these comments in support of the Commission’s efforts to update its digital advertising business Guidance (“Guidance”) and to share additional recommendations and expertise with the Commission. EPIC is a public interest research center in Washington, D.C. established in 1994 to focus on public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC

¹ Lesley Fair, *FTC calls for a reboot on business guidance about digital advertising*, FTC (June 3, 2022), <https://www.ftc.gov/business-guidance/blog/2022/06/ftc-calls-reboot-business-guidance-about-digital-advertising>; *see also* FTC, *FTC Staff Requests Information Regarding Digital Advertising Business Guidance Publication* (June 3, 2022), <https://downloads.regulations.gov/FTC-2022-0035-0001/content.pdf>.

² *Id.*

has long defended the rights of consumers and has played a leading role in developing the authority of the FTC to address emerging privacy and cybersecurity issues.³ EPIC routinely files comments in response to proposed FTC rules and consent orders as well as complaints concerning business practices that violate privacy rights.⁴

EPIC has a particular interest in mitigating the harmful effects of dark patterns and digital deception on consumers and privacy rights. In July, EPIC and coalition of U.S. consumer protection and privacy groups urged the FTC to open an investigation into Google’s use of dark patterns to manipulate and trap consumers into invasive tracking practices.⁵ Last year, EPIC filed a complaint with the Attorney General for the District of Columbia highlighting Amazon’s use of dark patterns in the Amazon Prime subscription cancellation process, explaining that Amazon “inhibits many consumers from exiting a contractual relationship with the company; charges those consumers

³ See, e.g., Consumer Reports & EPIC, *How the FTC Can Mandate Data Minimization Through a Section 5 Unfairness Rulemaking* (Jan. 26, 2022), https://epic.org/wp-content/uploads/2022/01/CR_Epic_FTCDataMinimization_012522_VF_.pdf; EPIC, *What the FTC Could Be Doing (But Isn’t) To Protect Privacy: The FTC’s Unused Authorities* (June 2021), <https://epic.org/privacy/consumer/EPIC-FTC-Unused-Authorities-Report-June2021.pdf>.

⁴ See, e.g., Comments of EPIC, *In re Support King, LLC (SpyFone.com)* (Oct. 8, 2021), <https://archive.epic.org/apa/comments/In-re-SpyFone-Order-EPIC-comment-100821.pdf>; Comments of EPIC et al., *In re Zoom Video Communications, Inc.* (Dec. 14, 2020), <https://epic.org/apa/comments/EPIC-FTC-Zoom-Dec2020.pdf>; Complaint of EPIC, *In re Online Test Proctoring Companies* (Dec. 9, 2020), <https://epic.org/privacy/dccppa/online-test-proctoring/EPIC-complaint-in-re-online-test-proctoring-companies-12-09-20.pdf>; Complaint of EPIC, *In re Airbnb* (Feb. 26, 2020), https://epic.org/privacy/ftc/airbnb/EPIC_FTC_Airbnb_Complaint_Feb2020.pdf; Petition of EPIC, *In re Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce* (Feb. 3, 2020), <https://epic.org/privacy/ftc/ai/epic-ai-rulemaking-petition/>; Complaint of EPIC, *In re HireVue* (Nov. 6, 2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf; Comments of EPIC, *In re Unrollme, Inc.*, FTC File No. 172-3139 (Sept. 19, 2019), <https://epic.org/apa/comments/EPIC-FTC-Unrollme-Sept2019.pdf>; Comments of EPIC, *In re Aleksandr Kogan and Alexander Nix*, FTC File Nos. 182-3106 & 182-3107 (Sept. 3, 2019), <https://epic.org/apa/comments/EPIC-FTC-CambridgeAnalytica-Sept2019.pdf>; Complaint of EPIC, *In re Zoom Video Commc’ns, Inc.* (July 11, 2019), <https://epic.org/privacy/ftc/zoomEPIC-FTC-Complaint-In-re-Zoom-7-19.pdf>.

⁵ Letter from EPIC et al. to FTC (June 30, 2022), <https://www.documentcloud.org/documents/22075421-tacd-ftc-google-account-letter>.

recurring fees; and continues to collect, retain, and use the personal data of misdirected Amazon Prime subscribers.”⁶

EPIC urges the Commission to strengthen its Guidance to account for the ways that dark patterns and digital deception injure consumers and to place companies on notice that such advertising practices are unfair and unlawful. In particular, EPIC urges the Commission to establish updated guidelines for sponsored content so that users can clearly understand when it is sponsored; to identify and target rapidly evolving uses of dark patterns and manipulative interfaces in advertising; and to develop more robust guidance concerning online disclosures when consumers must navigate multiple webpages.

I. The revised Guidance should establish stricter disclosure and design requirements to ensure that users know when content is sponsored.

Advertising is ubiquitous and inescapable for social media users. Traditional online ads are delivered directly to users in feeds and in stories. Users are also exposed to advertisements when the “influencers” they follow partner with a brand to produce an advertisement. The images below provide illustrative examples of the ways in which advertisements are delivered to social media users—and reveal how difficult it can often be to distinguish between sponsored and non-sponsored content. The Commission’s revised Guidance should reinforce that it is unfair and unlawful for platforms to serve sponsored posts to users without clearly and conspicuously labeling them as such.

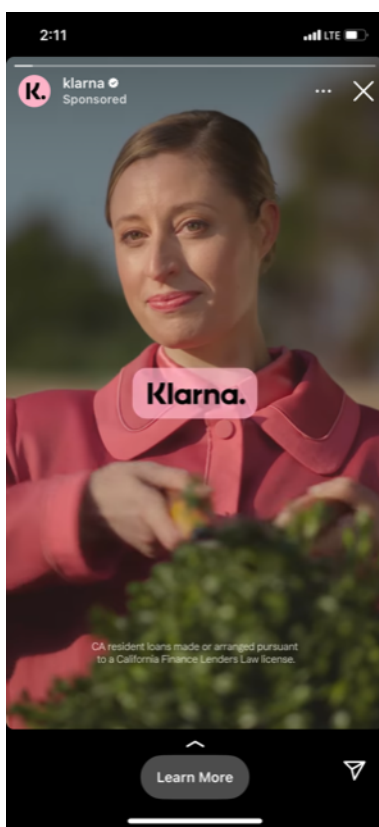
a. Instagram

Instagram enables advertisers to serve ads to users on users’ feeds, stories, Explore page, and reels. Advertisers can include photos and videos in Instagram advertisements, and ads can also include links to advertisers’ websites. Instagram shopping ads enable advertisers to tag products with

⁶ Complaint of EPIC, *In re Amazon, Inc.* (Feb. 23, 2021), <https://archive.epic.org/privacy/dccppa/amazon/EPIC-Complaint-In-Re-Amazon.pdf>.

links that allow users to purchase the products directly in the Instagram mobile app. Advertisers also frequently partner with influencers to produce feed-, story-, and reel-based advertisements.⁷ Instagram requires advertisers and influencers to disclose that content is sponsored,⁸ and the screenshots below shows some common disclosure methods.

Sponsored vs. non-sponsored stories: The Klarna story on the left is sponsored,⁹ and the Capitol Hill Business Improvement District (BID) story on the right is not.¹⁰ The Klarna story includes a sponsorship disclosure below the account name in the top left corner.



