

SOCIAL MEDIA, ENDORSEMENTS DEALS, AND REGULATIONS

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Executive Summary: The rise of social media in the past decade has had a significant effect on how brands interact with consumers.¹ Not only is social media a large percentage of companies' advertising budgets but it has been shown to be an effective way for brands to directly communicate with consumers.² Consequently, there has been an introduction of a new type of brand ambassador – the social media influencer.³ With businesses' use of modern marketing and advertising tactics, the FTC is keeping up to date with monitoring social media influencers to ensure their practices are not deceptive and in violation of Section 5 of the FTC Act.⁴ The FTC updated the Endorsement Guides in 2023 to ensure that they reflected current advertising trends and maintain that advertisers complied with Section 5 of the FTC Act. This was in response to several cases involving influencer marketing where the FTC grappled with businesses engaging with fake social media influence and deceptive claims or influencers failing to disclose material connections.⁵ The Final Revised Endorsement Guides marked the FTC's consideration of public comments it sought out in 2020 and makes it clear that the FTC is better equipped to tackle modern concerns where compliance will be key.⁶

The SEC Chair Gary Gensler cautions the dangers of influencer or celebrity marketing when selling securities online.⁷ The agency has intensified its enforcement of Section 17(b) of the Securities Act of 1933 targeting celebrities who fail to disclose compensation received for promoting securities, particularly in the cryptocurrency sector.⁸ These actions underscore the

¹ Rebecca Kowalewicz, *How Social Media Impacts Consumer Buying*, FORBES (Apr. 29, 2022), <https://www.forbes.com/councils/forbesagencycouncil/2022/04/28/how-social-media-impacts-consumer-buying/> (explaining that social media platforms have integrated many options for consumers to directly make purchases of products and interact with brands without interrupting their scrolling).

² *Id.*

³ Jihye Kim & Minseong Kim, *Rise of Social Media Influencer as a New Marketing Channel: Focusing on the Roles of Psychological Well-Being and Perceived Social Responsibility Among Consumers*, Int'l. J. Env't. Rsch. Pub. Health, Feb. 2022, at 1, 19 (noting that social media influencers can be more persuasive and can lead their followers to have strong brand/product association).

⁴ 15 U.S.C. § 45.

⁵ 16 C.F.R. § 255 (2023).

⁶ *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM'N (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements>.

⁷ U.S. Sec. & Exch. Comm'n, *Use Caution with Celebrity Endorsements of Investment Products, Officer Hours with Gary Gensler*, YOUTUBE, at 00:42 (Oct. 03, 2022), <https://www.youtube.com/watch?v=vbZS6tYQKIM>.

⁸ Jessica B. Magee, Keith P. Carroll, Andrew W. Balthazor, & Landon W. Mignardi, *Tout, Tout, Let It All Out: SEC Continues Crackdown on Celebs, Athletes Touting Digital Assets*, HOLLAND & KNIGHT SECOND OPINIONS BLOG (Mar. 3, 2023),

*SEC's commitment to enforcing transparency in celebrity endorsement of securities and ensuring that celebrity promotional activities adhere to federal securities law to protect investors from material, undisclosed information.*⁹ *The SEC's aggressive posture suggests to promoters that they need to pay close attention to their disclosure obligations, as social media platforms are not responsible with complying with Section 17(b).*¹⁰

BACKGROUND

I. WHO ARE INFLUENCERS AND WHAT IS INFLUENCER MARKETING?

Social media has created a new type of marketing through the voice of virtual public personalities: the social influencer.¹¹ An influencer is a person who has an engaged, and often large, social media following and can influence their followers' opinions, behaviors, and purchase decisions.¹² They are often seen as trendsetters and usually specialize in a specific niche or industry, such as beauty, fashion, fitness, travel, or food.¹³ The tiers of social media influencer are defined by the number of followers they obtain.¹⁴ Nano-influencers have between 1,000 and 10,000 followers, micro-influencers have between 10,000 and 100,000 followers, macro-influencers have between 100,000 and one million followers, and mega/celebrity influencers have over one million followers.¹⁵

