

ENTERTAINMENT AND SPORTS LAWYER

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Social Media Endorsement Activities Can Prompt Securities and Exchange Commission Liability for Celebrities

By Michael J. Rivera and Abby Yi

Celebrities have cultural, social and political influence on society. Celebrities exert their influence on social media platforms in a matter of seconds to their millions of followers. Their influence is the undeniable driving force behind lucrative endorsement and promotional deals. More than ever, celebrities utilize social media to endorse and promote more than basic household goods, gadgets and fashion lines, including, for example, insurance, financial products and investments. Celebrities should exercise caution when endorsing products in industries that are highly regulated by the government, as they are subject to complex laws and regulations that can easily be overlooked or misunderstood and can land the celebrity in hot water.

Endorsements of investment-related products pose heightened risks for celebrities as they fall under the jurisdiction of the Securities and Exchange Commission (SEC), known for being an aggressive regulator. Celebrity endorsements of investment products are therefore fraught with danger if not structured correctly. Recent SEC enforcement actions against celebrities illustrate this risk. Specifically, the SEC sued some celebrities for promoting certain digital assets in the form of Initial Coin Offerings (ICOs) on their social media platforms in a manner that violated the federal securities laws. These and other cases discussed in this article highlight a lurking hazard for celebrities beyond ICO endorsements because what constitutes an investment subject to the federal securities laws can be confusing, and often surprising, to both layman and non-securities lawyers.

While many perks come along with being a celebrity, notoriety generally is not a helpful attribute when a celebrity is in the cross hairs of a federal government investigation. For one thing, government agencies often relish the publicity garnered from suing a well-known person or company. And “landing a big fish” (*e.g.*, a celebrity defendant) may be perceived as advantageous for a prosecutor’s resume and promotion potential. Furthermore, the SEC’s announcement of charges against a celebrity most definitely receives broader and more diverse news coverage than does a run-of-the-mill case against an “ordinary” defendant.” As a result, a case against a celebrity can serve to more successfully propagate the SEC’s enforcement viewpoints and investor education warnings than the agency’s traditional (less widespread) methods. For these reasons, celebrities should proceed with caution when considering an endorsement deal to promote an investment-related product, and they certainly should not expect leniency due to their fame or unfamiliarity with the federal securities laws. Rather, they should expect the opposite.

Federal Securities Laws Implicated by Celebrity Endorsements

Federal securities laws apply to the offer and sale of products that constitute “securities.” Restrictions and obligations are imposed on those who offer and sell securities. The following federal securities laws are most implicated when celebrities publicly endorse products that are deemed to be securities:

- **Anti-Touting.** Section 17(b) of the Securities Act of 1933 (Securities Act) is known as the anti-touting provision. This law prohibits persons from promoting the sale of a security in return for undisclosed past or future compensation. Specifically, it is a violation of Section 17(b) for any person to “publish,

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give publicity to, or circulate any notice . . . or communication which . . . describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.¹ In other words, a person who received or was promised compensation in exchange for their promotion of a security must disclose this fact when promoting the security.

- **Registration of Securities.** Section 5 of the Securities Act requires all offers or sales of securities to the public to be registered with the SEC unless an exemption from registration is available.² Securities registration is designed to ensure the disclosure of information necessary to enable prospective purchasers to make informed investment decisions. Required disclosures include information about the issuing company's business operations, financial condition, management and risk factors.
- **Registration of Broker-Dealers.** Section 15(a)(1) of the Securities Exchange Act of 1934 (Exchange Act) requires persons involved in effecting securities transactions to register with the SEC as a broker-dealer or as a person associated with a broker-dealer.³ Individuals who participate in the solicitation or negotiation of securities transactions or receive compensation for securities transactions generally are deemed by the SEC to constitute broker-dealers.
- **Anti-Fraud.** Securities Act Section 17(a) and Exchange Act Section 10(b) are known as the anti-fraud provisions of the federal securities law.⁴ These provisions prohibit fraudulent and deceptive conduct in connection with the offer and sale of securities, including the failure to disclose material information that a reasonable shareholder would consider important in making an investment decision. The anti-fraud provisions prohibit the dissemination of false or misleading statements when promoting the offer and sale of securities.

