

## Keeping Up With the Regulations: The Pitfalls of Celebrity-Endorsed Securities Offerings

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### Summary and Background

Reality TV star Kim Kardashian is facing the repercussions of failing to carefully abide by applicable securities laws while advertising cryptocurrency. On October 3, 2022, the United States Security and Exchange Commission (SEC) announced that they had reached a \$1.26 million settlement with Kardashian and imposed a cease-and-desist order for failing to disclose that she had been paid to promote EthereumMax tokens, a crypto asset security.<sup>1</sup>

On June 13, 2021, Kardashian posted an endorsement of EthereumMax to her Instagram page, which at the time of posting, had approximately 225 million followers.<sup>2</sup> The post touted the recent success of EthereumMax and contained a link to purchase the tokens. It also contained the hashtag “#AD,” indicating that the post was an advertisement for EthereumMax, and a disclaimer that “this is not financial advice.”<sup>3</sup> The SEC had previously posted a warning to celebrities endorsing cryptocurrency to stay within the bounds of the law.<sup>4</sup>

In exchange for the post to her 225 million Instagram followers, Kardashian was paid \$250,000 through an intermediary. She failed to disclose both the fact that she was paid for the promotion, and how much compensation she received. This was found to be in violation of Section 17(b) of the Securities Act of 1933, which makes it unlawful to publish or circulate the description of a security offering without disclosing the receipt of payment for the promotion and the amount.

The settlement reached between the SEC and Kardashian requires her to pay a financial penalty of \$1 million, disgorgement of profits from the post of \$250,000, and \$10,415.35 in prejudgment interest. In addition, Kardashian cannot receive compensation in exchange for the promotion of cryptocurrency for three years. In a statement announcing the order, SEC Chair Gary Gensler warned investors to investigate cryptocurrencies being promoted by influencers and reminded celebrities to disclose all compensation received for advertisement of any security.<sup>5</sup>

### Application to the Canadian Context

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Canadian securities laws do not have a direct equivalent offence to Section 17(b). However, the type of advertising engaged in by Kardashian and EthereumMax could be considered misleading for investors and therefore contrary to securities regulations nonetheless. The Canadian Securities Administrators (CSA) have discouraged problematic promotional activities by issuers due to their potential to mislead. In CSA Staff Notice 51-356, published on November 29, 2018, the CSA highlighted various problematic or misleading promotional activities by issuers.<sup>6</sup> One activity explicitly discouraged by the CSA is:

“compensating third parties, who use social media and general investing blogs to promote issuers, but do not disclose their agency, compensation and/or financial interest;”<sup>7</sup>

Failing to abide by this direction could result in a regulatory response, including requiring the issuer to:

- Issue a clarifying news release;
- Retract or remove overly promotional language from their disclosure record including their website and/or social media; or
- Re-file continuous disclosure documents.<sup>8</sup>

To avoid misleading investors, Canadian issuers should be aware of the CSA guidance when paying a third party, like a celebrity or influencer, to publicly endorse any security asset.

## Key Takeaways

- Familiarize yourself with potentially misleading advertising activities.
- Be cautious when promoting a security of any kind over social media or paying an influencer or celebrity to do the same.
- For investors, take care to research any securities advertised by celebrities or influencers before investing.

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<sup>1</sup> Securities and Exchange Commission Release No. 11116/October 3, 2022, online: <<https://www.sec.gov/litigation/admin/2022/33-11116.pdf>>.

<sup>2</sup> *Ibid* at para 3.

<sup>3</sup> *Ibid* at para 9.

<sup>4</sup> “SEC Statement Urging Caution Around Celebrity Backed ICOs,” *SEC Statement*, November 1, 2017, online: <<https://www.sec.gov/news/public-statement/statement-potentially-unlawful-promotion-icos>>.

<sup>5</sup> “SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security,” *SEC Press Release*, October 3, 2022, online: <<https://www.sec.gov/news/press-release/2022-183>>.

<sup>6</sup> CSA Staff Notice 51-356, “Problematic Promotional Activities by Issuers,” November 29, 2018, online: <[https://www.osc.ca/sites/default/files/pdfs/irps/csa\\_20181129\\_51-356\\_problematic-promotional-activities-issuers.pdf](https://www.osc.ca/sites/default/files/pdfs/irps/csa_20181129_51-356_problematic-promotional-activities-issuers.pdf)> (CSA Staff Notice 51-356).

<sup>7</sup> *Ibid* at p. 1.

<sup>8</sup> *Ibid* at p. 3.

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*