While influencers are commonly known for their authenticity, they often collaborate with brands to promote brands' products or services through sponsored posts or product reviews.¹⁶ Influencer marketing is a booming industry, with an estimated growth of approximately \$24 billion by the end of 2024.¹⁷ An influencer endorsement deal with a brand combines two models:

<https://www.hklaw.com/en/insights/publications/2023/03/tout-tout-let-it-all-out-sec-continues-crackdown-on-celebs>.

⁹ See Tami Stark & Gabriella Margaux Pérez Klein, *The SEC Continues to Prove it is the Most Powerful Influencer: How to Avoid Touting Charges*, WHITE & CASE (May 1, 2023), <https://www.whitecase.com/insight-alert/sec-continues-prove-it-most-powerful-influencer-how-avoid-touting-charges> (noting that the SEC is not trying to determine intent, but the SEC does have to show that the company knowingly or recklessly failed to provide the accompanying necessary disclosure).

¹⁰ *SEC Says Social Media OK For Company Announcements if Investors Are Alerted*, U.S. SEC. & EXCH. COMM'N, (Apr. 2, 2013), <https://www.sec.gov/newsroom/press-releases/2013-2013-51htm>.

¹¹ Linda C. Ashar, *Social Media Impact: How Social Media Sites Affect Society*, AM. PUB. U. (May 2, 2024), <https://www.apu.apus.edu/area-of-study/business-and-management/resources/how-social-media-sites-affect-society>.

¹² *Influencer*, LATER: SOCIAL MEDIA GLOSSARY, <https://later.com/social-media-glossary/influencer/> (last visited Jan. 19, 2025).

¹³ *Id.*

¹⁴ *The State of Influencer Marketing 2024: Benchmark Report*, INFLUENCER MARKETING HUB (Dec. 16, 2024), <https://influencermarketinghub.com/influencer-marketing-benchmark-report>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.* (noting that influencer marketing has grown from \$1.7 billion in 2016, indicating a strong ongoing growth momentum).

brand deals and affiliate links.¹⁸ First, a brand deal is where an influencer is paid a flat rate per post to feature a product or service.¹⁹ Second, through the use of affiliate links, an influencer earns commission every time a viewer buys the product through a link that the influencer includes in their social media post.²⁰

II. WHAT LAWS REGULATE INFLUENCERS?

The two primary federal agencies that regulate the influencer space are the U.S. Securities and Exchange Commission (SEC), for matters involving securities, and the Federal Trade Commission (FTC), for false advertising and deceptive trade practices.²¹ In particular, the FTC provides key guidelines that impose legal liability on businesses and influencers.²²

Section 5(a) of the Federal Trade Commission Act “prohibits deceptive acts or practices that affect commerce,” and gives the FTC the power to regulate endorsements.²³ The FTC defines an endorsement as “any advertising, marketing, or promotional message for a product that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser.”²⁴ Endorsers may be liable for any false or deceptive statements made without proper disclosure in endorsements.²⁵ Moreover, the FTC may hold businesses liable for a deceptive endorsement, even if the influencer is not; thus, the FTC advises businesses to communicate the requirements of disclosures with influencers.²⁶

Furthermore, Section 17(b) of the Securities Act prohibits the promotion of a security without disclosing the receipt and amount of consideration received.²⁷ Influencers and celebrities promoting cryptocurrencies have accounted for a large portion of recent Section 17(b) settlements.²⁸ While some 17(b) cases involve fraud, the majority of them result from a lack of awareness of what “in-bounds activit[ies]” are.²⁹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ari Redbord, *Tom Brady And Other A-Listers Sued For Fumbling FTX Endorsements*, FORBES (Feb. 1, 2023, 10:25 AM), <https://www.forbes.com/sites/ariredbord/2023/02/01/tom-brady-and-other-a-listers-fumble-ftx-endorsements-but-will-they-be-held-liable>.