In response to an increase in the use of social media by celebrities to tout investments, the SEC directly warned celebrities that they must comply with the applicable federal securities laws when publicly endorsing stocks and other investments. In an alert issued in November 2017, the SEC's Division of Enforcement and SEC's Office of Compliance Inspections and Examinations explained:

Celebrities and others are using social media networks to encourage the public to purchase stocks and other investments. These endorsements may be unlawful if they do not disclose the nature, source, and amount of any compensation paid, directly or indirectly, by the company in exchange for the endorsement A failure to disclose this information is a violation of the anti-touting provisions of the federal securities laws. Persons making these endorsements may also be liable for potential violations of the anti-fraud provisions of the federal securities laws, for participating in an unregistered offer and sale of securities, and for acting as unregistered brokers.⁵

The SEC has not limited itself to issuing warnings to celebrities about the need to follow the federal securities laws when endorsing investments. Rather, as described below, the SEC has filed multiple enforcement actions against celebrities for violations in this context.

Anti-Touting Prohibition: Concerns Arising From Celebrity Endorsements of ICOs

a) Proliferation of ICOs Draws SEC Scrutiny

ICOs became a hot vehicle for raising capital over the last several years. ICOs involve the sale of digital assets (*e.g.*, virtual coins or tokens) created and disseminated using distributed ledger or blockchain technology. ICOs soared in popularity as many startups sought to raise capital by avoiding the traditional rigorous undertakings required for initial public offerings (IPOs), opting instead for a less regulated capital-formation process through an ICO. In an ICO, a company issues digital "tokens," which can be purchased through cash or other existing tokens (*e.g.*, Bitcoin and Ethereum). As currently noted on the SEC's website, "Companies and individuals are increasingly considering initial coin offerings (ICOs) as a way to raise capital or participate in investment opportunities."⁶ Through 2019, over 5,600 ICOs have

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raised more than \$27 billion.⁷

A determination of whether a specific ICO constitutes a security depends on the particular facts and circumstances of the ICO. However, as noted by the SEC's Chairman, the SEC views most ICOs as securities, and thus are subject to the federal securities laws.⁸ The SEC's most recent Enforcement Division annual report, published in November 2019, described its enforcement activities against the unlawful promotion of ICOs as having "matured" and "expanded," and signaled the agency's stance that it will continue to critically review ICOs as securities.⁹

The rapid proliferation of ICOs prompted the SEC in July 2017 to issue a Report of Investigation warning the public that virtual tokens or coins sold in ICOs may constitute securities and that persons involved in the offer and sale of a security must comply with the federal securities laws.¹⁰ Furthermore, the SEC began to closely scrutinize ICOs because they became a vehicle for fraud by bad actors. As a result, cracking down on fraudulent ICOs is an SEC priority. The SEC has filed numerous cases alleging violations relating to ICOs over the past few years, and several in 2020, including as recently as September 15.¹¹ The SEC has also issued alerts warning the general investing public about frauds related to ICOs.¹² A recent decrease in the number of ICOs likely is due to the SEC's increasing scrutiny of ICOs.

The SEC's concern over ICOs escalated significantly when companies began utilizing celebrity endorsements to generate public interest in their ICOs. The SEC feared that the social media influence of celebrities could result in the investing public buying ICOs without understanding that the investment could be fraudulent and/or that the celebrities were paid to endorse the ICO (and therefore their endorsement may be biased or uninformed). As explained by the SEC in an investor alert to the general public:

Celebrities, from movie stars to professional athletes, can be found on TV, radio, and social media endorsing a wide variety of products and services – sometimes even including investment opportunities. But a celebrity endorsement does not mean that an investment is legitimate or that it is appropriate for all investors. **It is never a good idea to make an investment decision just because someone famous says a product or service is a good investment.**

Celebrities, like anyone else, can be lured into participating (even unknowingly) in a fraudulent scheme.¹³

