



August 30, 2021

VIA EMAIL

Samuel Levine
Acting Director, Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580
[REDACTED]

Re: FabKids' Deceptive Advertising and Illegal Business Practices

Dear Mr. Levine:

A recent Truth in Advertising, Inc. ("TINA.org") investigation into TechStyle, Inc.(f/k/a Just Fabulous, Inc.)'s FabKids brand revealed that the company is engaged in deceptive marketing and illegal business practices, in violation of the Restore Online Shoppers Confidence Act (ROSCA)¹ and FTC law.

In February 2020, TINA.org reported to the FTC violations of law by TechStyle, Inc. for its deceptive advertising of its Savage X Fenty brand.² TINA.org now has evidence that the company's FabKids brand is violating the law in many of the same ways.

Specifically, TINA.org's investigation revealed, among other things, that FabKids:

- deceptively promotes discounts and product prices that are only available to consumers who are bound to the company's VIP membership program without clearly and conspicuously disclosing this fact in its marketing materials;
- by default, enrolls consumers into a negative option offer known as the VIP membership without clearly and conspicuously disclosing all the material terms and conditions, such as needing to take affirmative action every month to avoid recurring monthly charges;
- falsely tells consumers that monthly charges can be used as store credit "any time, on anything" when, in reality, the company prohibits consumers from using store credit unless they spend \$39.95 or more, among other restrictions – a fact not disclosed in any of its marketing materials; and

- employs dissuasion and diversion tactics so that consumers encounter unnecessary difficulty when trying to cancel their FabKids VIP memberships.

In addition, the company uses social media influencer advertisements that fail to adequately disclose the influencers' material connections to the company.

Each of these deceptive acts and practices are explained below.³

A. Deceptive Advertising of Prices and Sales

FabKids advertises on television and social media platforms, including Instagram, Facebook, and YouTube. In addition to advertising on its own social media pages, the company purchases Facebook and Instagram ads, and pays social media influencers to market the brand on their personal accounts. The company also frequently sends consumers promotional newsletters.⁴

Throughout its marketing, FabKids promotes prices and sales that are only available to consumers who are bound by the company's VIP membership program, but it does not generally disclose this fact clearly and conspicuously.

By way of example, a video posted on FabKids' YouTube channel⁵ entitled "Why moms need to know about FabKids," which has been viewed more than 43,000 times, fails to clearly and conspicuously disclose that the prices advertised are only available to members of FabKids' VIP program, as well as all of the material conditions of the negative option offer.

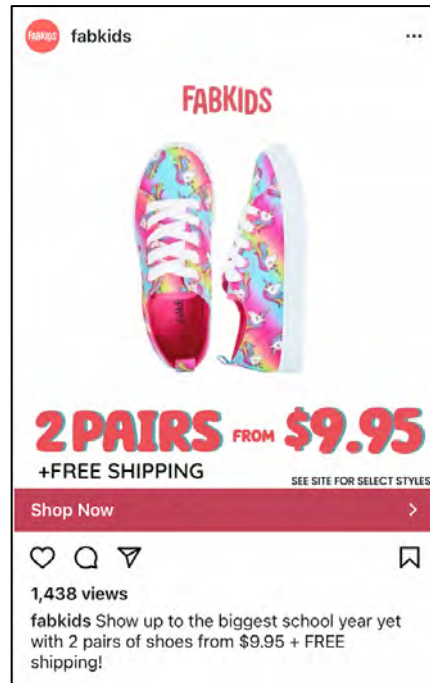
While the video states the membership conditions in barely legible fine print for a few seconds,⁶ the children featured in the 30 second commercial, as well as the voiceover, never mention the conditions when advertising the pricing:

"[Kids]: Mom! You're buying shoes all wrong! You're spending way too much on my shoes! Go to FabKids! Get two pairs of shoes for \$9.95! ... Two pairs of shoes for \$9.95? Who does that? ... [Voiceover:] Right now, get two pairs of shoes from just \$9.95 plus free shipping only at FabKids.com"

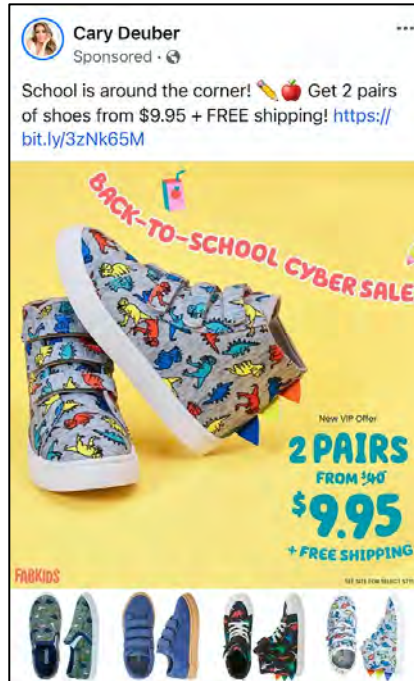


Screenshot

Similarly, other FabKids ads, such as the Facebook and Instagram ads below, promote a “2 pairs from \$9.95” sale that applies to new individuals that join the VIP membership program, but the only indicator of this limitation – if one exists at all – is the ambiguous phrase in small print stating “New VIP Offer” above large, bold, all caps print that states “2 PAIRS FROM \$9.95 + FREE SHIPPING.”