²² *Social Media Influencer Marketing & Related Legal Issues*, JUSTIA, <https://www.justia.com/business-operations/legal-issues-for-social-media-influencer-marketing> (Dec. 2024).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 15 U.S.C. § 77q (b).

²⁸ Nicholas J. Losurdo & Jonathan H. Hecht, *SEC and FINRA to Securities Influencers: Disclose the Truth of Your Compensation, or Else!*, GOODWIN (Mar. 2, 2023),

https://www.goodwinlaw.com/en/insights/publications/2023/03/03_02-sec-and-finra-to-securities-influencers.

²⁹ *Id.*

THE FTC'S ADVERTISING & ENDORSEMENT GUIDES

The FTC set forth guidelines for ensuring truth and transparency in advertisement within the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Endorsement Guide).³⁰ The FTC revised its Endorsement Guide in June of 2023 to keep up to date with how advertisements reach consumers and promote products and services.³¹ This Endorsement Guide underscores that though advertisers may reach consumers through updated techniques, marketers are still governed by the same advertising laws that have governed other advertising forms traditionally.³² Simply put, influencers who have been paid to promote a good should disclose it.³³

Two cases are indicative of the FTC's emphasis on ensuring the truthfulness of endorsers' personal experiences with brands and products. In July of 2024, CarShield agreed to pay a \$10 million fine to settle FTC's charges of misleading advertising related to their vehicle service contracts.³⁴ The FTC alleged that CarShield misrepresented coverage details in ads featuring celebrities like Ice-T and Vicia A. Fox that led consumers to incur unexpected repair costs.³⁵ Many of the ads claimed that upon a car break down, CarShield would cover the necessary repair costs, consumers would receive a rental car at no cost, and consumers could use any repair facility.³⁶ Further, the celebrity endorsers falsely claimed to have used CarShield's vehicle service contracts.³⁷ Along with the \$10 million fine, the FTC proposed settlement prohibits CarShield from making endorser misrepresentations and requires them to comply with the Telemarketing Sales Rule, which applies to all outbound telemarketing calls.³⁸ The FTC's decision in CarShield is consistent with other previous settlements, including Google's and iHeartMedia. Here, the FTC found Google's use of DJ read ads with the Pixel 4 phone problematic, since the advertisements indicated that the DJs had first-hand interactions with the Pixel 4 when in fact

³⁰ 16 C.F.R. Part 255 (2018).

³¹ *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE. COMM'N (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements>.

³² *Id.*

³³ *Id.*

³⁴ *CarShield, Nationwide Seller of Vehicle Service Contracts, to Pay \$10 Million to Resolve Federal Trade Commission Charges of Deceptive Advertising*, FED. TRADE COMM'N (July 31, 2024) [hereinafter *CarShield Press Release*] <https://www.ftc.gov/news-events/news/press-releases/2024/07/carshield-nationwide-seller-vehicle-service-contracts-pay-10-million-resolve-federal-trade>.

³⁵ Jonathan Stempel, *US FTC fines CarShield \$10 mln For Deceptive Ads, Including by Celebrities*, REUTERS (July 31, 2024), <https://www.reuters.com/business/autos-transportation/carshield-is-fined-by-us-ftc-deceptive-ads-including-by-celebrities-2024-07-31/>.

³⁶ *CarShield Press Release*, *supra* note 34.

