



# STAYING LEGAL WITH SOCIAL MEDIA

*Tracy Genesen, Vice President and General Counsel, Wine Institute*

*Direct to Consumer Wine Symposium 2019*

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Please note this does not constitute legal advice.

# Agenda



1. Advertising and social media
  - a) Federal Rules
  - b) California Rules
2. Advertising for events
3. Other state laws – major markets
4. Wine Institute's advertising guidelines

# Regulating Agencies



TTB



FTC



ABC





# TTB: Advertising = Social Media



DEPARTMENT OF THE TREASURY  
*Alcohol and Tobacco Tax and Trade Bureau*

*Industry Circular*

Number: 2013 - 1

May 13, 2013

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## Use of Social Media in the Advertising of Alcohol Beverages

To: Proprietors of Bonded Wineries, Bonded Wine Cellars, Taxpaid Wine Bottling Houses, Beverage Distilled Spirits Plants, Breweries, Importers, Wholesalers and Others Concerned

- Social media is subject to TTB's advertising regulations.
- Therefore, federal mandatory statements and prohibited practices for advertisements apply to social media.

# TTB Required Mandatory Statements, 27 CFR Part 4



**Promote transparency and accountability.**

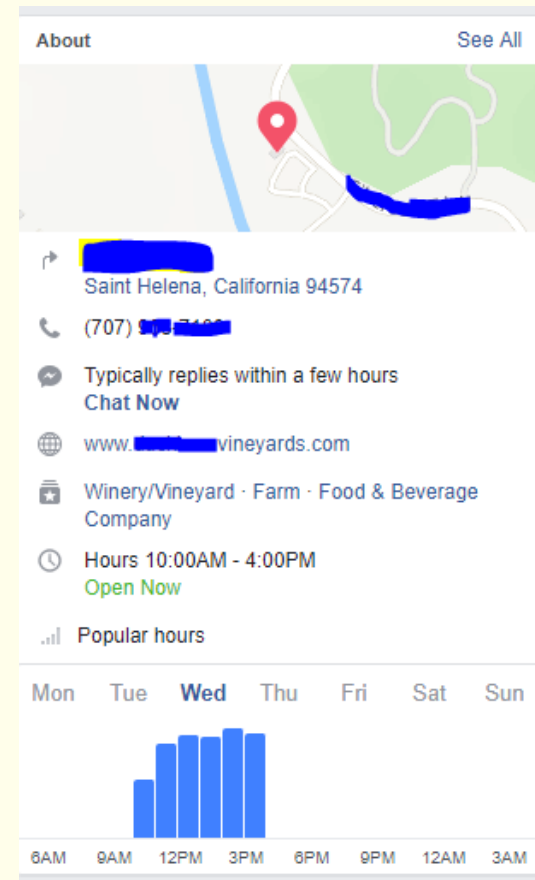
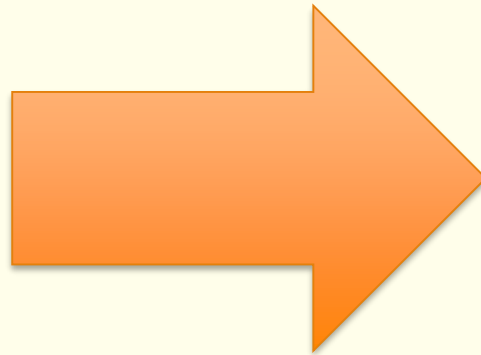
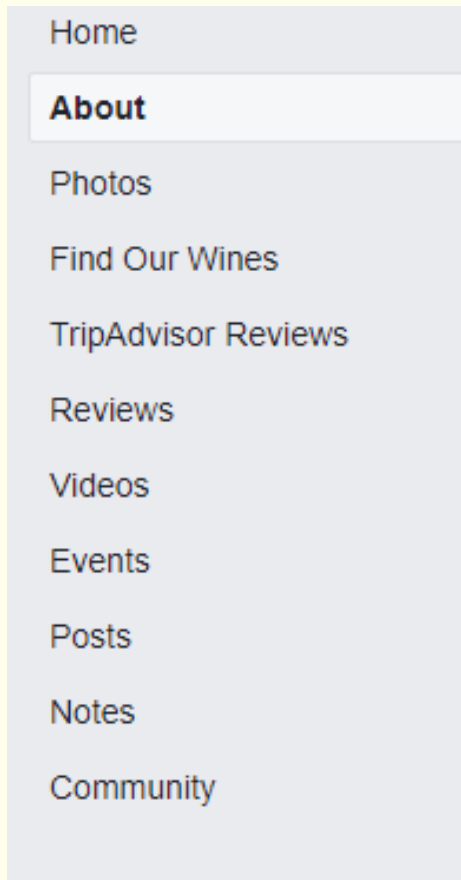
## **General Rule:**