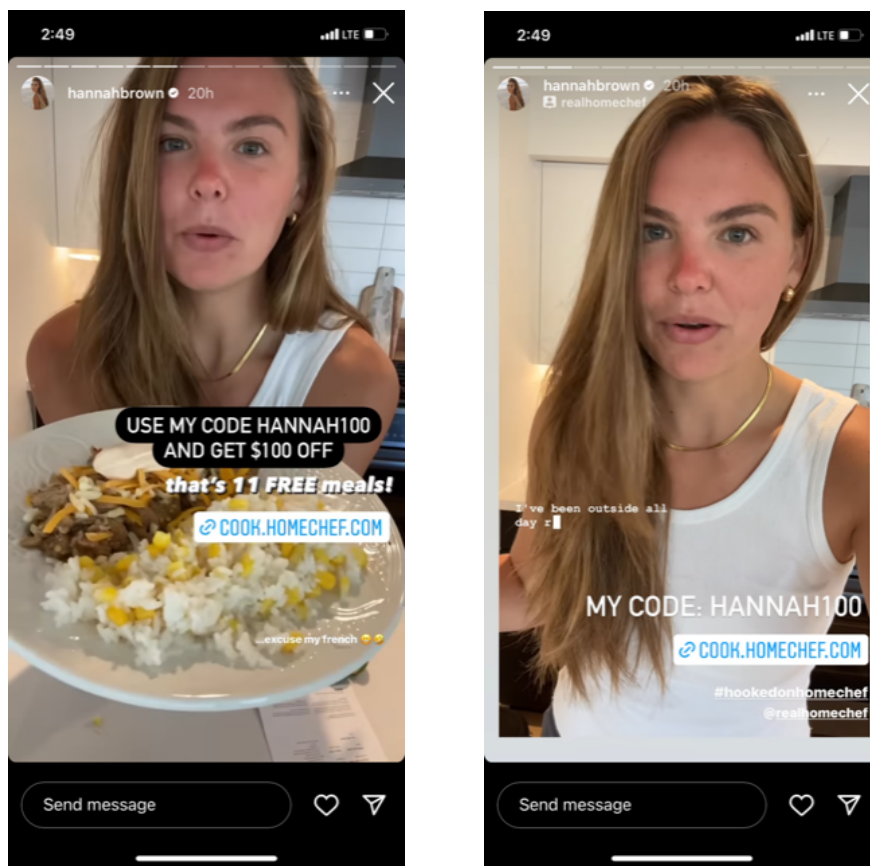
⁷ Jairene Cruz-Eusebio, *The Different Types of Instagram Ads and When to Use Them*, Brax (Jan. 7, 2022), <https://www.brax.io/blog/the-different-types-of-instagram-ads-and-when-to-use-them>.

⁸ *Branded Content Policies*, Instagram, https://help.instagram.com/1695974997209192?helpref=faq_content (last visited July 18, 2022).

⁹ *Klarna Instagram Story* (July 12, 2022), Instagram App, iPhone 11.

¹⁰ *Capitol Hill Business Improvement District* (July 12, 2022), Instagram App, iPhone 11.

Influencer stories: Below are two stories from influencer Hannah Brown’s partnership with Homechef. In the first frame on the left,¹¹ she shared a personal promotional code and a link to the Homechef website but the frame did not include a disclosure. In the second frame on the right, she shared her promotional code and the Homechef website again. She also included #hookedonhomechef, tagged @realhomechef, and the Homechef tag also appeared below her username.¹²



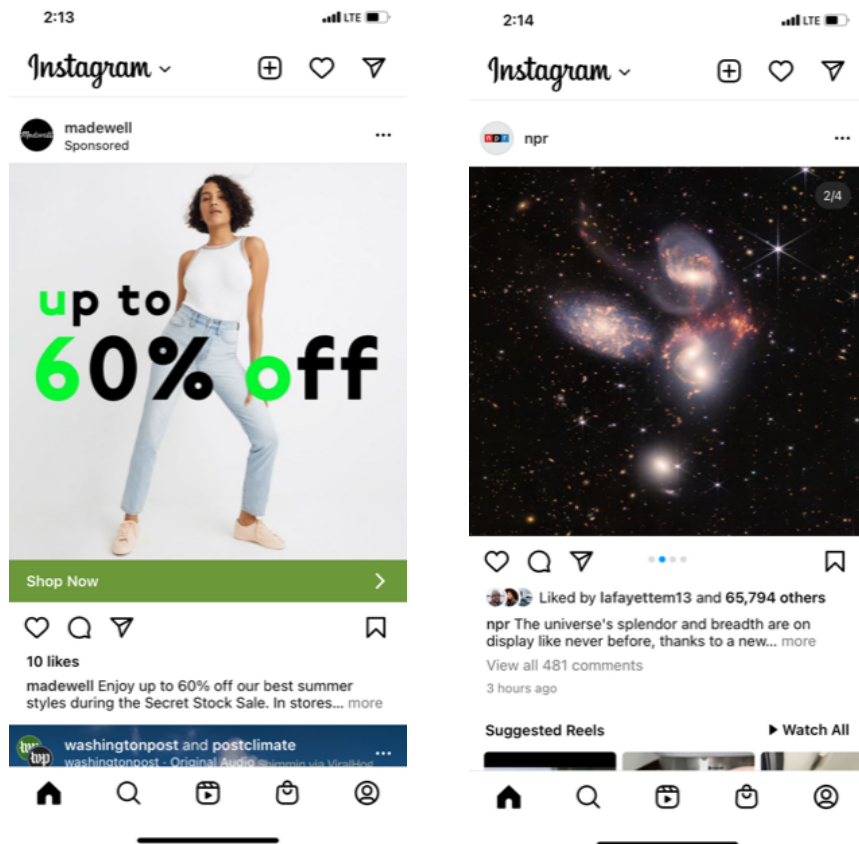
Sponsored vs. non-sponsored posts: The post on the left below is a sponsored post by Madewell, a clothing retailer.¹³ The post includes a “Sponsored” disclosure below the account name

¹¹ *Hannah Brown Instagram Story 1*, (July 12, 2022), Instagram App, iPhone 11.

¹² *Hannah Brown Instagram Story 2*, (July 12, 2022), Instagram App, iPhone 11.

¹³ *Madewell Sponsored Post*, (July 12, 2022), Instagram App, iPhone 11.

on the top left of the post. A “Shop Now” banner also appears along the bottom of the image which links to Madewell’s website. The post on the right by NPR is not sponsored.¹⁴ Nothing appears below NPR’s account name, and no banners or links appear on the post. Otherwise, the posts are visually similar.