³⁷ *Id.*

³⁸ *Id.*

they had not.³⁹ Instead, Google provided these DJs with scripts written in the first-person.⁴⁰ These ads were played more than 2400 times in Dallas, Fort Worth and Houston.⁴¹ Ultimately, Google agreed to pay \$8 million in settlement to the state of Texas, where the majority of consumers were located.⁴²

In August of 2024, the FTC introduced a regulation targeting influencers and brands that purchase fake followers and engagement to misrepresent their online influence.⁴³ The rule prohibits businesses from buying consumer viewers or procuring consumer reviews.⁴⁴ This initiative aims to protect consumers from deceptive advertising practices in the digital marketing space and deter fake reviews generated by artificial intelligence (AI).⁴⁵ This rule clarifies that consumer reviews and endorsements must be from real people who have had first-hand experience with the product or service, even if they posted negative reviews such as offensive or confidential content.⁴⁶ With this rule, the FTC emphasizes that deceptive consumer reviews and testimonials in marketing are a top priority for the FTC.⁴⁷

Following the FTC's revision of the Endorsement Guide, it sent out warning letters to the American Beverage Association, the Canadian Sugar Institute, many registered dietitians, and numerous online health influencers, warning them that they had inadequately disclosed the risks of aspartame, an artificial sweetener and their consumption of products containing sugar.⁴⁸ These groups advertised social media posts that failed to entirely disclose the influencers' relationships

³⁹ Gonzalo E. Mon, Paul L. Singer, *Google to Pay \$8 M to Settle with Texas Over DJ Endorsements*, KELLEY DRYE (May 16, 2023), <https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/google-to-pay-8-m-to-settle-with-texas-over-dj-endorsements>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ 16 CFR § 465.8 (2024).

⁴⁴ *Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials*, FED. TRADE COMM'N (Aug. 14, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials>.

⁴⁵ *U.S. FTC's New Rule on Fake and AI-Generated Reviews and Social Media Bots*, SIDLEY (Aug. 28, 2024), <https://www.sidley.com/en/insights/newsupdates/2024/08/us-ftcs-new-rule-on-fake-and-ai-generated-reviews-and-social-media-bots>.

⁴⁶ *Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials*, FED. TRADE COMM'N (Aug. 14, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials>.

⁴⁷ *Id.*

⁴⁸ *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar*, FED. TRADE COMM'N (Aug. 14, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials>.

with the trade organizations.⁴⁹ Other posts buried in-text disclosures in the advertisements, which were found to be insufficient notice to the average scroller.⁵⁰ These warnings signal to influencers that they should avoid relying solely on a platform's disclosure tools, since they may not meet the requirements of the Endorsement Guides.⁵¹

Against the backdrop of the FTC's interest and power to come after deceptive business practices, the Texas Attorney General settled with influencer Brittany Dawn Davis over allegations of misleading consumers by failing to deliver personalized fitness plans as advertised.⁵² Brittany Dawn is a health and fitness influencer and began selling personalized health and fitness plans on her website in 2014.⁵³ Customers claimed that they received obviously generic training rather than the personalized coaching that they were promised.⁵⁴ The state of Texas, like the FTC in similar cases, sought monetary damages to repay customers and civil penalties. This case underscores that influencers and small businesses are just as much on the FTC's radar with respect to their deceptive practices under state and federal laws including the FTC Act.⁵⁵

SEC REGULATIONS ON THE PROMOTION OF CRYPTOCURRENCY

A. BRIEF HISTORY OF SEC'S INVOLVEMENT IN THE PROMOTION OF CRYPTO

In 2017, the cryptocurrency industry began to boom with initial coin offerings (ICOs), which are unregistered offerings of coins and tokens by creators to raise money for their venture.⁵⁶ As celebrities and other influencers began to endorse and promote ICOs on their various social media platforms, concerns surrounding investor harm in ICOs resulted in the SEC issuing a Statement Urging Caution Around Celebrity Backed ICOs in November 2017.⁵⁷ The Statement warned investors that while celebrity endorsements may appear unbiased, they may be part of a promotion and to be wary of investment opportunities that sound "too good to be true."⁵⁸ Moreover, the statement declared 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

⁴⁹ Angela Yang, *Influencers Warned by FTC Over 'Inadequate' Disclosures of Artificial Sweetener Promotions*, NBC NEWS (Nov. 15, 2023), <https://www.nbcnews.com/news/us-news/ftc-influencer-warning-disclosures-artificial-sweetener-promos-rcna125396>.

