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Supervising FINfluencers' Social Media Spin: Don't Believe Everything You View on Your Phone

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In the all-encompassing age of social media, a new breed of influencers has emerged — FINfluencers (financial influencers). These individuals leverage their significant number of followers on social media platforms such as Instagram, TikTok, YouTube, and X (formerly Twitter) to make those followers aware of a broker-dealer and its services. While FINfluencers can make general financial literacy more accessible and reach an audience not traditionally targeted, broker-dealers need to consider the implications of these promotional communications.

The broker-dealer industry is subject to wide-ranging rules and regulations that govern how firms can promote themselves, market their services and solicit business. Even though social media streams and videos can come across as playful and spontaneous, these communications can trigger certain regulatory obligations for firms and expose gaps in supervisory procedures.

FINRA Enforcement Actions

For example, on June 10, TradeZero America was fined $250,000 by the Financial Industry Regulatory Authority (FINRA) for numerous violations related to its alleged failure to review, approve and retain the content its hired FINfluencers produced and communicated to the public.

FINRA's findings in the consent with TradeZero state that, from July 2020 to October 2022, TradeZero paid social media influencers to promote its services. These influencers made exaggerated claims about TradeZero's services, which were neither fair nor balanced. These posts often omitted crucial information about the risks associated with day-trading and other services. TradeZero did not review its influencers' videos that related to TradeZero's content before posting, nor did it retain these videos, violating FINRA Rule 2210 (Communications with the Public) and 2010 (Standards of Commercial Honor and Principles of Trade). Moreover, TradeZero failed to establish and enforce a system, including written supervisory procedures, to oversee retail communications disseminated by influencers on its behalf, as required by FINRA Rules 3110 (Supervision) and 4511 (General Requirements-Books and Records).

This disciplinary action against TradeZero echoes themes and concerns established in March, where FINRA fined M1 Finance LLC $850,000 for social media posts by influencers made on the firm's behalf that were allegedly unfair, unbalanced or contained misleading claims. Following a targeted exam of firms' practices in acquiring customers through social media, this action was FINRA's first formal disciplinary action regarding a firm's supervision of social media influencers.

In the M1 Finance matter, FINRA found that, between January 2020 and April 2023, M1 Finance employed social media influencers to promote its brokerage services. Influencers were instructed to include a unique hyperlink in their posts, directing potential new customers to M1 Finance's website to open and fund brokerage accounts. As a result, more than 39,400 new accounts were opened with the assistance of approximately 1,700 influencers. M1 Finance did not review nor approve the content in influencers' posts that related to M1 before posts went live, thereby allowing the influencers to make false promises, such as paying margin loans back at any given time, when investors who use margin are not generally entitled to an extension of time to meet the firm's margin requirements. M1 Finance also lacked a reasonably designed supervisory system to oversee the communications related to M1 made by the firm's influencers on its behalf. Through these FINfluencers, M1 Finance violated Rules 2210, 2010, 3110, and 4511.

These FINRA disciplinary actions underscore the importance of adhering to regulatory guidelines when using influencers for a firm's promotional activities.

FTC and SEC Regulations

FINRA is not the only regulator addressing influencer marketing — the Federal Trade Commission (FTC) is also on the beat. The FTC enforces rules for influencer marketing set forth in its Guides Concerning Use of Endorsements and Testimonials in Advertising (Endorsement Guides). Like other marketing materials, influencers' content must be truthful, non-misleading, and substantiated. Any claims should be verifiable and based on the influencer's honest, actual experience. Testimonials should reflect the typical customer experience, not extreme or exceptional results. Influencers must also clearly disclose "material connections" with the firm. "Material connections" may be any connection between an influencer and a marketer that could affect the credibility consumers give to that influencer's statements. Examples of "material connections" include monetary compensation, free products or services, in-kind gifts, or special access privileges. The disclosure must be "unavoidable," which is determined in part by the type of media (e.g., a video endorsement may require audio and visual disclosures). The FTC has enforced its endorsement rules in the financial sector, including actions relating to lending, real estate investments and other investment schemes.

Similarly, the Securities and Exchange Commission (SEC) is also active in this space. The SEC recently settled an action with Van Eck Associates for $1,750,000 for allegedly failing to disclose a social media influencer's role in the launch of its new exchange-traded fund (ETF). This influencer promoted and marketed the VanEck Social Sentiment ETF (NYSE BUZZ) and was compensated through a licensing fee structure based on a sliding scale linked to the size of the fund. Van Eck Associates did not disclose the influencer's planned involvement or the details of the fee structure to the ETF's board. Citing Section 15(c) of the Investment Company Act of 1940, the SEC claimed that Van Eck Associates did not have adequate written policies and procedures about providing the ETF's board with accurate information about the influencer's contract. Moreover, Van Eck Associates used a template document that did not include the economics of how the influencer would be paid more as the fund grew.

Key Takeaways

Firms should consider the following best practices for hiring a FINfluencer:

- Establish a written social media policy and make compliance with it mandatory for FINfluencers with respect to content related to their promotion of your business. If you already have such a policy, you should review and update it if necessary. The policy should provide clear guidelines and training for promotional practices on social media. The company should regularly monitor legal dockets and news for updates.

- Follow through with disciplinary action for influencers who do not comply with written guidelines and policies. It is not enough simply to have a policy that sits on the shelf. FINfluencers should be monitored, and if they materially deviate from the policy, the company should act and record the action taken. "Serious" violations should be defined in the policy and, if appropriate, result in the influencer's termination.

- Confirm that the policy ensures all applicable promotional content by influencers is fair, balanced, truthful and not misleading. Claims must be substantiated.

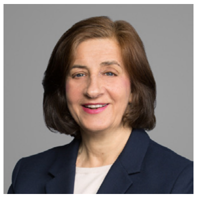
- Ensure influencers avoid claims based on atypical results and exaggerated or unwarranted promises.
- Require influencers to clearly disclose their financial relationship (or other "material connections") with the firm.
- Establish robust procedures for supervising influencer activities. Review content before it is posted and retain a record of promotional materials.
- Structure influencer compensation in a manner that does not incentivize influencers to create a false or misleading narrative to drive views.
- Address the above and related issues in a written influencer agreement.

TradeZero serves as a timely reminder of the growing regulatory scrutiny surrounding influencer marketing in the financial services industry. By implementing appropriate oversight and compliance measures, firms can effectively leverage social media influencers while avoiding legal risks. The written policy and evidence regarding the rigor with which it is enforced will be important to have in any subsequent enforcement investigation.

Broker-dealers should promptly analyze their written supervisory procedures, especially communications policies, to ensure that the actions of influencers related to the broker-dealer's business are properly addressed. Katten will continue to monitor FINRA, FTC and SEC guidance to keep clients informed of the latest developments.

CONTACTS

For more information, contact your Katten attorney or any of the following attorneys from the Advertising, Marketing and Promotions practice and the Financial Markets and Funds practice.



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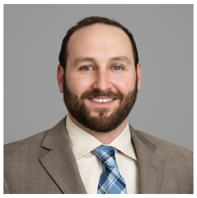

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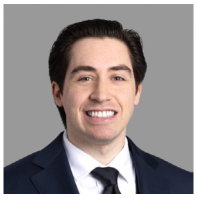

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