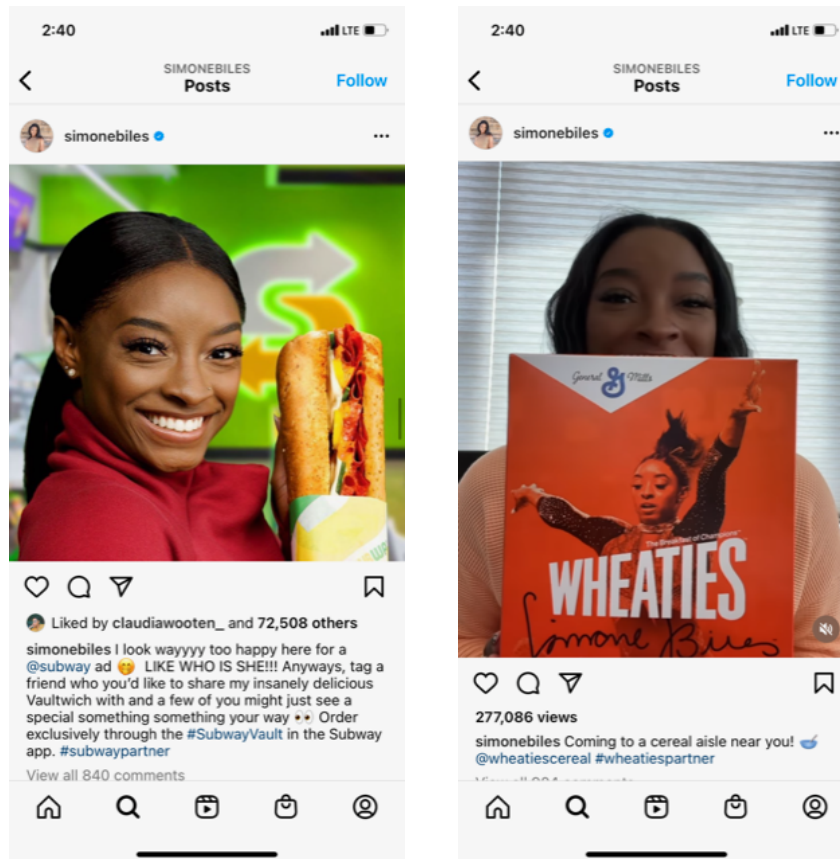
Sponsored partnership posts: Below are two posts created by Olympic athlete Simone Biles in partnership with two brands. In the post on the left, created in partnership with Subway, Biles includes the sponsorship disclosures @subway ad and #subwaypartner.¹⁵ In Biles’ Wheaties Sponsored post on the right, she includes the disclosure #wheatiespartner.¹⁶ Contrary to the

¹⁴ NPR Post, (July 12, 2022), Instagram App, iPhone 11.

¹⁵ Simone Biles Sponsored Post 1, (July 12, 2022), Instagram App, iPhone 11.

¹⁶ Simone Biles Sponsored Post 2, (July 12, 2022), Instagram App, iPhone 11.

sponsored Madewell post above, a “Sponsored” disclosure does not appear below Biles’ account name in the top left corner of the post.



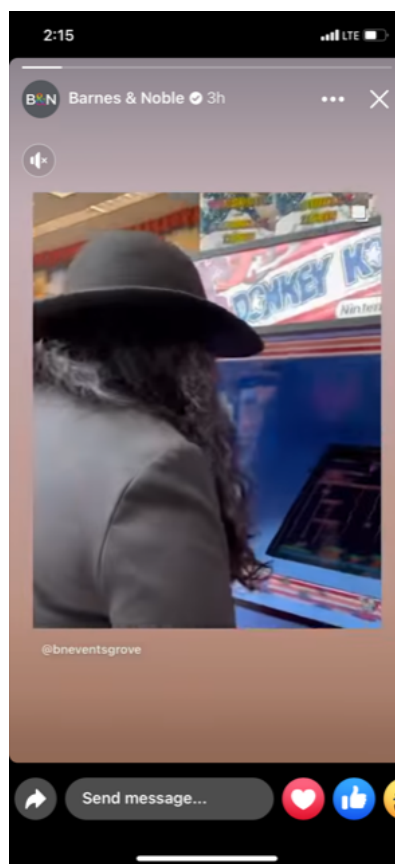
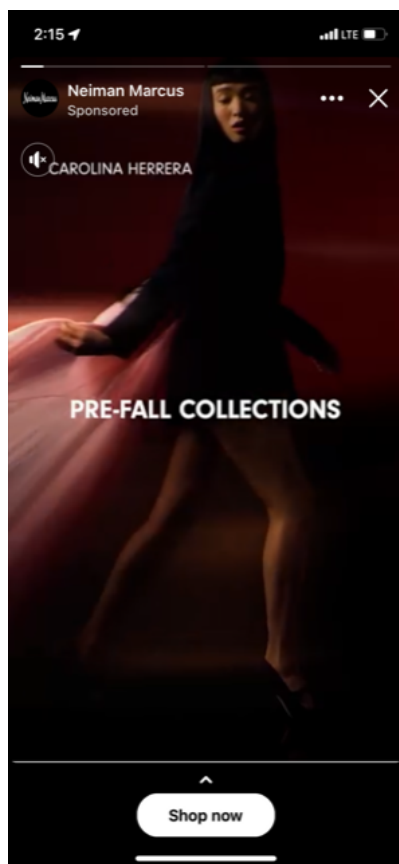
b. Facebook

Facebook permits advertisers to serve ads to users on users’ feeds, stories, Facebook Watch, Facebook Marketplace, and Facebook Messenger. Ads may include a static image, set of images, videos, links to websites or shopping pages, game previews, or private message with the advertiser.¹⁷ Facebook and Instagram are both owned by the parent company Meta, and they share the same

¹⁷ *Ad Formats*, Meta, <https://www.facebook.com/business/ads/ad-formats> (last visited July 18, 2022).

sponsorship disclosure requirements.¹⁸ Examples of different types of posts and sponsorship disclosures on Facebook are included below.

Sponsored v. non-sponsored stories: The story on the left is sponsored by Neiman Marcus.¹⁹ A “Sponsored” disclosure appears in the top right corner below the account name. A “Shop Now” button appears at the bottom of the story, which links to Neiman Marcus’ website. The story on the right by Barnes & Noble is not sponsored. At the bottom of the story, a text box allows users to send a message to Barnes & Noble.²⁰ There are also buttons allowing users to share the store or react to it with a heart or like.

