CARLTON FIELDS

Social Media Influencers Take Center Stage

Expect Focus

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Securities products and social media don't always mix. Just ask any of the celebrities who in recent years have faced SEC charges for unlawfully touting crypto asset securities. In March, the SEC settled charges against six well-known personalities, including the likes of actress Lindsay Lohan and rapper Lil Yachty, for promoting on their social media certain crypto asset securities without telling their followers that they were being paid to do so in violation of section 17(b) of the Securities Act of 1933. NBA Hall of Famer Paul Pierce, in February, and social media maven Kim Kardashian, last October, settled similar SEC charges involving other crypto asset securities.

Section 17(b) makes it unlawful for any person to promote a security without fully disclosing the receipt and amount of any compensation from an issuer. It is now more than five years since the SEC and its staff first publicly warned that digital tokens or coins may be securities and that "any celebrity or other individual who promotes a virtual token or coin that is a security must disclose the nature, scope, and amount of compensation received in exchange for the promotion."

Anti-touting cases are relatively easy to charge because the SEC is not required to show an intent to defraud. Paid influencers who, whether knowingly or negligently, make false or misleading statements while promoting a security may face additional charges. Paul Pierce, for example, was also charged with violating section 17(a)(2) of the Securities Act, which prohibits obtaining money or property through false or misleading statements made in the offer or sale of securities, for allegedly making statements "indicating that he was holding — and intended to increase — his investment in the crypto asset security while contemporaneously selling the securities."

Paid influencers have not been the only targets of the SEC's attention. In a more egregious matter, the SEC charged eight individual social media influencers at the end of 2022 in a $100 million stock manipulation scheme on Discord and Twitter. The defendants allegedly used social media to amass a large following of novice investors and then took advantage of them by repeatedly feeding them "a steady diet of misinformation."

As if on cue, in February, FINRA issued an update on its ongoing targeted exam sweep, launched in September 2021, of firm practices related to, among other things, the use of social media influencer and referral programs to promote products and services and recruit new customers. The update summarizes selected practices in this area that firms are encouraged to consider to ensure their compliance arrangements are reasonably designed to achieve compliance with relevant regulatory obligations. Among the practices noted:

- Maintaining focused written supervisory procedures, including:
  - Additional controls for social media influencers with a relatively large social media presence;
  - Updating written supervisory procedures regularly and in response to program developments, regulatory changes, or industry trends; and
  - Addressing program participants' compensation.
- Evaluating potential social media influencers' backgrounds and prior social media activities to identify any compliance and reputational risks before admitting them into social media influencer programs.
- Providing training, and defining permitted and prohibited conduct, for social media influencers.
- Maintaining records of social media influencer and referral program communications with the public, consistent with applicable SEC and FINRA record-keeping obligations.

With the SEC and FINRA's heightened focus on the activities of social media influencers and their relationships with market participants, there would seem to be no time like the present for securities firms of all stripes to dust off their compliance policies and procedures in this area for a thorough review.

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