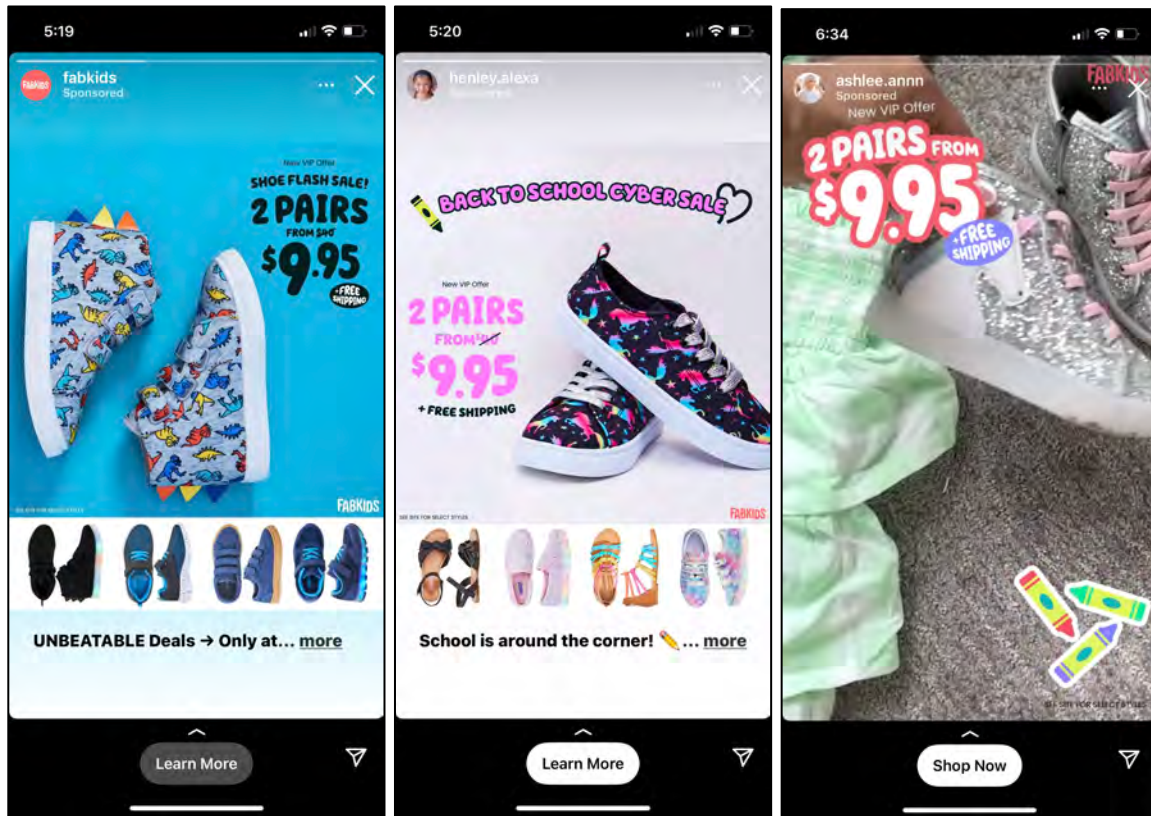


No disclosure of pricing conditions



Fine print states “New VIP Offer” with no disclosure of pricing conditions

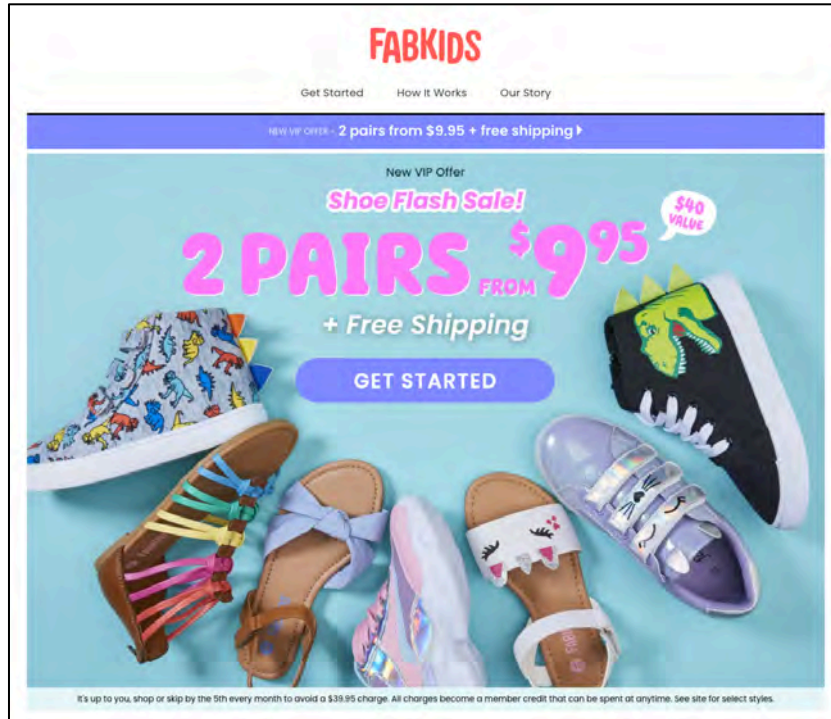
The same deceptive tactic is used in Instagram stories (both on FabKids’ account as well as on FabKids influencers’ accounts) where the images disappear within seconds, making the rather meaningless “New VIP Offer” language even more ineffective.



TINA.org has collected more than 80 examples of deceptive FabKids marketing materials that fail to clearly and conspicuously disclose the material conditions for obtaining the offered price, all of which violate FTC law, and are available at <https://www.truthinadvertising.org/fabkids-deceptive-pricing-database/>.

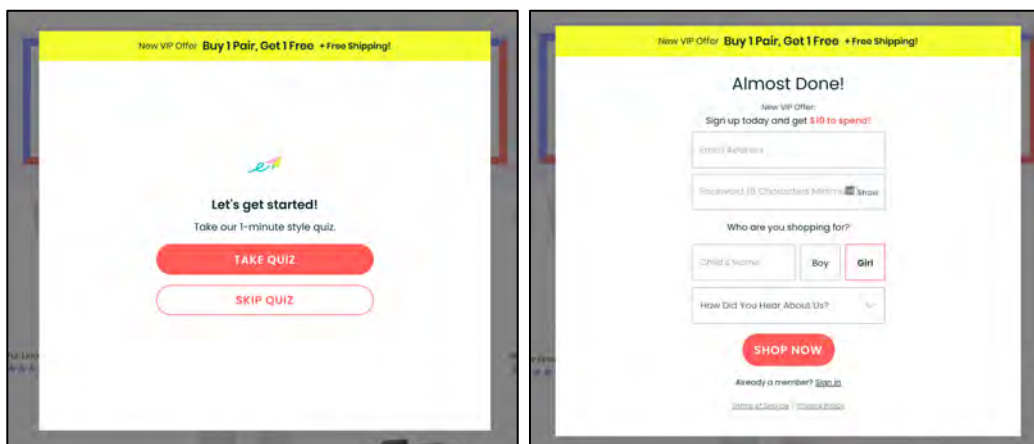
Unclear and Inconspicuous Negative Option Offer

Consumers whose interest has been piqued by the company’s advertisements may then visit its website, www.fabkids.com. There, the home page boldly advertises a “Shoe Flash Sale! 2 Pairs From \$9.95 + Free Shipping” with a prompt to “Get Started.”