In addition to alerting investors about fraudulent ICOs, the SEC issued a warning specifically directed at celebrities who promote ICOs. As noted above, an ICO that is a security (which the SEC believes is the case with virtually all ICOs) is subject to the requirements of the federal securities law, as are those individuals who promote the ICO. As such, the SEC cautioned that the federal securities laws (anti-touting provision) require celebrities to properly disclose compensation received in exchange for promoting an ICO that is a security and that the failure to do so could result in the celebrity being charged.¹⁴

b) SEC Enforcement Actions Against Celebrities for Violating Anti-Touting Provisions

After the SEC warned celebrities about ICO endorsements, the SEC filed several enforcement actions against celebrities who failed to heed the SEC's public warnings about ICO promotion on social media. The SEC charged the celebrities with violating the anti-touting provision by failing to disclose the nature, source and amount of compensation they received in exchange for their endorsements. These enforcement actions demonstrate the SEC's intent and willingness to punish celebrities who fail to abide by applicable securities laws in connection with investment endorsements (particularly in light of the public warnings issued by the SEC).

On November 29, 2018, the SEC announced that it had charged Floyd Mayweather Jr. and Khaled Khaled (known as DJ Khaled) in separate actions relating to their promotion of investments in ICOs.¹⁵ Mayweather is one of the most successful and celebrated boxers in American history. Khaled is a music industry mogul and world-renowned music producer. These cases represented the first SEC charges for anti-touting violations involving ICOs. The SEC alleged that Mayweather and Khaled touted investments in certain virtual coin or token ICOs on their social media accounts – including Instagram, Twitter and YouTube – without disclosing payments they received for their promotional efforts. For example, Mayweather’s Twitter account posted a picture of Mayweather holding his boxing title belts with this caption about an ICO of a now-defunct cryptocurrency firm named Centra Tech Inc. (Centra): “*Centra’s (CTR) ICO starts in a few hours. Get yours before they sell out, I got mine . . .*”¹⁶ Similarly, Khaled touted Centra’s ICO and debit card product on his Instagram and Twitter accounts and included the statement: “*This is a Game changer here. Get your CTR tokens now!*”¹⁷ Mayweather received promotional payments from three ICO issuers, including \$100,000 from Centra and \$200,000 from two other companies.¹⁸ Khaled was paid \$50,000 by Centra.¹⁹

To settle the SEC charges, Mayweather and Khaled agreed to disgorge (forfeit) the undisclosed promotional compensation at issue and to pay additional penalties and prejudgment interest, totaling over \$614,000 for Mayweather and over \$162,000 for Khaled.²⁰ In addition, the SEC prohibited Mayweather and Khaled from promoting securities for three years and two years, respectively. In the press release announcing these charges, a co-director of the SEC’s Enforcement Division commented on the importance of ensuring that investors receive the information necessary to understand whether an investment opinion could be biased: “These cases highlight the importance of full disclosure to investors. . . . With no disclosure about the payments, Mayweather and Khaled’s ICO promotions may have appeared to be unbiased, rather than paid endorsements.”²¹

More recently, on February 27, 2020, the SEC charged action movie star and producer, Steven Seagal, on similar charges of violating the anti-touting provisions by failing to disclose compensation he received for promoting an ICO sponsored by an international online company, Bitcoin2Gen (B2G).²² According to the SEC, Seagal promoted the B2G ICO on his social media accounts, including Twitter and Facebook, and posted links to participate in the B2G ICO.²³ The SEC alleged that Seagal failed to disclose a promise of \$250,000 in cash and \$750,000 worth of B2G tokens in exchange for his promotional efforts.²⁴ Seagal, who currently resides in Russia, consented to a settlement that required him to pay over \$300,000 (constituting the portion of the promised compensation that he received from B2G, an additional monetary penalty and prejudgment interest) and to abstain from promoting any securities for three years.²⁵ To reinforce the SEC’s present mission to protect investors in the context of paid celebrity investment endorsements, the chief of the SEC Enforcement Division’s Cyber Unit commented as follows on the Seagal settlement: “[t]hese investors were entitled to know about payments Seagal received or was promised to endorse this investment so they could decide whether he may be biased. . . . Celebrities are not allowed to use their social media influence to tout securities without appropriately disclosing their compensation.”²⁶

