

Influencer Advertising: The SEC, Not Just The FTC, Could Be Watching

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by Fara Sunderji



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Avid readers of this blog know that the FTC spends as much time on Instagram and other social platforms as your favorite millennial, but who knew that the SEC also spends it's working hours perusing posts on popular social media sites looking at influencer advertising? Now, you do.

Late last month, the Securities and Exchange Commission announced a settlement with DJ Khaled and Floyd Mayweather Jr. for failing to disclose payments they received for promoting Initial Coin Offerings, known as ICOs, on their social media accounts. Mayweather was paid some \$300,000 by three separate ICO issuers to promote the crypto currencies, while DJ Khaled was paid \$50,000 by a single issuer. The pair made Instagram, Twitter, Facebook and YouTube posts promoting the ICOs to their millions of followers, but failed to make any mention of their status as paid influencers. As we've told our loyal readers over the years, the FTC Endorsement Guides are pretty straightforward on this subject:

if there is a 'material connection' between an endorser and the marketer of a product – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement. Material connections could consist of a business or family relationship, monetary payment, or the provision of free products to the endorser.

Section 17(b) of the Securities Act also requires such disclosures, but the SEC takes it a bit further. In particular, the Act makes it unlawful to promote the sale of any securities "without fully disclosing the receipt, whether past or prospective, of [any received] consideration *and the amount thereof*." (emphasis added).

SEC Enforcement Division Co-Director Stephanie Avakian noted that "with no disclosure about the payments, Mayweather and Khaled's ICO promotions may have appeared to be unbiased, rather than paid endorsements." Enforcement Division Co-Director Steven Peikin also noted that "investors should be skeptical of investment advice posted to social media platforms, and should not make decisions based on celebrity



endorsements."

Mayweather agreed to pay \$300,000 in disgorgement, a \$300,000 penalty and \$14,775 in prejudgment interest, while DJ Khaled agreed to pay \$50,000 in disgorgement, a \$100,000 penalty and \$2,725 in prejudgment interest. They also agreed not to promote any securities on social media or otherwise for a few years. And you thought the FTC's

settlement agreements for failing to disclose material connections were tough!

So what can you take away from these settlements? Brands and influencers are responsible for making sure that material connections, including payments to influencers, are properly disclosed. If the product is a security, check the Securities Act – your disclosure obligations go a bit further than #Ad and require full disclosure of the amount of money involved.