



## AVOIDING A LEGAL HANGOVER

### Who is regulating bar advertisements on social media?

BY RICH FAMA & DEAN PORTER, COZEN O'CONNOR

**S**ocial media is where groups of people catch-up, get together, and, most importantly, plan their nights out. As a result, it can be a game-changing advertising environment for bars and restaurants—but not without potential pitfalls. As bars increasingly develop their social media presence, situations like the below hypothetical have become increasingly common.

**The clients and their establishment:**

The owners of a bar and restaurant that recreates the iconic Atlantic City, New Jersey Boardwalk for their guests. Cocktail in hand, guests play carnival games, bocce ball, and shuffleboard, and peruse the bar's faux boardwalk and attractions.

**The advertisement:** The bar's owners have an idea for an ad that captures the bar's theme—childhood excitement but with adult beverages. The ad features the bar's patrons as children, unlocking their childhood wonder through the bar's

games and attractions. This is juxtaposed against scenes of those same patrons—only now full grown—enjoying the establishment's alcoholic beverage offerings. Rather than using traditional media, the bar owners decide to display the ad on social media through the bar's various accounts and pages.

**Now, the question:** The ad may be effective, but is it legal? Would the ad run afoul of state and federal regulations or violate the rules of the social media platforms that host it? And more pointedly, if it does, what are the consequences?

Frankly, the answer isn't crystal clear and may vary from state to state and platform-to-platform. While advertisements by alcohol manufacturers are prolific and the regulatory environment that surrounds them is well-known, establishments that sell and serve alcohol, such as bars and restaurants, enjoy far less certainty. Alcohol retailer advertisements may be regulated by

federal and state agencies, and, when the ad appears on social media, the rules and regulations governing use of each social media platform.

**State and Federal Regulation**

Federal regulation of advertising by alcohol retailers is minimal. The Federal Alcohol Administration Act oversees advertising by the alcohol industry, and federal agencies like the Alcohol and Tobacco Tax and Trade Bureau or Bureau of Alcohol, Tobacco, and Firearms are charged with ensuring compliance with labeling and marketing regulations pertaining to all spirits, wine, and malt beverages sold in the United States.

Federal regulations prohibit alcohol advertisements from making false claims intended to deceive consumers and maintains that advertisements cannot include obscene or indecent statements or representations. However, these regulations do not cover a retailer or server, instead applying only to

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“person[s] engaged in business as a brewer, wholesaler, or importer, of malt beverages.”

Thus, due to the absence of robust federal regulations, alcohol retailer advertisements are primarily governed at the state and local levels. Regulations vary from state to state, and governing jurisdiction could be asserted either where a retailer intends to direct its advertisements (usually where it has locations, and thus, liquor licenses) or where the advertisement is viewed (much more difficult to define).

Since states supply licenses for businesses attempting to serve, sell, or otherwise distribute alcoholic beverages within their borders, state authority to oversee advertising is commonly tied to those licenses through Alcohol and Beverage Control (ABC) guidelines or state liquor codes. For example, New Jersey regulates alcohol retailers through its ABC Guidelines, which also govern the issuance of state liquor licenses. The Guidelines permit liquor license holders to run advertisements in newspapers, radio, television, or any other media that regularly promotes business to potential customers, so long as the content of the advertising is not prohibited by state regulations or would not cause a violation of a state law or regulation.

Fortunately, New Jersey, and most other states, provide even more guidance. New Jersey’s ABC code specifies certain matters that are prohibited in advertising, including advertisements that (i) are false, misleading, or deceptive; (ii) contain “lewd or obscene” matter; (iii) suggest that the use of any alcoholic beverage will result in health or athletic benefits; and (iv) contain improper references to religious figures or portray minors. Most states that regulate retailers through their alcohol control agencies have similar prohibitions.

Now, concerning our hypothetical, the proposed advertisement could violate New Jersey regulations because it portrays minors. Licenses that violate state advertising regulations will commonly receive notice of either required corrective action through a warning letter, a fine in lieu of prosecution, or formal charges, which

could result in the suspension of the retailer’s liquor license.

States can also choose to police offending advertisements through their consumer protection statutes. For instance, in California, the “unlawful prong” of its Unfair Competition Law (“UCL”) prohibits almost any practice made illegal by statute, case law, or a regulatory body—and according to California’s Business and Professional Code, that could include portrayals of minors in alcohol advertisements. Penalties from violations of consumer protection statutes often include



## Social media ads are a new frontier for regulators.



monetary damages, punitive damages, attorneys’ fees, and injunctive relief, which could result in the discontinuation of the advertisement.

### Regulation by Social Media Platforms

Alcohol retailers that seek to advertise on social media—such as YouTube, Facebook, Twitter, and Instagram—must also meet the standards of the hosting platform.