⁵⁰ *Id.*

⁵¹ Bruce Sokler & Sherwet Witherington, *Indecent Disclosure: FTC Slams Advertisers and Influencers for Failure to Divulge Material Connections*, JD SUPRA (Nov. 20, 2023), <https://www.jdsupra.com/legalnews/indecnt-disclosure-ftc-slams-1418674>.

⁵² John Sanders & Hannah Luke, *Influencer False Ad Settlement Shows Small Biz Is Fair Game*, LAW 360 (July 6, 2023), <https://www.law360.com/articles/1695856>.

⁵³ Brief for Petitioner at 4, *Texas v. Brittany Dawn Davis, et al.*, No. DC-22-01388 (Tex. Dist. Feb. 1, 2022).

⁵⁴ Sanders et al., *supra* note 52.

⁵⁵ *Id.*

⁵⁶ Magee et al., *supra* note 8.

⁵⁷ *Id.*

⁵⁸ *SEC Statement Urging Caution Around Celebrity Backed ICOs*, U.S. SEC. & EXCH. COMM'N (Nov. 1, 2017), <https://www.sec.gov/newsroom/speeches-statements/statement-potentially-unlawful-promotion-icos>.

compensation received in exchange for the promotion.”⁵⁹ If such individuals fail to do so, then they are violating the anti-touting provision of the federal securities laws.⁶⁰ The SEC’s statement raised the threshold jurisdictional question in the digital asset space: are these coins and tokens securities?⁶¹ The SEC’s position is that most tokens are securities, and therefore, are subject to federal securities laws, including the anti-touting provisions.⁶²

Particularly relevant is Section 17(b) of the Securities Act of 1933, known as the anti-touting provision, which requires that a person who is paid by an issuer to promote a security to disclose the nature and the amount of the compensation.⁶³ Specifically, Section 17(b) makes it unlawful for a person to:

[P]ublish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, 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.⁶⁴ Furthermore, Section 17(b) places the responsibility of disclosing the paid promotion on the party being paid for the promotional activities.⁶⁵ To establish a Section 17(b) violation, “a person must (1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which described a security), (3) for consideration received, (4) without full disclosure of the consideration received and the amount.”⁶⁶

B. HOW THE SEC HAS ADDRESSED CELEBRITIES VIOLATING SECTION 17(B)

In 2021, Kim Kardashian posted an Instagram story promoting Ethereum Max (E-Max), a brand-new token and told her millions of followers ““what [her] friends just told her about the Ethereum Max token’ – namely that they were reducing supply to give ‘back to the entire E-Max community.””⁶⁷ Kardashian further provided a link in the post to the E-Max website, which provided instructions for how to purchase E-Max tokens.⁶⁸ Kardashian was paid \$250,000 to

⁵⁹ *Id.*

⁶⁰ *See id.* (stating that persons 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”).

⁶¹ Magee et al., *supra* note 8.

⁶² *See id.* (noting, however, that the lack of guidance on the “crypto as securities” issue creates potential liability for any paid promotional activity of coins or tokens by celebrities or influencers).

⁶³ 15 U.S.C.S. § 77q (b).

⁶⁴ *Id.*

⁶⁵ Magee et al., *supra* note 8.

⁶⁶ *S.E.C. v. Gorsek*, 222 F. Supp. 2d 1099, 1105 (C.D. Ill. 2001).

⁶⁷ John Hyatt, *The Untold Story Behind Emax, The Cryptocurrency Kim Kardashian Got Busted for Hyping*, FORBES (Nov. 11, 2022, 6:30 AM), <https://www.forbes.com/sites/johnhyatt/2022/11/11/the-untold-story-behind-emax-the-cryptocurrency-kim-kardashian-got-busted-for-hyping/?sh=67984cda40d7>.