In miniscule black print beneath the colorful offer and the prompt to shop (i.e., in a place consumers will not see unless they do not click on the “Get Started” button and instead scroll down the page) the company states “It’s up to you: shop or skip by the 5th of every month to avoid a \$39.95 charge. All charges become a member credit that can be spent at anytime. See site for selected styles.” Similar fine print terms are disclosed near the bottom of the homepage.⁷

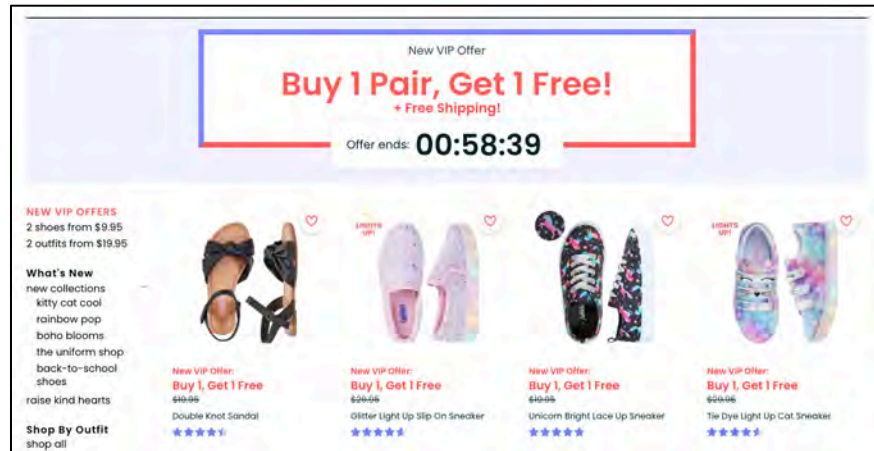
Clicking on the “Get Started” button leads consumers to a pop-up asking them to take or skip a quiz, followed by a prompt to enter an email address, as well as other information.



(Consumers cannot shop the website without entering the requested information)

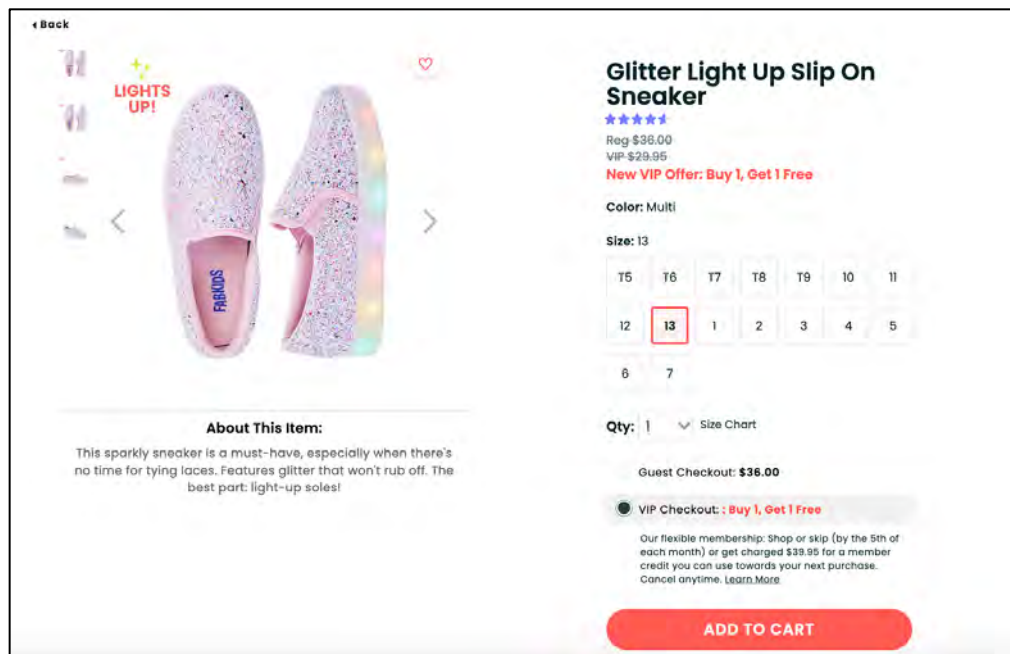
After entering the required information and clicking on “Shop Now,” consumers are led to a page with a prominent countdown clock at the top, apparently counting down the

remaining minutes and seconds before the advertised offer ends (but never actually ends), a type of dark pattern used to add a false sense of urgency to a sale.⁸



On this same page, each product is shown with a red “Buy 1, Get 1 Free” offer but no ultimate price is shown.⁹

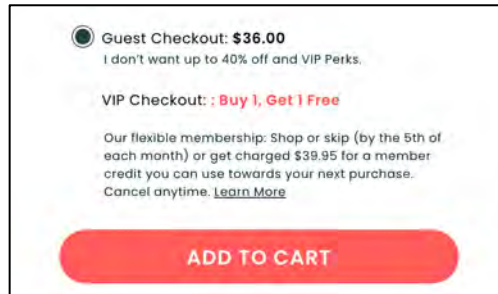
Clicking on a product, such as the Glitter Light Up Slip On Sneaker, brings consumers to an individual product page where the “New VIP Offer: Buy 1, Get 1 Free” language is repeated but the VIP price at the top of the page is crossed out (along with the regular price, though a “guest” price of \$36 is provided further down the page). At this point in the shopping process, it is unclear how much a consumer must pay to get the BOGO deal.



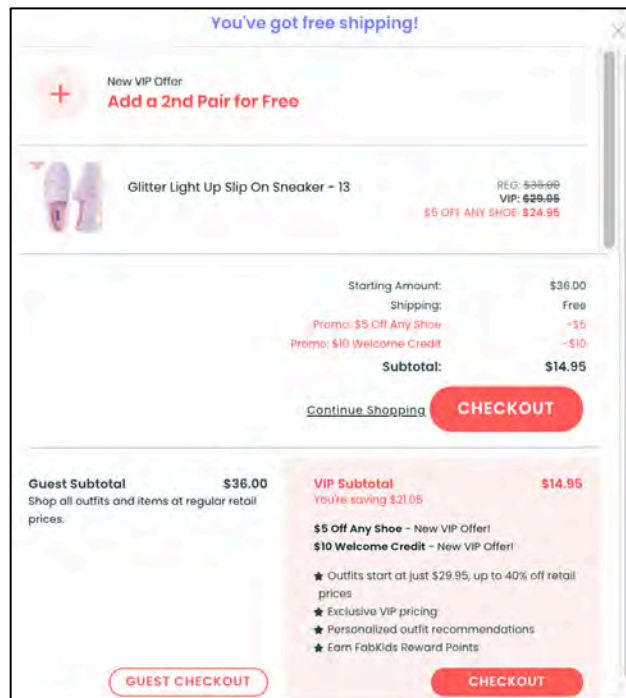
As the screenshot above shows, the “VIP Checkout” is preselected. Just below that grey box, select terms of FabKids “flexible membership” program are provided in fine print:

Our flexible membership: Shop or skip (by the 5th of each month) or get charged \$39.95 for a member credit you can use towards your next purchase. Cancel anytime. [Learn More](#)

However, there is nothing to affirmatively link the membership program to the “New VIP Offer.” Only if a consumer clicks on “Guest Checkout” do they get an inkling that there are conditions on the VIP offer when FabKids attempts to pressure consumers to rethink their decision by stating “I don’t want up to 40% off and VIP Perks,” another dark pattern known as confirmshaming.¹⁰

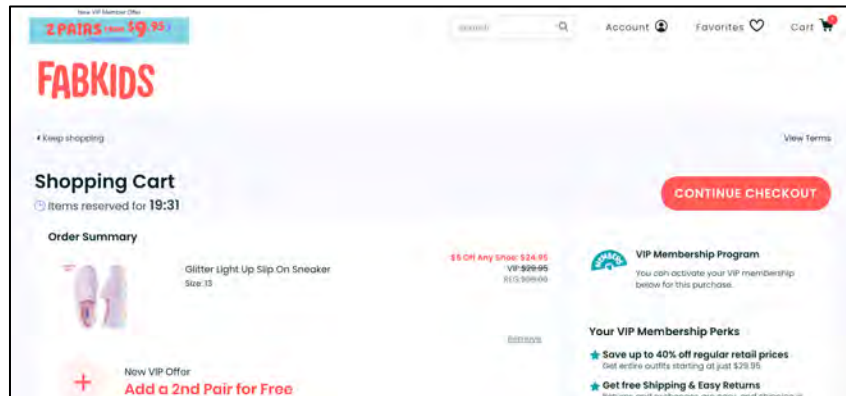


Consumers who either do not notice the Guest Checkout option or opt for the VIP Checkout then click “Add to Cart” and are brought to the following screen, which finally indicates what the cost of the purchase will be.¹¹ However, none of the financial or other material obligations of the VIP membership are disclosed on this page.

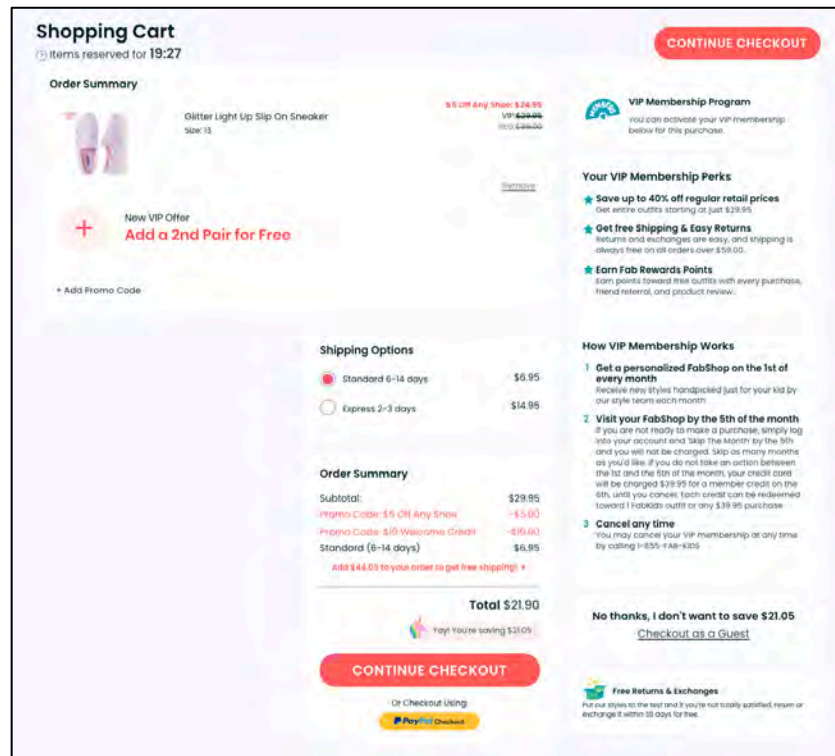


Clicking on “Checkout” brings consumers to the following screen featuring another (fake) countdown timer in the upper left corner apparently showing how many minutes the items in the cart are reserved. If consumers scroll down far enough on the page, they

might see, in fine black print separated from the brightly colored “Continue Checkout” buttons, terms about the negative option offer. However, consumers can “continue checkout” without ever having to scroll down the page.



View of the Shopping Cart page without scrolling down



View of the Shopping Cart page after scrolling down to see “How VIP Membership Works”

“If you are not ready to make a purchase, simply log into your account and ‘Skip The Month’ by the 5th and you will not be charged. Skip as many months as you’d like. If you do not take an action between the 1st and the 5th of the month, your credit card will be charged \$39.95 for a member credit on the 6th, until you cancel. Each credit can be redeemed toward 1 FabKids outfit or any \$39.95 purchase”

At this point, any consumer wishing to checkout as a guest rather than continue with a VIP membership is faced with additional confirmshaming (“No thanks, I don’t want to save \$21.05”), as shown above.

Clicking on either “Continue Checkout” button leads consumers to a page that prompts consumers to enter “Billing & Shipping” information.