- Name, city, and state of licensee responsible for the advertisement.
- Information should be placed in a logical location that is easily viewable/accessible by viewers.

## **Applied to Social Media:**

- Information placed on profile or “about” sections.
- Not required for in each post/tweet.
- If material can be downloaded, the statement must be included in the downloadable content.

# Promoting Transparency & Accountability



# TTB Prohibited Practices, 27 CFR Part 4



**Objective: Protect consumers and deter unfair business practices.**

## **Advertisements cannot include:**

- False, untrue or misleading statements
- Disparaging competitor's products
- Statement, design, or representation that wine has intoxicating qualities
- Obscene statement, design, or representation
- Misleading health statements
- Statements inconsistent with the label
- Reference to an illegal event

\*For a complete list of restrictions, see 27 CFR 4.64 ([www.ecfr.gov](http://www.ecfr.gov))

# FTC Endorsement Guides



- Social media “influencers” advertising brands is a growing trend.
- Post(s) must disclose any “material connection” between the endorser and marketer of a brand. “Material connection” is commonly established by payment or contract.
- Disclosure must be clear. Disclosure like “Thanks [Brand],” or “#partner” to mean that the post is sponsored is not sufficient.
- FTC has conducted audits and issued warning letters to influencers who violate their endorsement guidelines.
- Guidelines apply to marketers and endorsers!



# TTB Tied House Rules 27 CFR Part 6



- TTB may view social media posts driving business to a single retailer as tied house violations.
- Most state laws mirror TTB tied house prohibitions.
- There are a number of tied house exceptions in TTB regulations and state regulations.
- Be sure to identify an exception that applies to the specific event/activity.

# Naming Retailer(s) in Social Media Advertisements



Can list the names and addresses of 2+ unaffiliated retailers provided:

**(a)** The advertisement does not also contain the retail price of the product (except where the exclusive retailer is a State/political subdivision of a State);

**(b)** The listing is the only reference to the retailers in the advertisement and is relatively inconspicuous in relation to the advertisement as a whole, and;

**(c)** The advertisement does not refer only to one retailer or only to retail establishments controlled directly or indirectly by the same retailer.



# Examples of Naming Retailer(s)

- Walmart and Sam's Club both sell your products and you list both on a retailer list.
- Since Walmart owns Sam's Club, the two retailers are affiliated. Therefore, a retailer list which **only** lists Sam's Club and Walmart would **not** constitute a lawful listing.
- "Unaffiliated" means there is no common ownership and they are not members of the same buying group or advertising cooperative.

# Social Media Laws in California



# Social Media Laws in California



- Like federal law, directing business to a single retailer may be considered a tied house violation under CA law.
- A supplier who directs business using social media can be the subject of a California ABC investigation.
- Under California law social media is regulated as any other advertising.