⁶⁸ *SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security*, U.S. SEC. & EXCH. COMM’N, (Oct. 3, 2022), <https://www.sec.gov/newsroom/press-releases/2022-183>.

promote E-Max, and despite labeling the social media story as an ad, she was charged by the SEC for violating the anti-touting provision of the federal securities laws.⁶⁹ Without admitting or denying the SEC’s findings, Kardashian agreed to settle the charges by paying \$1.26 million in penalties and to cooperate with the Commission’s ongoing investigation.⁷⁰ SEC Chair Gary Gensler stated that Kardashian’s charges were a “reminder to celebrities” that they must disclose such payments.⁷¹

However, this was not the first celebrity charged by the SEC for touting a crypto asset security on social media. In 2018, the SEC charged professional Floyd Mayweather Jr. and music producer Khaled Khaled, known as DJ Khaled, for failing to disclose payments they received for promoting ICOs.⁷² Like Kardashian, neither Mayweather nor Khalid admitted or denied the SEC findings, and agreed to pay disgorgement, penalties, and interest.⁷³

More recently in 2022, Edwin Garrison, an Oklahoma resident, filed a lawsuit alleging that he purchased an unregistered security in the form of a yield-bearing account (YBA) after being exposed to some or all of Defendants’ “misrepresentations and omissions regarding the Deceptive FTX Platform[.]”⁷⁴ The now bankrupt cryptocurrency exchange company, FTX, was valued between \$30-\$40 billion before the company collapsed in November 2022.⁷⁵ The collapse of the company resulted in billions of customers assets in the company to be completely wiped out.⁷⁶ Along with Sam Bankman-Fried, FTX founder, Garrison named a number of celebrities and athletes as co-defendants in the suit, including Larry David, Tom Brady, Gisele Bundchen, Shaquille O’Neal, Naomi Osaka, Shohei Ohtani, Trevor Lawrence, David Ortiz, “Shark Tank” star Kevin O’Leary, and Stephen Curry.⁷⁷ Garrison alleged that public figures “controlled, promoted, assisted in, and actively participated in” FTX selling customers unregistered securities in the form of YBAs.⁷⁸ He further alleges that the co-defendants violated the anti-touting provisions by failing to disclose the nature, scope, and amount of compensation that they

⁶⁹ *Id.*

⁷⁰ *Social Media Influencer Marketing & Related Legal Issues*, *supra* note 22.

⁷¹ *Id.*

⁷² *See Two Celebrities Charged With Unlawfully Touting Coin Offerings*, U.S. SEC. & EXCH. COMM’N (Nov. 29, 2018), <https://www.sec.gov/newsroom/press-releases/2018-268#:~:text=The%20SEC's%20orders%20found%20that,changer.%22%20Mayweather's%20promotions%20include%20a> (finding that Mayweather failed to disclose promotional payments from three ICO issuers, including \$100,000 from Centra Tech Inc., and that Khalid failed to disclose a \$50,000 payment from Centra Tech).

⁷³ *See id.* (stating that Mayweather agreed to pay over \$600,000 and Khaled agreed to pay over \$150,000).

⁷⁴ *See Personal Liability for Celebrities Touting FTX?*, UNIV. MD. FRANCIS KING CAREY SCHOOL L., (Mar. 2, 2023), <https://www.law.umaryland.edu/content/articles/name-647657-en.html> (quoting Complaint at 6, Garrison v. Bankman-Fried, et al., No. 1:22-cv-23753-XXXX (S.D. Fla. filed Nov. 12, 2022)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Complaint at 2, Garrison v. Bankman-Fried, et al., No. 1:22-cv-23753-XXXX (S.D. Fla. filed Nov. 12, 2022).