Additional SEC Exposure: Securities Registration, Broker-Dealer Registration and Fraud

To charge a celebrity with violating the anti-touting provisions, the SEC must prove that the celebrity both received and failed to disclose compensation in exchange for promoting an investment. However, celebrities who promote investments are not immune from SEC scrutiny even if they disclose *or receive no* such compensation due to other potentially applicable federal securities law requirements. In particular, depending on the circumstances, celebrities who actively promote and endorse securities can be held liable by the SEC for failing to register as a broker-dealer (in violation of Section 15(a)(1) of the Exchange Act) or for selling unregistered securities (in violation of Section 5 of the Securities Act). In a worst-case

scenario, the SEC can seek to impose its most serious charge – fraud – if the agency believes the celebrity has disseminated false or misleading statements in connection with the offer and sale of a security (in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act).

Grammy award-winning rapper T.I. (whose legal name is Clifford Harris, Jr.), film director and producer Ryan Felton, and three other individuals were charged by the SEC on September 10-11, 2020 for securities law violations relating to the sale of unregistered and fraudulent ICOs on behalf of two companies owned by Felton, FLiK and CoinSpark. Felton marketed FLiK as an entertainment streaming platform (which he described as “Netflix on the blockchain”) and marketed CoinSpark as a new cryptocurrency trading exchange.

The SEC alleged that in 2017 and 2018 Felton fraudulently promoted ICOs for FLiK and CoinSpark, including by publishing materially false and misleading statements on the FLiK and CoinSpark websites and various social media platforms, including Facebook, Instagram, Twitter, bitcointalk.org, and the Telegram Messaging App.²⁷ For example, Felton falsely promoted and claimed that T.I. co-owned FLiK and that all investor funds would go towards the development, launch, and support of these companies. Instead of using the funds raised in the ICOs as advertised and promised, the SEC alleged that Felton spent the vast majority of investor proceeds to fund his extravagant lifestyle, including the purchase of a \$1.5 million house and a Ferrari sports car.

The SEC alleged that T.I. “significantly amplified the reach of the FLiK ICO” by promoting it to his millions of followers on social media. Posts on T.I.’s social media accounts inaccurately referred to T.I. as co-owner of FLiK, encouraged investors to participate in the FLiK ICO, and provided hyperlinks to facilitate investor participation in the FLiK ICO. T.I. also allegedly arranged for “his friend, a well-known actor, comedian, and producer, to promote the FLiK ICO as [T.I.’s] ‘new venture.’”²⁸ As a result, the FLiK ICO reached “tens of millions more” persons. Based on information provided in a separate private securities fraud lawsuit discussed in the next section of this article, it is apparent that Kevin Hart is the T.I. friend who posted FLiK ICO information on his social media accounts.

The SEC charged Felton with fraud and improperly offering and selling unregistered securities. Felton is contesting the SEC lawsuit and has also been criminally indicted by a federal grand jury. For his part, T.I. was charged by the SEC with improperly offering and selling unregistered securities. He settled the SEC charges by agreeing to pay a \$75,000 penalty and to not participate in offerings or sales of digital asset securities for at least 5 years.

On June 25, 2020, the SEC charged Jack Abramoff, a well-known and formerly disgraced lobbyist, with participating in a fraudulent ICO of a blockchain-based digital token (AML BitCoin).²⁹ The SEC alleged that in 2017 and 2018, Abramoff, NAC Foundation (“NAC”) and the CEO of NAC, posted inaccurate statements on NAC’s website, Facebook, and other online forums, in an effort to publicly promote the ICO of AML BitCoin.³⁰

Abramoff was once a high flying influence specialist. He was convicted in 2006 on felony federal corruption charges relating to his lobbying work. After serving over four years in prison, Abramoff wrote a memoir and embarked on a media tour promoting the book. In 2017, Abramoff reportedly worked on a reality TV show, “Capital Makeover: Bitcoin Brigade,” that was to explore the world of American political lobbying and digital currency.³¹