FABKIDS

3 PAIRS ~~was \$9.95~~

Account Favorites Cart Offer ends in 57:28

Billing & Shipping

1. Enter Address Information

Shipping Address * required fields

*First Name *Last Name

*Address

Address can't be city name

Apartment / Suite # (Optional)

*City

*Country
 United States

*State *Zip Code

*Phone Number

Billing Info

Some as Shipping Address

Different from Shipping Address

CONTINUE CHECKOUT

2. Payment Information

Order Summary Member Status: VIP

- 3D Dino High Top Sneaker \$59.95
Size: T7
Qty: 1
- Paint Splatter Slip On Light Up Sneaker \$59.95
Size: T7
Qty: 1

Subtotal \$59.90

Promo Code: Buy 1, Get 1 FREE -\$29.90

Promo Code: \$10 Welcome -\$13.00

Credit

Shipping: standard (6-14 business days) Free

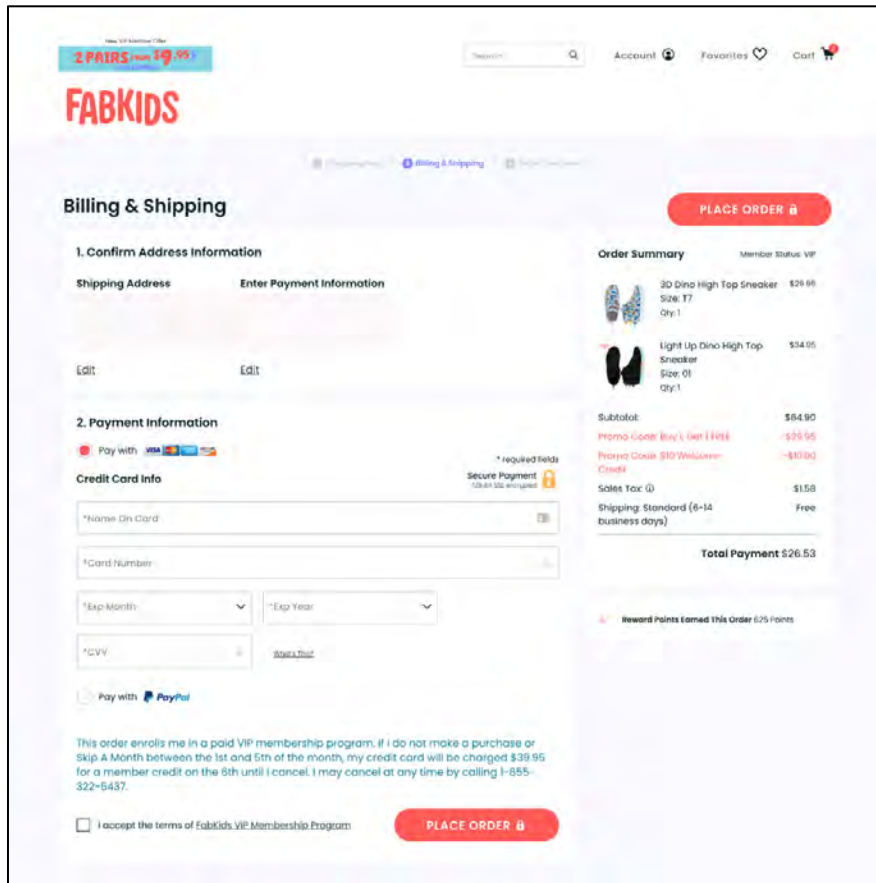
Total Payment \$19.95

Reward Points Earned This Order: 500 Points

How VIP Membership Works

- Get a personalized FabShop on the 1st of every month**
Receive new styles & merchandise just for you led by our style team each month.
- Visit your FabShop by the 5th of the month**
If you are not ready to make a purchase simply log into your account and "Skip The Month" by the 5th and you will not be charged. Skip as many months as you'd like. If you do not take an action between the 1st and the 5th of the month, your credit card will be charged \$39.95 for a member credit on the 5th, until you cancel. Each credit can be redeemed toward 1 FabKids outfit or any \$39.95 purchase.
- Cancel any time**
You may cancel your VIP membership at any time by calling 1-800-FAB-KIDS.

View of page when prompting consumer to enter shipping information



View of page when prompting consumers to enter billing information

As shown above, when consumers are prompted for shipping information, certain terms of the VIP membership are disclosed in fine print on the side of the page rather than above the “Continue Checkout” button, which does not comport with the FTC’s definition of “clear and conspicuous.”¹² And when consumers are prompted for billing information, there is an abbreviated summary of the terms of the VIP membership in fine print *after* FabKids has collected consumers’ credit card information, which does not comply with ROSCA’s requirement that all material terms of the transaction be clearly and conspicuously disclosed *before* obtaining the consumer’s billing information.¹³

In sum, the material terms and conditions of the FabKids membership program are never clearly and conspicuously disclosed to consumers. The different language used throughout the marketing and shopping process to describe the “New VIP Offer” versus the material terms of the VIP membership program, which only appears in small font and in easy-to-miss locations, in combination with the use of dark patterns, including countdown timers and confirmshaming, ensures that the material terms of FabKids’ negative option offer are never adequately disclosed. In fact, numerous consumers have complained about unwittingly being signed-up for FabKids’ negative option offer.

By way of example, the complaints below were posted to the BBB’s review page for FabKids in July and April 2021:¹⁴

I am absolutely beyond mad to find out that Fabkids has been charging me \$39.99 per month!! I bought my Daughter some shoes for X-Mas. THAT WAS 7 MONTHS AGO!!!! This company is a huge scam!!! I just lost out on almost \$300! This should be a crime and will be reporting this to my bank!

I purchased a few months back not realizing that I would be signed up for vip charging me ***** monthly. I just realized it today... I've been charged the last 3 months...

They charge your card \$39 every single month even if you do not shop that month. I would have never even shopped on their website if I known that. No where did I see I would be charged \$39. I think it's sneaky and not good business. And I also see I'm not the only one who had this problem. I would have never known they were taking money out if it wasn't for me checking my bank statement because they don't send you a receipt to your email like they do when you order something.

Further, according to FabKids' Terms of Service, it automatically enrolls consumers in the VIP Membership program when they purchase any item from the website, indicating that the company may not be obtaining consumers' informed consent.¹⁵ Specifically, the Terms of Service state:

To become a FabKids VIP Member, simply purchase any FabKids item on this Site or through an applicable FabKids Service and you will be automatically enrolled in the FabKids VIP Membership Program (including the monthly, automatic purchase feature).

In short, it is clear that FabKids pushes consumers into a negative option offer without clearly and conspicuously disclosing all material terms and conditions and without obtaining consumers' affirmative consent, in violation of ROSCA, as well as the FTC's general disclosure requirements for online marketing.

B. Material Store Credit Limitation is Hidden

Consumers who read through the FabKids homepage¹⁶ and "How It Works" page¹⁷ are repeatedly told that those who sign up for the VIP membership and accumulate store credit can use that store credit "any time, on anything."

**Become a VIP and get up to 40% off
all day, every day**

How it works: It's so easy...