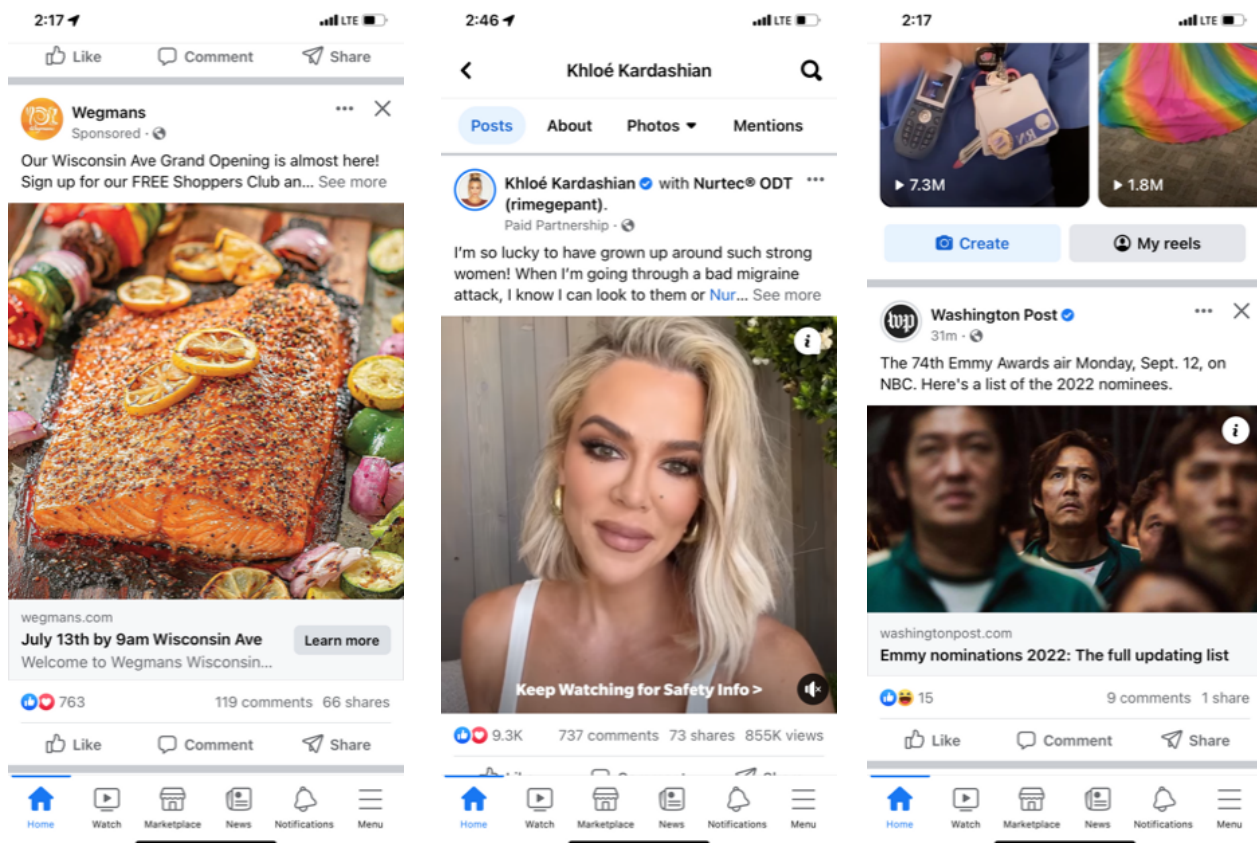


¹⁸ *About Branded Content Policies*, Meta Business Help Center, <https://www.facebook.com/business/help/653146638176520?id=1912903575666924> (last visited Jul 18, 2022).

¹⁹ *Neiman Marcus Sponsored Story*, (July 12, 2022), Facebook App, iPhone 11.

²⁰ *Barnes & Noble Story*, (July 12, 2022), Facebook App, iPhone 11.

Sponsored v. non-sponsored posts: The sponsored post on the left by Wegmans includes a “Sponsored” disclosure under the account name in the top left corner of the post.²¹ The post also includes a banner along the bottom of the photo which links to Wegmans’ website. The post in the middle is a partnership between Khloe Kardashian and Nurtec ODT.²² The post says “Khloe Kardashian with Nurtec ODT” at the top, and it also includes a “Paid Partnership” disclosure underneath the account name. The post on the right by the Washington Post is not sponsored, but it also includes a banner along the bottom of the post which links to the Washington Post’s website.²³



²¹ *Wegman’s Sponsored Post*, (July 12, 2022), Facebook App, iPhone 11.

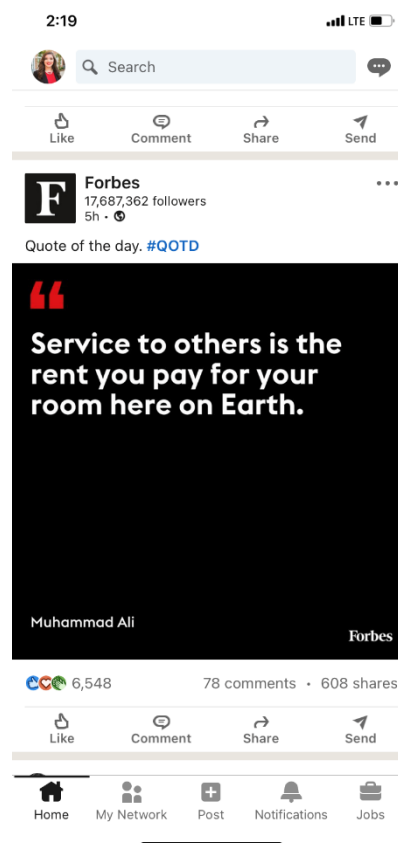
²² *Khloe Kardashian Sponsored Post*, (July 12, 2022), Facebook App, iPhone 11.

²³ *Washington Post Facebook Post*, (July 12, 2022), Facebook App, iPhone 11.

c. *LinkedIn*

Advertisers on LinkedIn can create ads in the form of image feed posts, video feed posts, events, messages, follow promotions, and forms. Advertisements can also include links.²⁴ When advertisers post sponsored content on LinkedIn, the content includes a “Promoted” disclosure. LinkedIn also provides advertising specifications pages for each type of ad offered, which reminds advertisers to “insert any legally required language in the introductory text.”²⁵ The screenshots below compare a sponsored and non-sponsored post on LinkedIn.

Sponsored v. non-sponsored post: On the left, Frontier Communications’ sponsored post includes a “Promoted” disclosure below the account name in the top right corner of the post.²⁶ The



²⁴ *Sponsored Content*, LinkedIn, <https://business.linkedin.com/marketing-solutions/native-advertising> (Last Visited July 18, 2022).

²⁵ *Single Image Ads – Advertising Specifications*, LinkedIn Help, <https://www.linkedin.com/help/linkedin/answer/a426534> (Last visited July 18, 2022).

²⁶ *Frontier Communications Promoted LinkedIn Post*, (July 12, 2022), LinkedIn App, iPhone 11.

post also includes a banner along the bottom that links to the advertiser’s website. Forbes’ unsponsored post is on the right.²⁷ The unsponsored post does not include any disclosures or links, but the posts are otherwise similar: they both include a static image and buttons at the bottom that allow users to like the post, comment, share the post, or send the post to someone.

d. Pinterest

Pinterest enables advertisers to create sponsored “pins,” or posts, that include photos, a set of photos, videos, and links to a website or an app.²⁸ When advertisers create an ad using Pinterest’s advertising platform, the sponsored pins included “Promoted” disclosures. The screenshots below show different types of sponsored pins appearing on Pinterest.

Sponsored v. non-sponsored pins: The screenshot below on the left includes a sponsored pin by Aerie, which displays a collection of images.²⁹ It includes the disclosure “Promoted by Aerie.” In the middle, the screenshot includes a sponsored pin by Amazon.com including a single image and the disclosure “Promoted by Amazon.com.”³⁰ The sponsored pins included in the screenshots on the left and middle are the same size as the other non-sponsored pins around them. In contrast, the sponsored pin included in the screenshot on the right is larger than a normal pin.³¹ The pin includes the disclosure “Promoted by Volvo.”