# ABC Position: Social Media = Advertising



**“[T]he same rules apply to social media that apply to all other forms of advertising, communications and promotion for alcoholic beverages”**

Matthew Botting, ABC General Counsel  
(Napa Valley Vintners Bulletin, November 10, 2014)

# California Tied House Laws



- Winegrower cannot give thing of value to on-sale or off-sale alcohol retailer. (ABC Act Sec. 25500, 25502).
- Advertising is a thing of value.
- “No supplier of alcoholic beverages directly or indirectly, shall participate with a retailer in paying for an advertisement placed by the retailer...”(CA ABC Rule 106)....**Unless a specific exception applies!**

# CA ABC: Retailer Listings, CA Bus. Prof. Code 25500.1



(a) Must list two or more unaffiliated on-sale or off-sale retailers (names, addresses, phone numbers, email addresses, websites, etc.) provided that conditions are met:

- (1) The listing does not contain the retail price of the product.
- (2) The listing is the only reference to the on-sale or off-sale retailers in the direct communication.
- (3) The retailers listed are independent from one another.
- (4) The listing is made, or produced, or paid for, exclusively by supplier.

**Caution:** The general “retailer listing rule” **does not** give wineries complete freedom to mention retailers in their social media posts.

# Advertising for Winery Events At Retailer Premises (prior to 1/1/2019)



The following is an overview of advertising for:

- **Instructional Events at On-Premises Retailers (25503.57)**
- **Winemaker Dinners at On-Premises Retailers (25503.4)**
- **Instructional Tastings at Type 86 Licensed Off-Premises Retailers (25503.56)**

Permitted	Prohibited
Name, address, of host retailer, but must be relatively inconspicuous in relation to ad as a whole.	No laudatory references to the retailer.
Name of wines featured	No retail price of the wines.
Time, date, and location and other info regarding the event itself	No pictures or illustrations of retailer's premises.

# Advertising for Winery Events

At Retailer Premises (prior to 1/1/2019)



**We hold dinner at  
Restaurant.  
Here is address.  
7:30 PM**



# Advertising for Winery Events

## At Retailer Premises (effective 1/1/2019)



The following is an overview of advertising for the same events governed by 25503.4, 25503.56, and 25503.57 only.

Permitted	Prohibited
Name, address, <b>telephone number, email address, internet Web site address, any other electronic media</b> of host retailer, but must be relatively inconspicuous in relation to ad as a whole.	No laudatory references to the retailer.
Name of wines featured	No retail price of the wines.
<b>“Still” pictures, illustrations, and depictions of retailer’s premises, personnel, and customers</b>	<b>No videos.</b>
Time, date, and location and other info regarding the event itself	
<b>Can repost (including retailer posts) so long as post is compliant.</b>	

Source: Esq, John Trinidad, DPF Law

# AB 2452 Example: Images & Links



Join us at [Zeus Restaurant](#) for a g. Cuneo  
winemaker dinner on 1/24.

Monte, 2500 SE Clinton Street, Portland

Click on the link above for reservations.

Hope to see you there!

# Green light



# AB 2452 Example: Reposting



# Green light





# Considerations for Promoting an Event at Retailer:



1. When holding event at retailer, understand which **tied-house exception** you fall under, comply with those rules.
2. Purpose of the ad is to get people to **the event**.
3. Make the ad primarily **about the winery**, not the retailer.
4. Scrub for laudatory statements (esp. in reposts).

# Like, comment or repost- Green light?



18 hrs · Instagram · 21

One of the most fun, random nights in LA that [redacted] and I have had in a long time! Got invited to a Pop Up Restaurant that travels around the country. The day of we were given the address and password for the door. Not knowing a soul we entered a beautiful loft downtown LA, had the most amazing cuisine, delicious cocktails thanks to @buffalotrace and met 20 new people from all walks of life (including a guy that look liked he was a part of Devo, no joke) We walked away with new friends and satisfied tummies! Thank you so much @placeinvaders for an incredible night!!



Like

Comment

Share

# TTB Rules on Third Party Content



TTB Industry Circular states, “content created by a third party and reposted by an industry member, is part of the fan page and therefore considered to be part of the advertisement.”

- Retweeting, reposting, and sharing another post is adopting the content as your own.
- Limited safe harbor for posts made by others.