<p>1</p> <p>Get personalized picks!</p> <p>Shop our limited-edition monthly collections with outfits and shoes curated just for kids!</p>	<p>2</p> <p>Shop, skip or save</p> <p>Choose to shop, skip or rack up a member credit to spend later. If you don't shop or skip by the 5th (we'll send you reminders!), your credit card will be charged \$39.95 on the 6th until you cancel. This charge is a member credit in your VIP account to use any time, on anything.</p>	<p>3</p> <p>Put it to the test</p> <p>Hit the playground! Try out the new styles and if you're not totally satisfied, you can return or exchange within 30 days.</p>	<p>4</p> <p>No strings attached</p> <p>It's easy to cancel! Call Member Services 24/7 at 1-855-FAB-KIDS or use our online Live Chat Service from 9AM-9PM EST.</p>
--	---	--	--

Your membership is always in your hands!

Screenshot from FabKids homepage

2

Shop, skip or save

Choose to shop, skip or rack up a member credit to spend later. If you don't shop or skip by the 5th (we'll send you reminders!), your credit card will be charged **\$39.95** on the 6th until you cancel. This charge is a member credit in your VIP account to use **any time**, on anything.

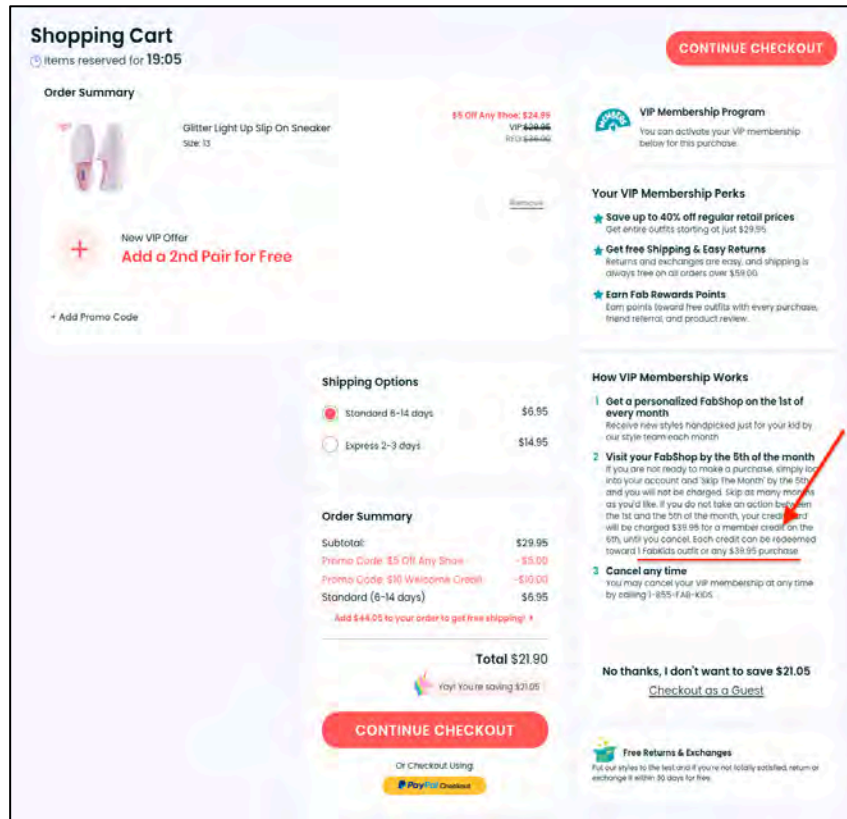
Screenshot of text on How It Works page

Member Credits: 0

**Credits can be used
anytime, on anything.**

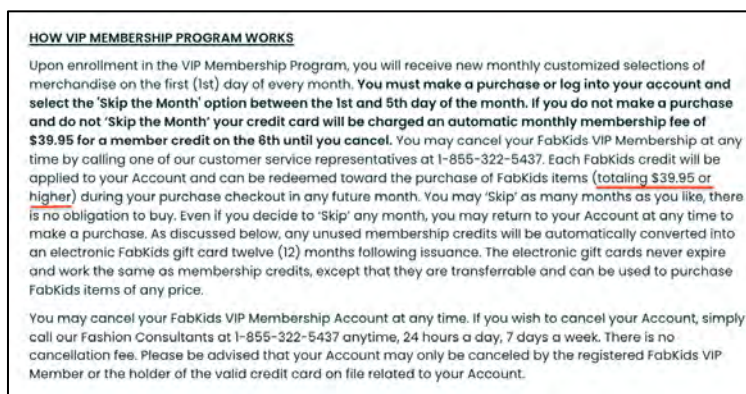
Screenshot from video on How It Works page

In reality, however, FabKids significantly limits when consumers may use their accumulated unused store credits, and only discloses this in two different fine print statements. First, the fine print terms in the bottom right corner of the Shopping Cart page and Billing & Shipping page – pages that both include a countdown timer – state that store credit can be “redeemed toward 1 FabKids outfit or any \$39.95 purchase.”¹⁸



Red underline added by TINA.org

Second, more than 700 words into the company’s Terms of Service,¹⁹ which are accessible at the bottom of the FabKids homepage, the company states that store credit can “be redeemed toward the purchase of FabKids items (totaling \$39.95 or higher) during your purchase checkout in any future month.”



Red underline added by TINA.org

FabKids’ Terms of Service also state, more than 1,300 words into the document, that “Membership credits may only be redeemed in one transaction” and, worse, that the company “expressly reserves the right to impose inactivity or dormancy fees on membership credits and gift cards in some or all states...”²⁰

In other words, FabKids conceals – deep within a document that most customers will never read – that it might charge consumers *more* than \$39.95 for forgetting to skip a month, and that consumers’ store credit is not actually free to use “any time, on anything.” In fact, TINA.org was unable to find any FabKids marketing materials that disclose these material facts. This deception is a clear violation of ROSCA and FTC law.²¹

C. Difficulty Canceling Subscription

Countless consumers also report experiencing great difficulty when trying to cancel their FabKids VIP Memberships, which can only be done by calling the company, or possibly via online chat,²² despite the fact that joining the subscription service only takes the click of a button online. For example,²³

I have been calling the company to ask for my VIP membership refund as promised. Every time I call to ask where my refund is, they say the same thing, "waiting for back office" and "need to get a supervisor". The total amount they agree to refund changes every single time I talk to someone. Every time! I feel like they are either a scam company or they are really trying to delay doing anything so that I'll have to pay another \$29.95 for VIP. Which by the way, I didn't realize I signed up for. Tricky tricky. I cannot cancel the membership until I use up my credits, which I can't even use until they refund the part they agreed to. I'm tired, I just want my refund. (7/20/21)