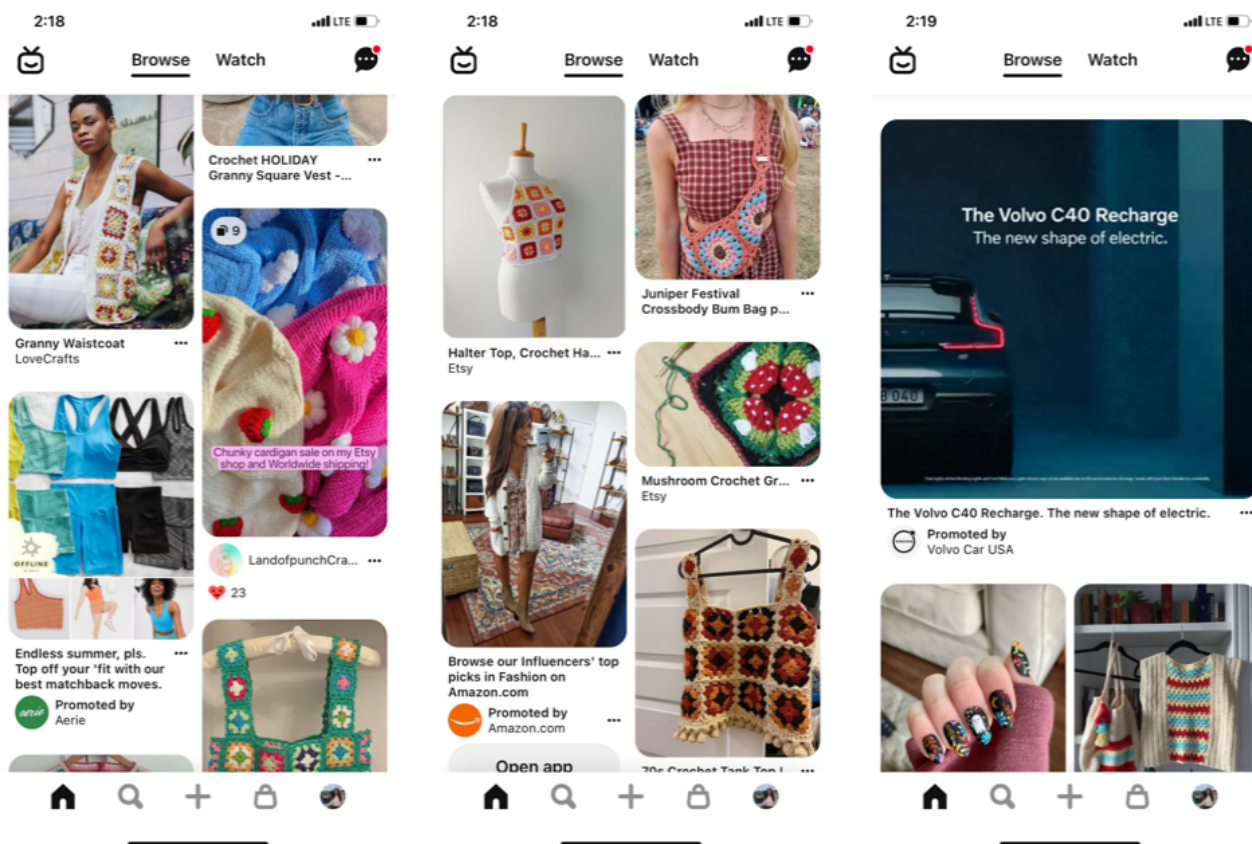
²⁷ *Forbes LinkedIn Post*, (July 12, 2022), LinkedIn App, iPhone 11.

²⁸ Hallie Gilbert, *The Ultimate Guide to Pinterest Ads*, LaterBlog (July 10, 2020), <https://later.com/blog/pinterest-ads/>.

²⁹ *Aerie Sponsored Pin*, (July 12, 2022), Pinterest App, iPhone 11.

³⁰ *Amazon Promoted Pin*, (July 12, 2022), Pinterest App, iPhone 11.

³¹ *Volvo Promoted Pin*, (July 12, 2022), Pinterest App, iPhone 11.

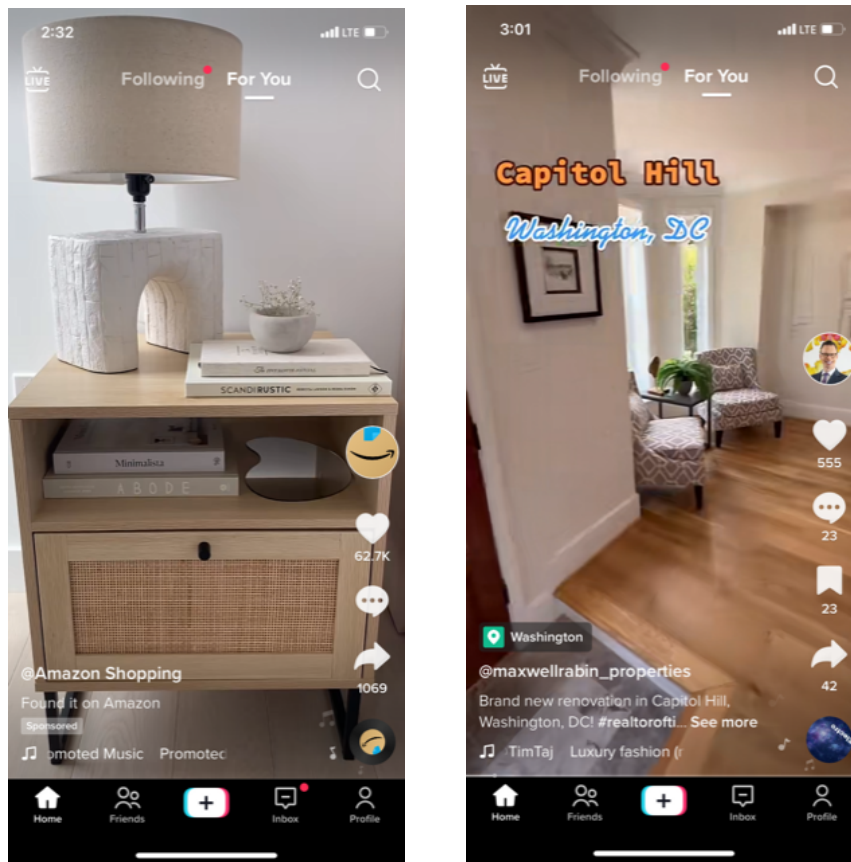


e. TikTok

On TikTok, advertisers can create video post ads that appear in users' feeds, ads that appear as the first post when users open the app (called TopView), branded hashtag challenges that encourage user interaction, and sponsored filters and video effects. Ad partnerships are also common on TikTok.³² TikTok requires users to add sponsorship disclosures to branded content by enabling the app's branded content toggle when posting the advertisement. The screenshots below show examples of sponsored and non-sponsored content on TikTok and the types of disclosures that were included on the posts.

³² *It Starts on TikTok*, TikTok for Business, <https://www.tiktok.com/business/en-US/apps/tiktok> (Last visited July 18, 2022).

Sponsored v. non-sponsored TikTok posts: An Amazon Shopping sponsored post is included on the left.³³ It includes a “Sponsored” disclosure below the caption in the bottom right corner of the post. On the right is a non-sponsored post from the account @maxwellrabin_properties.³⁴ Both posts include similar buttons allowing users to follow the accounts, like the post, comment, or share the video. The non-sponsored post also includes a button allowing users to save the video.