# Red Light



# Instagram “Influencer” Post-Green Light?



djkhaled • Follow

djkhaled #bluedot @ciroc 🌐 Celebration Bottle!! Celebrate success right!! #AD

Load more comments

valentina.santiagodeluca Cool Clique  
morelifepodcast That's a clean picture.  
What kinda camera y'all used.

bournetl1 Dope pic

cutiegirlkayla 🔥

igotthehookupz Khaled with his family  
photographer !

simplybee\_me 🎵🎧💕💕💕💕💪

deletedtext Dueceswildstray

newlife1976 SUCCESS

khalildaboii Inside out Oreo 🤔

yesh44 @523dean325

king\_medusa\_23 NEW MIXTAPE ALERT 📺📺



40,820 likes

JANUARY 24

Add a comment...





# Green light



# Posting to Facebook –Green Light?



# Red Light



# Logistical info for event at retailer-Green Light?



Come taste some of the Petaluma Gap's finest wines along with food pairings and VIP seminars. Tickets here: <https://goo.gl/VHrs8E>



Like Comment Share

# Green Light



# Example of Retweet- Green Light?



[Redacted name]  
@ [Redacted handle]



I just had the best California  
Sauvignon Blanc of my life thanks to  
[@WineryX](#). [@WineryY](#), step it up!  
Very disappointing compared to this  
phenomenal Sauvignon!!!

1/9/18, 10:39 AM

||| View Tweet activity



# Retweets are endorsements!



## WARNING

**Disclaimers do not replace the need to follow alcohol beverage advertising regulations.**

- You can **not** retweet this because it does not comply with the mandatory statements prescribed in Section 4.64: *“Any statement that is disparaging of a competitor's products.”*



# Red Light



# 02 Vs. 17/20 License



## Caution!!!

17/20 licensees have different privileges than 02 licensees. For example, 17/20 holders are not permitted to conduct on or off-sale tastings, contests or sweepstakes.

## 17/20 License

A wine and beer wholesaler license in combination with a retail license for off sale consumption. In combination, you can only sell wine to retailers and consumers off-premise

## Type 02 License

Only allows winery to serve and sell wine from its own licensed premises.