I would give 0 stars if it was an option. This company is such a scam. I ordered one thing off their site and was charged \$39 a month going forward. I called in March 2021 to cancel the membership that I never signed up for, only to find out in July that they have still be charging me. This cannot be legal. (7/14/21)

I am aware this is subscription based but I cancelled my subscription in October 2020. Then, since January 2021 I've been getting charged monthly with no authorization from myself. I have called to get the fees credit back, and they do credit me back but it is a pain to be calling every month to have these fees credit back. I have asked multiple times to stop charging me. I am very upset at the way they do business. I will never be buying anything from here ever again. (3/16/21)

If you buy any item of clothing, they sign you up for a membership and then they charge you \$39.95/month after that on your card to go and buy clothes from their site with. Then they do not let you cancel the membership!! Do not buy here! (2/6/21)

No doubt the tactics used by FabKids customer service representatives, as reported by consumers, are employed to dissuade, or even prevent, VIP members from canceling so that FabKids may continue charging consumers on a monthly basis. This practice violates ROSCA.

D. Deceptive Social Media Influencer Ads

Finally, many FabKids influencers are marketing the company's products without clearly and conspicuously disclosing their material connections to the company. TINA.org has identified a sampling of more than 45 social media influencer posts by more than 25 different influencers that deceptively advertise FabKids' products. These posts do not contain adequate disclosures of the influencers' material connections to the company either by failing to include any disclosure at all, using inadequate and unclear language to disclose the relationship, or placing the disclosure in a place that it will easily be overlooked by consumers. Below are examples of each of these deceptive influencer marketing issues.

FabKids influencer ad without disclosure of influencer's connection to the company:²⁴



FabKids influencer ad using unclear language (i.e., “#myfabkids”) to disclose connection to the company:²⁵



FabKids influencer buries influencer’s material connection so it is easily overlooked by consumers:²⁶



TINA.org’s sampling of deceptive social media ads for FabKids is available at <https://www.truthinadvertising.org/fabkids-influencer-database/>.

Conclusion

FabKids deceives consumers in a multitude of ways in order to persuade them to purchase children’s clothing and shoes, much like TechStyle’s Savage X Fenty brand does to persuade consumers to purchase lingerie. TINA.org urges the Federal Trade Commission to commence an investigation into TechStyle and its subsidiary Personal Retailing, Inc. d/b/a FabKids and take appropriate enforcement action.

Sincerely,

Laura Smith, Esq.
Legal Director
Truth in Advertising, Inc.

Bonnie Patten, Esq.
Executive Director
Truth in Advertising, Inc.

Cc via email: Matt Fojut, General Counsel, TechStyle Fashion Group
Edward Shapiro, Reed Smith

¹ 15 U.S.C. §§ 8401-8405.

² See TINA.org February 10, 2020 Complaint, available at https://www.truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf.

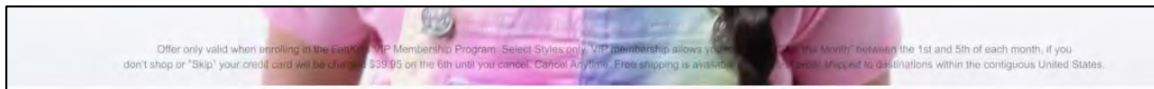
³ Just like Savage x Fenty, FabKids’ deceptive acts and practices also violate the 2014 California Stipulated Final Judgment against TechStyle and others. Accordingly, TINA.org has also notified California District Attorneys of its FabKids findings.

⁴ Milled: FabKids, <https://milled.com/fabkids>.

Of note, a review of the company’s daily email newsletters indicates that the company may, in addition to the numerous deceptive practices outlined in detail in this letter, be running perpetual – and therefore fabricated and deceptive – sales on their products for new VIP Members.

⁵ FabKids YouTube channel, <https://www.youtube.com/channel/UCm3KrVC1B7CPYhuyaTrMBpg>.

⁶ The fine print that appears at the bottom of the screen for a brief few seconds states:

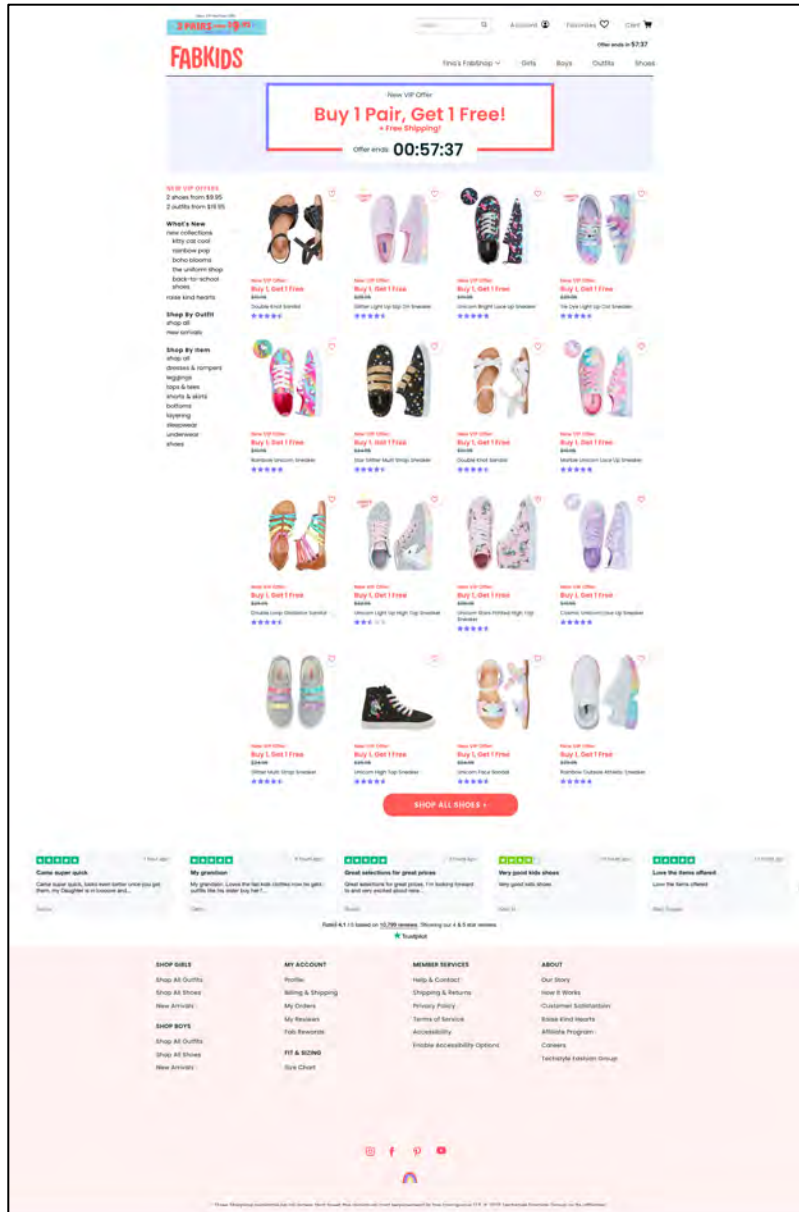


“Offer only valid when enrolling in the FabKids VIP Membership Program. Select Styles only. VIP Membership allows you to shop or “Skip the Month” between the 1st and 5th of each month, if you don’t shop or “Skip” your credit card will be charged \$39.95 on the 6th until you cancel. Cancel Anytime. Free shipping is available on your first order, shipped to destinations within the contiguous United States.”

⁷ Screenshot of the FabKids home page (red arrow added by TINA.org):

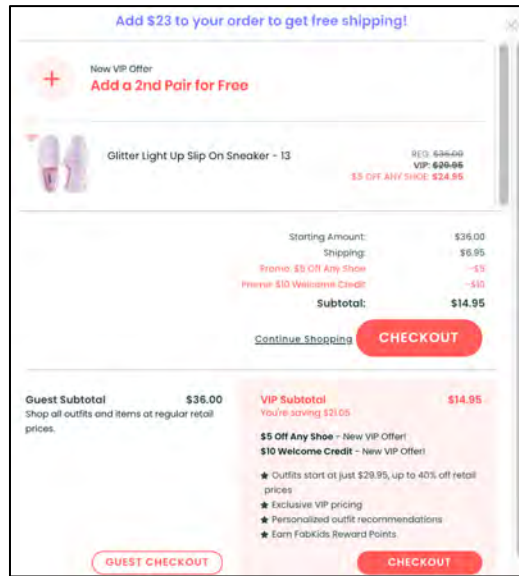
⁸ See Hayley Peterson, *Retailers ‘exploit’ shoppers with fake countdown clocks, sneaky charges, and other ‘dark pattern’ tricks that lure people into spending more money online – here’s what to watch out for*, Nov. 25, 2019, available at <https://www.businessinsider.com/how-shoppers-are-lured-into-spending-more-money-online-2019-11>; Reed Steiner, *Dark Patterns: A New Scientific Look at UX Deception*, Feb. 14, 2020, available at <https://www.fyresite.com/dark-patterns-a-new-scientific-look-at-ux-deception/>.

⁹ <https://www.fabkids.com/fabshop?newleadreg=1>.



¹⁰ Dark Patterns, <https://www.darkpatterns.org/types-of-dark-pattern/confirmshaming>.

¹¹ Even if you click on “Guest Checkout” and then “Add to Cart,” the following pop-up populates, forcing consumers to re-select the less colorful “Guest Checkout.”



¹² See FTC .com Disclosures: How to Make Effective Disclosures in Digital Advertising, available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

¹³ 15 U.S.C. § 8402(a)(1).

¹⁴ BBB FabKids page, <https://www.bbb.org/us/ca/san-francisco/profile/childrens-clothing-stores/fabkids-1116-440970/customer-reviews>.

¹⁵ FabKids Terms of Service, <https://www.fabkids.com/terms>.

¹⁶ <https://www.fabkids.com/>.

¹⁷ <https://www.fabkids.com/how-it-works>.

¹⁸ <https://www.fabkids.com/terms>.

¹⁹ *Id.*

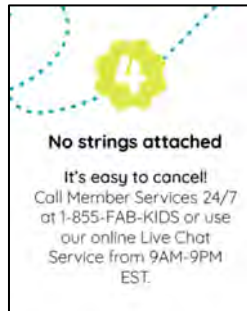
²⁰ *Id.*

²¹ In addition to this store credit issue, at least one consumer has also reported their store credit disappearing.

I purchased a few months back not realizing that I would be signed up for vip charging me ***** monthly. I just realized it today... I've been charged the last 3 months... that blame is on me as I didn't read the fine print but what they didn't tell me today when canceling is that my points would be removed as well...I called customer service asking why they informed me that they were removed due to canceling my vip... I've been paying them almost \$40 for the last 3 months the least they could do is allow me to either use my points for refund me money!! He said he couldn't do that but what he could do was re enroll me to start earning points again...really? I opted out because I never use it but they'll take your money in a heartbeat!! They only want your money!!

See <https://www.bbb.org/us/ca/san-francisco/profile/childrens-clothing-stores/fabkids-1116-440970/customer-reviews>.

²² FabKids' homepage states that membership cancellation can be done over the phone or through an online live chat (see screenshot below), while the company's Terms of Service contains conflicting information about cancellation stating that canceling can only be done over the phone. <https://www.fabkids.com/terms> ("You may cancel your FabKids VIP Membership at any time by calling one of our customer service representatives at 1-855-322-5437.")



Screenshot from FabKids homepage

²³ <https://www.bbb.org/us/ca/san-francisco/profile/childrens-clothing-stores/fabkids-1116-440970/customer-reviews>.

²⁴ https://www.truthinadvertising.org/wp-content/uploads/2021/08/FabKids-farnsworthdaisy-IG-6_17_21-combined.pdf.

²⁵ https://www.truthinadvertising.org/wp-content/uploads/2021/08/FabKids-therockymtnmomma-IG-5_26_21-tags.png.

The FTC advises social media influencers to use "simple and clear language," such as "advertisement," "ad," and "sponsored," rather than "vague or confusing terms like 'sp,' 'spon,' or 'collab,'" and to "stay away from other abbreviations and shorthand when possible." See FTC: Disclosures 101 for Social Media Influencers, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

²⁶ https://www.truthinadvertising.org/wp-content/uploads/2021/08/FabKids-lindyjboymom-IG-7_20_21-tags.png.

The FTC cautions that "[d]isclosures are likely to be missed if they appear ... at the end of posts or videos, or anywhere that requires a person to click MORE." See FTC: Disclosures 101 for Social Media Influencers, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.