The SEC alleged that NAC’s offering materials, press releases, social media posts, and marketing efforts contained false and misleading statements about the status of the technology and status of negotiations

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regarding the use of AML BitCoin by governmental agencies. Despite becoming aware that NAC's promotional materials were inaccurate, Abramoff continued to solicit investors and conduct promotional activities for the offering. In addition, Abramoff and the NAC CEO allegedly engaged in a deceptive marketing scheme in which they filmed an advertisement for AML BitCoin to be aired during the Super Bowl and later claimed the ad was rejected by the NFL and NBC Network because of its political content.³²

The SEC alleged that Abramoff and the NAC CEO at least \$5.6 million from approximately 2,400 retail investors.³³ While the SEC's case against NAC and the CEO is ongoing, a final judgment was entered against Abramoff on July 15, 2020, which permanently enjoined him from violating the anti-fraud provisions of the federal securities law and required him to pay over \$55,500 in disgorgement and interest and to abstain from acting as an officer or director of any public company.³⁴ Abramoff also plead guilty to DOJ charges relative to the conduct described above.³⁵

In December 2018, the SEC charged "media influencer" Jordan Goodman for failing to register as a broker-dealer, selling unregistered securities and violating the anti-touting provision, in connection with Goodman's promotion of the unregistered securities of Woodbridge Group of Companies, LLC (Woodbridge) sold by a group of unregistered brokers.³⁶ According to the SEC, Goodman proclaimed himself as "America's Money Answers Man."³⁷ He appeared frequently on Fox News Network, Fox Business Network, CNN, CNBC and CBS.³⁸ Abramoff also worked on the editorial staff of Money magazine for 18 years, where he served as a Wall Street correspondent.³⁹ He authored/co-authored 13 books on personal finance.⁴⁰

The SEC alleged that Goodman touted the safety and profitability of Woodbridge securities during frequent guest radio appearances nationwide.⁴¹ Goodman also touted Woodbridge's securities on the internet through his own website and an affiliated website.⁴² In reality, according to the SEC, Woodbridge operated as a massive Ponzi scheme, raising more than \$1.2 billion before collapsing and filing a petition for bankruptcy.⁴³ Goodman's promotional efforts contributed to the sale of approximately \$147 million of Woodbridge securities to more than 1,200 investors across the country.⁴⁴ For his efforts, Goodman was paid almost \$2.3 million in undisclosed transaction-based sales commissions.⁴⁵ To settle the SEC charges, Goodman agreed to pay over \$2.7 million in disgorgement, penalties and prejudgment interest.⁴⁶

Where the SEC finds misstatements by individuals (including celebrities) about investments to be particularly egregious, it imposes fraud charges under the anti-fraud provisions of the federal securities laws (Section 10(b) of the Exchange Act and Section 17(a) the Securities Act). This is the position the SEC pursued in its lawsuit against Ryan Felton in the FLiK/CoinSpark case discussed above. In another such example, on March 20, 2020, the SEC announced that it had obtained an asset freeze to halt a securities fraud scheme being orchestrated by several defendants, including former Washington State Senator David Schmidt.⁴⁷ Schmidt served in the Washington State Legislature from 1994-2006, first as a state representative and then as a state senator.⁴⁸ The SEC alleged that the defendants made numerous false and misleading statements to investors in connection with the offer and sale of a digital asset (Meta 1 Coin) in an ICO, including that Meta 1 Coin was backed by a \$1 billion art collection or \$2 billion of gold and that KPMG was auditing the gold assets.⁴⁹ The SEC alleged that Schmidt published content discussing Meta 1 Coin on three websites he operated and solicited investment in Meta 1 Coin on a weekly online radio talk show, which was typically posted to one or more of his websites, his YouTube channel and to his Facebook page.⁵⁰ Through various promotional efforts, Schmidt and the other defendants allegedly raised \$4.3 million from more than 150 investors, but never distributed the Meta 1 Coins.⁵¹ Instead, according to the SEC, these defendants used investor funds for their personal use.⁵² The SEC alleged that Schmidt and the other defendants violated the anti-fraud provisions and is seeking disgorgement,