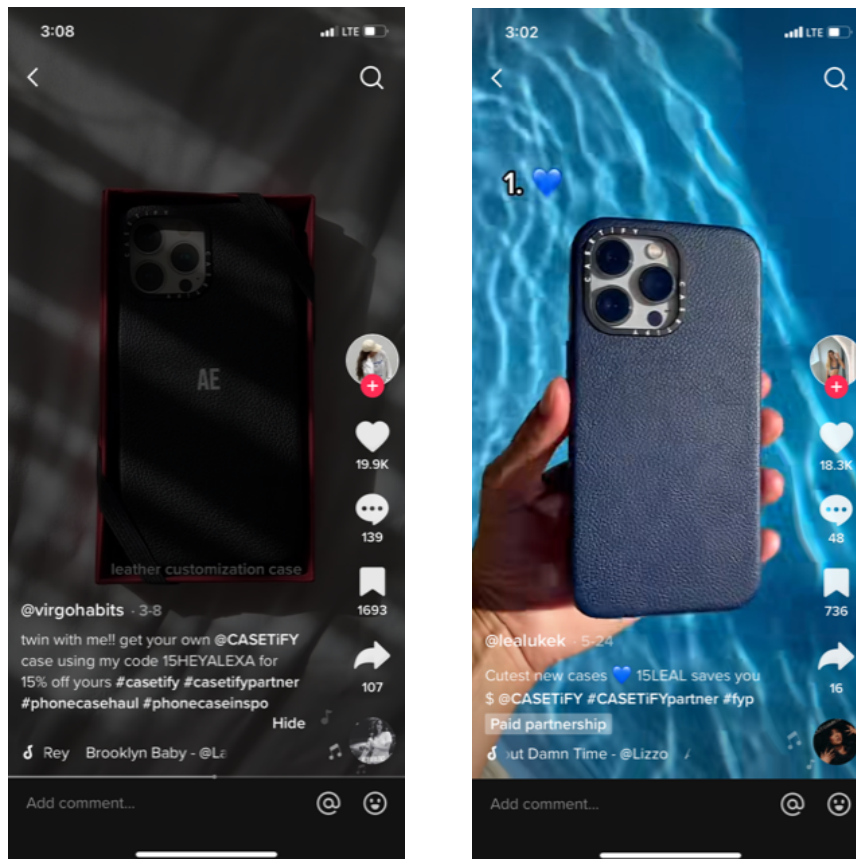


Sponsored partnership posts: Below are two screenshots of two different branded partnership posts between Casetify and TikTok creators. The posts share the same advertiser and the same product, but they use different disclosure methods. The post on the left created by @virgo habits

³³ *Amazon Sponsored Video*, (July 12, 2022), TikTok App, iPhone 11.

³⁴ *Maxwell Rabin Properties Video*, (July 12, 2022), TikTok App, iPhone 11.

discloses that the content is sponsored by using #casetifypartner.³⁵ This hashtag is only visible if users click “See more” on the caption. In the post on the right, @lealukek also uses #CASETiFYpartner, and the creator also includes a “Paid Partnership” disclosure below the caption.³⁶



In revising its Guidance to ensure that sponsored posts are clearly identifiable to users as such, the Commission should take account of the above examples and the ways that platforms and advertisers frequently attempt to disguise paid content. Existing guidance and enforcement against these types of camouflaged advertising fail to ensure that platforms and advertisers clearly disclose when content is sponsored.

³⁵ @virgo habits Sponsored Video, (July 12, 2022), TikTok App, iPhone 11.

³⁶ @lealukek Sponsored Video, (July 12, 2022), TikTok App, iPhone 11.

II. Consumers face a rising tide of dark patterns and manipulative user interface designs online.

As the FTC is aware from its prior work on the use of dark patterns in negative option marketing,³⁷ online platforms frequently use design features to encourage consumers to make choices that are counter to their own interests. Dark patterns, also called deceptive design, manipulate users into making choices that benefit online platforms at the cost of consumers' money, time, and privacy.³⁸ Harry Brignull, who coined the term, has classified fourteen common types of dark patterns, many of which are deployed in online advertising:³⁹

Types of Deceptive Design (Excerpted from Harry Brignull's Website "Deceptive Design") ⁴⁰	
Trick Questions	While filling in a form you respond to a question that tricks you into giving an answer you didn't intend. When glanced upon quickly the question appears to ask one thing, but when read carefully it asks another thing entirely.
Sneak Into Basket	You attempt to purchase something, but somewhere in the purchasing journey the site sneaks an additional item into your basket, often through the use of an opt-out radio button or checkbox on a prior page.
Roach Motel	You get into a situation very easily, but then you find it is hard to get out of it (e.g. a premium subscription).
Privacy Zuckering	You are tricked into publicly sharing more information about yourself than you really intended to. Named after Facebook CEO Mark Zuckerberg.
Price Comparison Prevention	The retailer makes it hard for you to compare the price of an item with another item, so you cannot make an informed decision.
Misdirection	The design purposefully focuses your attention on one thing in order to distract your attention from another.
Hidden Costs	You get to the last step of the checkout process, only to discover some unexpected charges have appeared, e.g. delivery charges, tax, etc.
Bait and Switch	You set out to do one thing, but a different, undesirable thing happens instead.
Confirmshaming	The act of guilt-tripping the user into opting into something. The option to decline is worded in such a way as to shame the user into compliance.

³⁷ FTC, *Enforcement Policy Statement Regarding Negative Option Marketing* (Oct. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.

³⁸ Harry Brignull, *What is Deceptive Design?*, Deceptive Design, <https://www.deceptive.design/>.

³⁹ Harry Brignull, *Types of Deceptive Design*, Deceptive Design, <https://www.deceptive.design/types>.

⁴⁰ *Id.*

Disguised Ads	Adverts that are disguised as other kinds of content or navigation, in order to get you to click on them.
Forced Continuity	When your free trial with a service comes to an end and your credit card silently starts getting charged without any warning. In some cases, this is made even worse by making it difficult to cancel the membership.
Friend Spam	The product asks for your email or social media permissions under the pretense it will be used for a desirable outcome (e.g. finding friends), but then spams all your contacts in a message that claims to be from you.

Arunesh Mathur, Jonathan Mayer, and Mihir Kshirsagar have also laid out a useful set of attributes to describe and identify dark patterns.⁴¹ They divide dark patterns into two groups: those that modify the decision space and those that modify the information flow.⁴² Within the two groups, the researchers further subdivide dark patterns by attribute. Under their taxonomy, dark patterns may exhibit one or more attributes.⁴³

First, Mathur, Mayer, and Kshirsagar explain that dark patterns that modify the decision space exhibit the following attributes: asymmetric, restrictive, covert, or disparate treatment. Asymmetric dark patterns impose an outsize burden on users by prominently featuring choices that are beneficial to the platform and obscuring choices that are beneficial to the user. For example, social media platforms often make it difficult for users to switch to more privacy protective settings. Restrictive dark patterns reduce the choices available to users. For example, some online subscription services do not allow users to cancel their subscriptions online. Covert dark patterns hide influence mechanisms from users to steer users toward making a certain choice, like when shopping websites offer “free” gifts to shoppers to make them feel like they are getting a bigger

⁴¹ See, Arunesh Mathur, Jonathan Mayer & Mihir Kshirsagar, *What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and Measurement Methods*, Chi. Conf. on Hum. Factors in Computing Syst., May 2021, <https://arxiv.org/pdf/2101.04843.pdf>.