received from FTX.⁷⁹ While this is an ongoing lawsuit, perhaps *Garrison v. Bankman-Fried, et al.*⁸⁰ will establish a new rule rather than relying on SEC enforcement actions.⁸¹

One celebrity avoided ending up a co-defendant in the suit by pulling out of a deal to promote FTX.⁸² Taylor Swift discussed a \$100 million-tour sponsorship with FTX in 2021, which would have included selling tickets as NFTs.⁸³ Swift's team raised the crucial question of whether cryptocurrencies are considered "securities," specifically whether the digital asset constitutes an "investment contract," and thus a security.⁸⁴ Swift ended up rejecting the proposed endorsement because FTX could not provide a straight answer, and her team's due diligence resulted in her escaping potentially being named a co-defendant in the ongoing class action.⁸⁵

Furthermore, in March of 2023, the SEC charged eight celebrities for touting digital assets, Tronix (TRX) and BitTorrent (BTT) without disclosing that they were endorsed to do so, violating Section 17(b).⁸⁶ The celebrities included Lindsay Lohan, Jake Paul, Deandra Cortez Way, known as Soulja Boy, Austin Mahone, and others.⁸⁷ It is alleged that Justin Sun, crypto asset entrepreneur paid the celebrities to tout the unregistered offerings, while also directing them to not disclose their compensation.⁸⁸ With the exception of Cortez Way and Mahone, the celebrities charged agreed to pay a total of more than \$400,000 without admitting or denying the SEC's findings.⁸⁹ What all of these actions share is the reminder to companies that when asking

⁷⁹ *Personal Liability for Celebrities Touting FTX?*, *supra* note 74.

⁸⁰ No. 1:22-cv-23753-XXXX.

⁸¹ *Id.*

⁸² Pete Syme, *Taylor Swift Didn't Sign \$100 million FTX Sponsorship Because She was the Only One to Ask About Unregistered Securities, Lawyer Says*, BUSINESS INSIDER (Apr. 19, 2023, 7:26 AM), <https://www.businessinsider.com/taylor-swift-avoided-100-million-ftx-deal-with-securities-question-2023-4>.

⁸³ *Id.*

⁸⁴ See Cory Olson, *Taylor Swift and the Unanswered \$100 Million Question*, ANTHONY OSTLUND (Nov. 6, 2023), <https://anthonyostlund.com/taylor-swift-and-the-unanswered-100-million-question/> (noting that the Supreme Court held that an "investment contract" is one in which "a person invests money 'in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party'" (quoting *Securities Exchange Commission v. W.J. Howey Co.* et al., 328 U.S. 293, 299 (1946))).

⁸⁵ *Id.*

⁸⁶ *SEC Charges Crypto Entrepreneur Justin Sun and His Companies for Fraud and Other Securities Law Violations*, U.S. SEC. & EXCH. COMM'N (Mar. 22, 2023), <https://www.sec.gov/newsroom/press-releases/2023-59>.

⁸⁷ See *id.* (charging Michele Mason (Kendra Lust), Miles Parks McCollum (Lil Yatchy), Shaffer Smith (Ne-Yo), and Aliaune Thiam (Akon) as well).

⁸⁸ See *id.* (stating that "[t]his is the very conduct that the federal securities laws were designed to protect") (quoting Gurbir S. Grewal, Director of the SEC's Division of Enforcement).

⁸⁹ *Id.*

celebrities to promote a security, “it is imperative . . . to ensure that the public figures disclose both the fact, and the amount, of the compensation they are receiving.”⁹⁰

⁹⁰ Stark et al., *supra* note 9; Daniel Levin, & Gabriella Margaux Pérez Klein, *The SEC Continues to Prove it is the Most Powerful Influencer: How to Avoid Touting Charges*, WHITE & CASE (May 1, 2023), <https://www.whitecase.com/insight-alert/sec-continues-prove-it-most-powerful-influencer-how-avoid-touting-charges>.