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prejudgment interest and monetary penalties.⁵³

In yet another example of endorsement conduct deemed worthy of a fraud charge, the SEC charged a former Fox TV news commentator, Tobin Smith, with violating the anti-fraud provisions for disseminating false and misleading statements to promote a penny stock of a data storage company, IceWEB Inc.⁵⁴ Smith was a Fox News contributor for 13 years (2000-2013), including on the “Bulls and Bears” television show on the Fox News Channel.⁵⁵ According to the SEC, Smith made false and misleading statements about IceWEB through web postings, blog posts and emails to his subscribers, including that IceWEB provided cloud-based solutions to customers like Facebook, Amazon and Microsoft, when Smith neither had knowledge about whether these statements were true nor had verified this information.⁵⁶ In addition, Smith allegedly touted the prospect of large investment returns on IceWEB stock despite knowing the company’s poor financial condition.⁵⁷ Smith settled with the SEC by agreeing to be charged with violating the anti-fraud provisions, to pay over \$250,000 in disgorgement and penalties, and to abstain from involvement in any future penny stock offerings.⁵⁸

Risk of Private Securities Litigation

Another risk to be weighed by celebrities considering an endorsement deal for an investment is the prospect of being sued by a disgruntled investor. This risk is exacerbated when speculative investments are involved, like ICOs and penny stocks. Stand-up comedian Kevin Hart and rapper T.I. were hit with a private securities fraud lawsuit in relation to their endorsement and promotion of the FLiK ICO discussed above.

According to the lawsuit, Hart and T.I. promoted the FLiK ICO on social media after FLiK announced them as co-owners of the company. The lawsuit complaint provides more details about the FLiK-related social media posts by Hart and T.I. than the SEC settlement documents. The complaint alleges that Hart tweeted a photo of himself and T.I. stating, in part, “Me tellin Tip [T.I.] how much help he gon need spending all that money he gonna make on his new venture.”⁵⁹ Around the same time, T.I. tweeted to his followers to “Check out my new #ICO...it’s about to change #Hollywood!!!”⁶⁰ In October 2018, 25 investors who purchased FLiK digital tokens in 2017 filed a lawsuit in federal court against Hart, T.I. and Ryan Fenton, claiming the investors collectively lost over \$1.3 million as a result of the defendants’ misleading promotional statements about FLiK’s ICO.⁶¹ The lawsuit alleged that both T.I. and Hart promoted the FLiK ICO on social media and encouraged the public to visit the FLiK ICO website.⁶² The plaintiffs further alleged that the defendants were involved in a “pump and dump” scheme, essentially claiming that after the price of FLiK tokens had artificially increased due to the defendants’ promotional activities, the defendants “dumped” (sold) their tokens and “disappeared from social media.”⁶³ In February 2020, the presiding federal judge over the case dismissed charges against T.I., but the case currently is proceeding against Hart and Fenton.⁶⁴

Risks Arising from Other Product Endorsements

While this article focuses on potential SEC liability, we thought it would be helpful to note that celebrity product endorsements can trigger scrutiny from other federal regulators. Like the SEC, the regulations of other government agencies, such as the Federal Trade Commission (FTC) and Food and Drug Administration (FDA), require endorsers of products and services to disclose certain information, including compensation received for promotional activities. Over the past few years, both the FDA and the FTC have warned celebrities of the need to comply with laws and regulations applicable to their promotional efforts.

The FTC requires endorsers to disclose any “material connection” to the brand they are promoting, including a personal, family, employment or financial relationship.⁶⁵ For example, an endorser will be

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deemed to have a material connection to a brand if the brand is giving the endorser monetary payments or free or discounted products or services. In April 2017, the FTC issued a press release stating it issued more than 90 letters to celebrities and other individuals “[a]fter reviewing numerous Instagram posts by celebrities, athletes and other influencers,” to reiterate that “influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media.”⁶⁶ Five months later, in September 2017, the FTC sent letters to 21 celebrities and influencers -- including rapper Nicki Minaj; talk show host Ellen DeGeneres; supermodel Naomi Campbell; actresses Lindsay Lohan, Vanessa Hudges and Sofia Vergara; and other media personalities -- inquiring about whether they had any “material connection” to marketers they were promoting on social media.⁶⁷