⁴² *Id.* at 8.

⁴³ *Id.*

discount than they really are. Disparate treatment dark patterns give certain groups an advantage over others. Online games that allow users to pay to skip advertisements give an advantage to those who have the ability to pay while forcing those who cannot afford to skip to spend more time watching ads.

Second, Mather, Mayer and Kshirsagar explain that other dark patterns modify the flow of information, and they exhibit deceptive or information hiding attributes. Deceptive dark patterns utilize false statements or omissions to manipulate users' choices. For example, shopping websites often display a timer for a sale which will not actually expire once the timer runs out. Information hiding obscures important information from users. Websites that do not clearly disclose that users are signing up for a subscription service instead of a one-time purchase employ the information hiding dark pattern attribute.

Dark patterns are prevalent online, particularly in online subscription models, online shopping platforms, and in online advertisements. For example, the Commission issued a settlement order against Age of Learning, Inc., the company that operates the educational children's game ABC Mouse, because the company used dark patterns to manipulate consumers into signing up for subscriptions.⁴⁴ Former Commissioner Rohit Chopra described the dark patterns that ABC Mouse used as a "roach motel," using Brignull's category.⁴⁵ ABC Mouse did not clearly disclose to consumers that their membership would renew; this information was hidden in the "Terms and Conditions."⁴⁶ ABC Mouse is not alone in tricking consumers by using dark patterns to manipulate

⁴⁴ *FTC Sends Refunds to Consumers Unfairly Billed for ABCmouse Memberships*, Federal Trade Commission (Apr. 19, 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-sends-refunds-consumers-unfairly-billed-abcmouse-memberships>.

⁴⁵ Statement of Commissioner Rohit Chopra, Regarding Dark Patterns in the Matter of Age of Learning, Inc., FTC File No. 1723186, https://www.ftc.gov/system/files/documents/public_statements/1579927/172_3086_abcmouse_-_rchopra_statement.pdf.

⁴⁶ *Id.*

them into signing up for a subscription. Last year, Forbrukerrådet (the Norwegian Consumer Council) detailed how Amazon’s subscription model incorporates dark patterns because consumers can sign up for an Amazon Prime subscription in just a few clicks, but consumers must navigate an elaborate process to successfully unsubscribe from Prime.⁴⁷ (EPIC also built on Forbrukerrådet’s research in its complaint to the Attorney General for the District of Columbia highlighting Amazon’s use of dark patterns in the Prime cancellation process.⁴⁸) Throughout the cancellation process, Amazon presents frequent warnings about all of the benefits consumers will miss out on once they cancel their subscription.⁴⁹ If the consumer clicks on any of the warnings throughout the process, the consumer must start the process over.⁵⁰ Online retailers often trap consumers into subscription models using dark patterns, and they also use dark patterns to harm consumers in other ways.

A 2019 large-scale study of 11,000 shopping websites showed that shopping websites frequently manipulate consumers into making purchasing decisions using dark patterns.⁵¹ The researchers found that 183 websites engaged in 1,818 instances of dark patterns.⁵² The shopping websites used a variety of dark patterns to manipulate consumers, including adding additional items to shoppers’ carts without consent, signing consumers up for subscriptions without clear consent, displaying a countdown timer for a sale even though the sale would never actually expire, using language to pressure or confuse consumers into making certain purchasing decisions, preselecting more expensive variations of a product, indicating that a product was low in stock or in high demand

⁴⁷ Forbrukerrådet, *You Can Log Out, but You Can Never Leave* 27 (Jan. 14, 2021), <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

⁴⁸ Complaint of EPIC, *In re Amazon, Inc.* (Feb. 23, 2021), <https://archive.epic.org/privacy/dccppa/amazon/EPIC-Complaint-In-Re-Amazon.pdf>.

⁴⁹ *Id.* at 18.

⁵⁰ *Id.*

⁵¹ Arunesh Mathur, et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, Web Transparency (2019), <https://webtransparency.cs.princeton.edu/dark-patterns/>.

⁵² *Id.*

to encourage consumers to buy quickly even if that was false, and forcing consumers to create an account or share unnecessary personal information to complete their purchase.⁵³ More popular websites were found to be more likely to use dark patterns.⁵⁴

Consumers also encounter dark patterns when they see online advertisements. One of Brignull’s dark pattern categories highlights disguised ads, which are present when advertisers use design features to trick consumers into think that content is not an ad.⁵⁵ For example, Facebook allows advertisers to create “game preview” ads, which allow users to play a game for a few moments before being redirected to another site.⁵⁶ Game preview ads are only available on Facebook, and consumers are likely to be unfamiliar with such a unique ad format. Because the game preview ad format differs significantly from traditional online ads, the ads could qualify as dark patterns if they are not clearly and sufficiently disclosed as ads to consumers. Additionally, sponsorship disclosures are sometimes difficult to see because of the design or colors of the advertisement.

Consumers may not understand that content is an advertisement if the sponsorship disclosure blends into the background color of the advertisement or if sponsorship disclosures are hidden in captions that are not visible unless consumers click to “view more.” Examples of hard to see disclosures are included below. On the left, @elleusa included a “Sponsored” label on its Instagram story, but the white words are difficult to see on the white background.⁵⁷ On the right, @virgo habits included #casetifypartner, but the disclosure is not visible unless viewers click “See more” on the caption.⁵⁸

⁵³ *Id.*

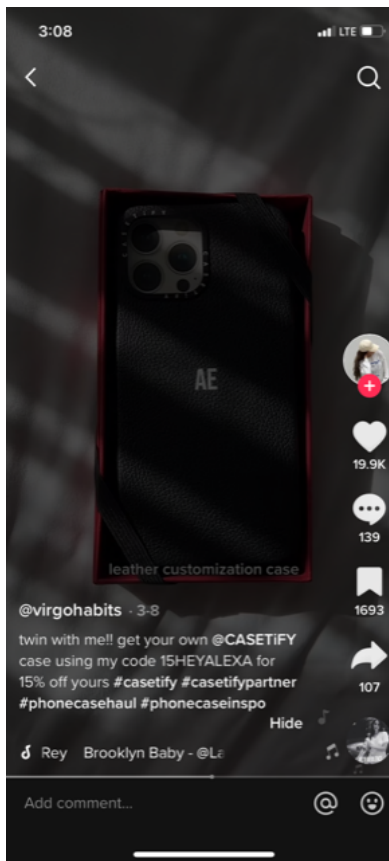
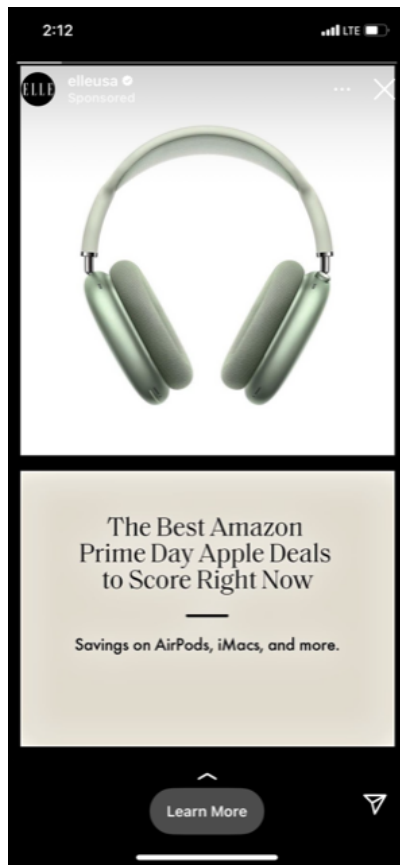
⁵⁴ *Id.*

⁵⁵ Harry Brignull, Types of Deceptive Design, Deceptive Design, <https://www.deceptive.design/types>.