**YouTube.** Advertisements on YouTube must comply with YouTube’s Terms of Service and Community Guidelines. While YouTube’s Terms of Service broadly apply to paid advertisements and non-paid promotional content, the more restrictive “Prohibited Commercial Uses” section of the Terms of Service does not apply to general, non-paid uses of YouTube’s platform. Non-paid uses include merely uploading an original video to YouTube, or maintaining an original channel on YouTube to promote a business.

Next, YouTube’s Community Guidelines regulate the appropriateness of all YouTube content. The Guidelines are primarily policed by users who flag or report offensive content. When

content is flagged or reported, YouTube staff reviews the content and issues a determination on whether the content has violated the Guidelines. The Guidelines are distributed into twelve broad categories, which include nudity or sexual content, harmful or dangerous content, violent or graphic content, and child safety. Regarding child safety, users are instructed not to post content showing a minor participating in a dangerous activity, or encouraging minors to engage in dangerous activities. An ad depicting minors in an alcohol retail establishment, such as our hypothetical, could be deemed to be in violation of YouTube’s guidelines.

**Facebook.** Facebook and Instagram regulate paid advertisements through Facebook’s “Advertising Guidelines.” Although these guidelines cover paid advertisements, they do not regulate ads that appear on an establishment’s Facebook page or are posted, since those materials are already targeted to those who subscribe to the content.

Facebook’s Advertising Guidelines state that: “[a]ds that promote or reference alcohol must comply with all applicable local laws, required or established industry codes, guidelines, licenses, and approvals.”

Ads meant to target consumers in the United States must also take steps to ensure that the ads are targeted to those over the age of legal consumption and “cannot include content that might appeal to (or mislead) minors by implying that the consumption of alcoholic beverages is fashionable or the accepted course of behavior for those who are underage,” or “include or target any person under the legal drinking age in the region the ad appears, or be

## Pro Tip

Keep all social media advertisements as clear as possible by including language such as, “Must be 21 or over to drink.”



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suggestive of the presence of those who are underage.”

It is therefore clear that our hypothetical ad may run afoul of Facebook’s Advertising Guidelines, so long as the ad is a “paid advertisement.” Facebook does offer an ad submission and review process for paid advertisements, whereby the proposed ad may be submitted to Facebook, reviewed alongside its Advertising Guidelines, and ultimately approved or rejected.

**Twitter.** Twitter’s Ad Policies apply to Twitter’s paid advertising products, which can be tweets, trends, and accounts. The Ad Policies restrict the promotion of online and offline sale of alcohol and general awareness of alcohol brands. These restrictions can relate to the specific product or service being promoted and the country the campaign is targeting. The Ad Policies apply to branding, promoting, selling, or facilitating the online or offline sale of any kind of alcoholic beverage; but they do not apply to “breweries, wineries, and distillery branding, tours, and tastings.” Thus, not all alcohol retailers are subject to the same restrictions, and whether an ad violates Twitter’s policies is highly dependent upon whether the ad is paid, the nature of the establishment, and the type of alcohol sold.

General content on Twitter, which could include non-paid tweets meant to promote a business or service, is not subject to the above guidelines and instead falls within Twitter’s general rules about content. These rules are far more open-ended and broadly prohibit graphic, violent, or adult content, but do not specifically address the sale of alcohol.



### What Makes for a Compliant Advertisement?

Social media advertisements are a new frontier for regulators. They offer bars an unrivaled ability to target and interact with potential consumers, and they are *effective*. For example, in a Michigan State University study, researchers exposed 121 participants to ads on Facebook. One group viewed advertisements for a brand of beer, while the other saw ads for a brand of bottled water. At the study’s conclusion, the researchers offered participants the choice between one of two gift cards—one for a bar, the other for a coffee shop. Of those who saw the beer ad, 73% chose the bar gift card; conversely, of those who saw the water ad, 55% chose the bar card—a difference of nearly 30%.

However, regulation is largely uncertain.

Best practices are to keep advertisements as clear as possible. This can be accomplished by including language such as “Must be 21 or over to drink” throughout an ad. Second, because social media platforms police non-paid advertisements differently than paid advertisements, posting non-paid content through your social media accounts is a less-restrictive, and safer, alternative. Third, avoid the depiction of minors and overly-sexualized content in your ads. When such conduct is included in an advertisement, such as in our hypothetical, create clean lines—through visual or textual cues—between alcohol and prohibited content.

Ultimately, the benefits of every ad must be weighed against its costs. If the content of an advertisement is likely to give the establishment negative attention, by regulators or the public, promptly pulling the advertisement can prevent or mitigate a hangover down the road. **T**

**Pick Your Mule**

**VODKA**

**MOSCOW MULE** **CAPE COD MULE**

**BOURBON** **TEQUILA**

**Kentucky Mule** **MEXICAN MULE**

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*Richard Fama is a member of Cozen O'Connor's class action and complex litigation practice groups in New York. He is a leading labeling advisor and defense attorney for many of the world's largest food and beverage companies, including CBD food producers. Dean Harris Porter is an associate in Cozen O'Connor's class action and complex litigation practice groups. To learn more, visit [cozen.com](http://cozen.com).*

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