Over two years later, the FTC issued new Endorsement Guidelines for social media influencers in November 2019 specifically focused on social media endorsements.⁶⁸ This guidance builds on preexisting Endorsement Guidelines and reiterates the requirement that endorsers of products on social media disclose a “material connection” to the brand. Although the FTC did not take legal action against any of the celebrities mentioned above, the FTC repeatedly warned the industry indicating that it will pursue charges for violations of its endorsement rules by celebrities. The FTC has commented that it is the responsibility of endorsers themselves to be familiar with the Endorsement Guidelines, to make the required disclosures, and to comply with the laws against deceptive advertisements. The FTC expressly stated that endorsers relying on others to satisfy their compliance obligations is not acceptable.

The FDA requires endorsers who post testimonials about prescription drugs on social media to comply with the Federal Food, Drug, and Cosmetic Act (FDCA). The FDCA governs the advertising of prescription drugs and restricted medical devices, among other things. Specifically, the FDCA requires endorsers, among other things, to fully disclose risks associated with the use of pharmaceutical products in endorsement or promotional activities.⁶⁹ In August 2015, the FDA sent a warning letter to a pharmaceutical company regarding media personality Kim Kardashian’s Instagram post about the company’s morning sickness drug that failed to communicate any risks associated with its use.⁷⁰ The FDA letter stated that Kardashian’s Instagram post “is false or misleading in that it presents efficacy claims for DICLEGIS, but fails to communicate any risk information associated with its use and it omits material facts.”⁷¹ The FDA did not bring formal charges against Kardashian, but the Instagram post at issue was deleted.

Considerations and Recommendations

Celebrities – including athletes, actors and other influencers – routinely reap the benefit of their popularity by earning compensation to endorse products and services. In most instances, these endorsements present little risk of legal liability. To avoid the cost, time drain and negative publicity associated with a regulatory inquiry or a private lawsuit, celebrities should consult counsel when considering an endorsement involving any type of heavily regulated product, especially one that is investment-related (and therefore potentially subject to SEC jurisdiction).

With respect to the endorsement of investments, we offer the following considerations for celebrities and their advisers/counsel to help mitigate the risk of SEC scrutiny:

1. Approach endorsements of any investment or financial product with extreme care as the SEC has broad jurisdiction over investments and securities. What constitutes a “security” for purposes of the federal securities laws is complex and includes many forms of transactions that would not be obvious to non-securities experts.
2. Perform due diligence on the company offering an endorsement deal to promote securities or other types of investments that the company is offering to the public. Vet the offering company to ensure it is legitimate and that its owners are not bad actors. For the reasons discussed above, endorsements

of ICOs are particularly fraught with danger as many ICOs have been classified as fraudulent by the SEC.

3. Carefully review the endorsement comments to be posted by the celebrity to ensure that the statements do not contain express or implied misrepresentations about the investment or product being endorsed.
4. Review applicable laws and regulations to verify whether the celebrity's promotional messages and communications trigger any disclosure requirement. For example, determine whether the celebrity must disclose compensation received for the endorsement or "material connections" to the product.
5. Ensure that the substance and format of any required disclosures comply with the applicable laws and regulations.

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Endnotes

1. 15 U.S.C. § 77q(b).
2. 15 U.S.C. § 77e(a) and (c).
3. 15 U.S. Code § 78o.
4. 15 U.S. Code § 77q(a) and § 78j(b).
5. *SEC Statement Urging Caution Around Celebrity Backed ICOs*, U.S. SECURITIES AND EXCHANGE COMMISSION (Nov. 1, 2017), <https://www.sec.gov/news/public-statement/statement-potentially-unlawful-promotion-icos>.
6. *Spotlight on Initial Coin Offerings (ICOs)*, U.S. SECURITIES AND EXCHANGE COMMISSION (last visited Sept. 18, 2020), <https://www.sec.gov/ICO>.
7. See ICObench website <https://icobench.com/>.
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