⁵⁶ *Ad Formats*, Meta, <https://www.facebook.com/business/ads/ad-formats> (last visited July 18, 2022).

⁵⁷ @elleusa *Sponsored Story*, (July 12, 2022), Instagram App, iPhone 11.

⁵⁸ @virgo habits *Sponsored Video*, (July 12, 2022), TikTok App, iPhone 11.



III. The Commission should update the Guidance to account for increasingly common dark patterns and deceptive practices in digital advertising.

The FTC should update its Guidance on digital advertising in light of the growing prevalence of dark patterns in digital advertising. Although the FTC’s current Guidance requires online advertisements to be labelled clearly and conspicuously (and its *Disclosures 101 for Social Media Influencers* provides guidance for brand partnership disclosure), the online advertising ecosystem has changed significantly since 2013.⁵⁹ In addition to updating its Guidance to reflect the current online environment, the FTC should also enhance efforts to monitor platforms’ compliance with the Guidance.

⁵⁹ .com Disclosures, FTC (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [hereinafter “.com Disclosures”]; *Disclosures 101 for Social Media Influencers*, Federal Trade Commission (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

Clear and conspicuous advertisement labels are necessary to prevent consumer confusion and manipulation. Adding a disclosure to an advertisement helps consumers to recognize that the content is an advertisement. Recognizing the sponsored nature of the content communicates the commercial intent to sell the good or service to the consumer. Sponsorship disclosures make consumers more skeptical about a brand, so advertisers often seek to make their ad more effective by minimizing disclosures. For example, advertisers often partner with social media influencers to make their advertisements feel more like a natural endorsement than a traditional commercial. The FTC should update its Guidance to clarify that advertisers may not minimize sponsorship disclosure in advertisements, especially given the increasingly pervasive and manipulative nature of online advertising.

In particular, the FTC's Guidance should be updated to ensure that it reflects the unique needs of children and adolescents online. Young people are frequently targeted in online marketing campaigns.⁶⁰ However, youth are still developing online literacy, so they are even more likely than adults to be manipulated by dark patterns.⁶¹ The FTC should incorporate specific guidance regarding advertisement disclosures targeted to children and adolescents. For example, sponsorship disclosures should be written clearly in language that children can understand.

In addition to updating its Guidance to reflect the current online environment and the needs of all users, the Commission should also enhance compliance efforts pertaining to online disclosures. Some platforms' terms specifically require advertisers to include clear sponsorship disclosures, like

⁶⁰ Delia Cristina Balaban, et. al., *Adolescents' Understanding of the Model of Sponsored Content of Social Media Influencer Instagram Stories*, 10 Media & Comm. 305, 306, Nov. 2021, <https://www.proquest.com/docview/2650005682?accountid=36339&forcedol=true&parentSessionId=RmrQzyWgMN3B0gAINSh%2FSBdhkEgtV5hJnMfN6NZNSgQ%3D&pq-origsite=primo>.

⁶¹ *Id.* at 312.

Instagram and Facebook,⁶² but others, like LinkedIn, Pinterest, and TikTok,⁶³ have vague sponsorship disclosure policies or no policies at all. Platforms' terms are often not in line with the FTC's Guidance, and instances of improperly disclosed sponsorships are prevalent across social media platforms. The Commission should take this opportunity to strengthen its Guidance accordingly; to ensure that platforms' sponsorship policies and agreements with advertisers are in line with that Guidance; and to ensure that platforms have robust controls in place to catch violations of those policies.

IV. The Guidance should limit the ability of advertisers to separate required disclosures from triggering claims.

EPIC urges the Commission, in its revised Guidance, to further minimize the opportunities for advertisers to place a required disclosure on a separate webpage or screen from the advertisement to which it pertains. Directing users to another page to read important disclosures decreases the likelihood that users will actually read and understand the content of those disclosures. The current Guidance acknowledges the risk that consumers may not read hyperlinked disclosures and directs businesses to pay attention to indications that consumers are not seeing, reading, or understanding necessary disclosures.⁶⁴ The current Guidance also instructs companies to follow empirical data about whether consumers read disclosures and note that "if hyperlinks are not followed, another method of conveying the required information would be necessary."⁶⁵ Although these guidelines serve to limit the distance between each disclosure and its "triggering claim,"⁶⁶ the potential for

⁶² *Branded Content Policies*, Instagram, https://help.instagram.com/1695974997209192?helpref=faq_content (last visited July 18, 2022); *About Branded Content Policies*, Meta Business Help Center, <https://www.facebook.com/business/help/653146638176520?id=1912903575666924> (last visited Jul 18, 2022).

⁶³ *Sponsored Content*, LinkedIn, <https://business.linkedin.com/marketing-solutions/native-advertising> (Last Visited July 18, 2022).

⁶⁴ *.com Disclosures*, *supra* note 59, at 7, 13.

⁶⁵ *Id.*

⁶⁶ *Id.* at ii.

deliberate obfuscation remains. Accordingly, EPIC urges the Commission to tightly constrain the circumstances in which disclosures may be made on a separate webpage or screen. In situations where it would be genuinely impossible—not merely challenging—for an advertiser to make required disclosures in direct conjunction with an advertisement, the Commission should establish the expectation that advertisers will still provide as much relevant information as feasible in or adjacent to the ad. This will minimize the need for consumers to take the cumbersome step of visiting a second page or screen to obtain at least a passing understanding of important information about the advertisement.

The same logic holds for circumstances in which a consumer must navigate multiple webpages in order to complete a purchase. As the Commission’s current Guidance notes, “Consumers may not relate a disclosure on the order screen to information they viewed much earlier.”⁶⁷ To minimize the risk that consumers will complete a purchase without an awareness of relevant disclosures, the Commission should establish an expectation that such disclosures be made both at the beginning of the consumer’s clickstream (in conjunction with the advertisement or claim to which each disclosure pertains) and again at the end of the clickstream (when the consumer would actually order the product in question). This guideline would provide an additional assurance that individuals are able to make fully informed consumer decisions online.

V. Conclusion

EPIC applauds the Commission for its continued attention to pernicious effects of dark patterns and other deceptive practices in online advertising. We urge the Commission to revise its Guidance on digital advertising consistent with the above evidence and recommendations.

⁶⁷ *Id.* at 15.

Sincerely,

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