# 02 Vs. 17/20 License –Green Light?



**Can a 17/20 licensee post this on Instagram?**

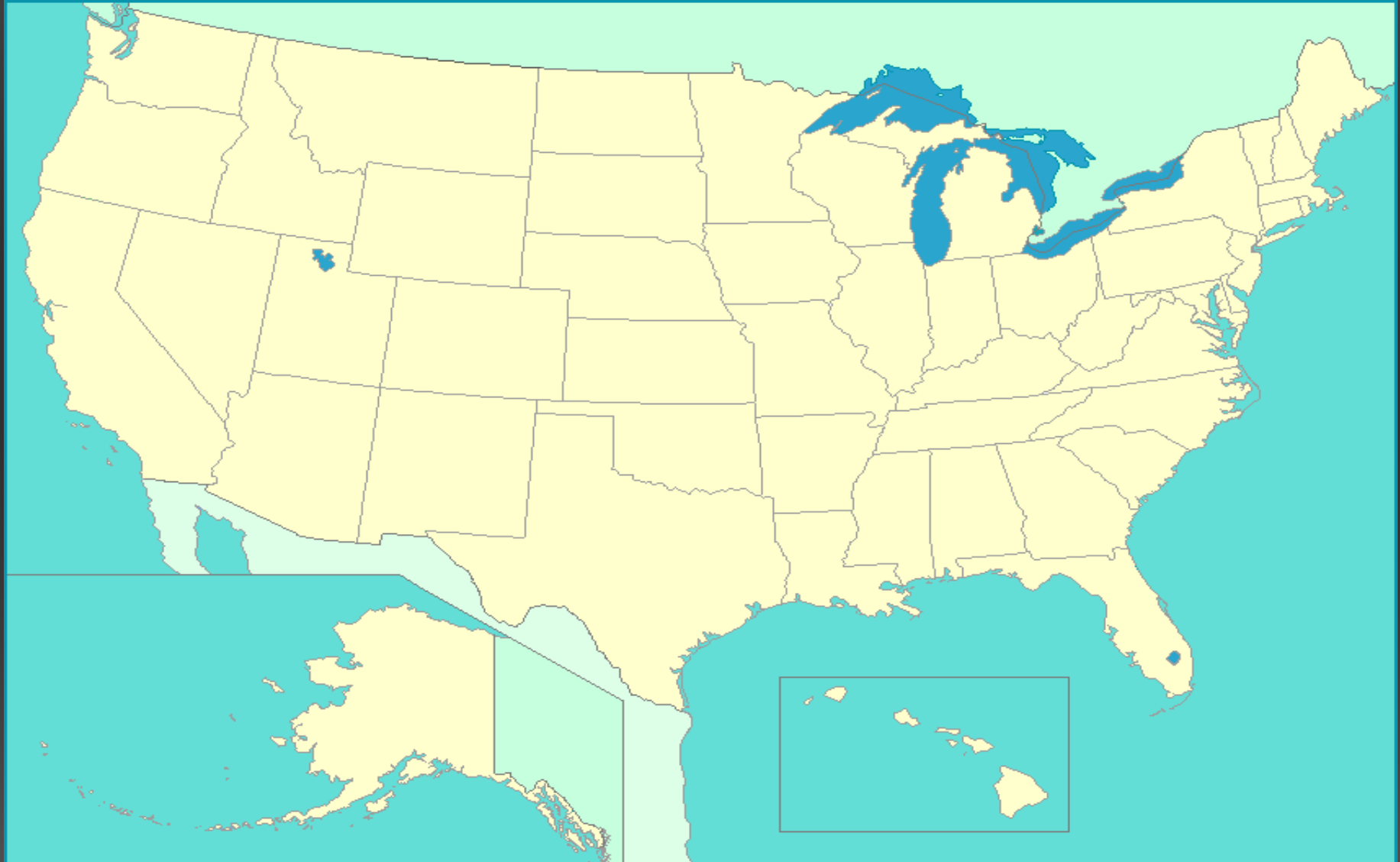


*“Share this post and be entered into a sweepstakes to win a paid vacation to Maui!”*

# Red Light



# Social Media in Other States



# New York Advertising a Retailer(s)



Suppliers are permitted to advertise on social media about an event if:

- Two unaffiliated retailers are listed
- Price of the wine is not included
- The listing is the only reference to the licensee
- The retailer is relatively inconspicuous in relation to the entire advertisement
- **No picture or illustration of the retail establishment**
- No laudatory references

**Source:** [NY Regulations, Title 9, Subtitle B, Chapter I, Subchapter E, Part 86, Section 86.10.]



# Florida Advertising a Retailer(s)

Suppliers may include the names of retail licensees on social media advertisements provided advertisement lists:

- Two (2) or more unaffiliated retail licensees.
- The portion of the advertisement identifying retailers shall be relatively inconspicuous
- The purpose of placing the advertisement shall **not** be to underwrite any retailer's event or the cost of any retail publication.

*Source: [FL Regulations, Chapter 61A-1, Section 61A-1.01015.]*



# Kentucky, North Carolina & Minnesota Social Media Advertising



- These states allow social media advertising generally without guidance.
- However, Minnesota requires pre-approval of all advertising via a submission to the board.

# The Following States Address Social Media:



## **Colorado**

[Regulation 47-316 \(C\) page 20](#)

[Regulation 47-322 \(B\) \(C\) pages 24-27](#)

## **Florida**

[Declaratory Statement 2014-001-Winemaker Dinners](#)

## **Illinois**

[Social Media Advertising, 235 ILCS 5-6/6\(iv\)](#)

## **Kentucky**

[804 KAR 1:100. General Advertising Practices/Social Media](#)

## **Louisiana**

[Social Media Advisory](#)

## **Michigan**

[MLC Section 436.1610](#)

## **New York**

[Advertising Names of Retailers, 9-CRR-NY 86.10](#)

[Advisory #2014-8 Events at Retail Establishments](#)

## **Pennsylvania**

[Advertising Advisory](#)

## **Texas**

[Cooperative Advertising FAQ](#)

[Marketing Practices Bulletin- "Wine, Beer and Other Alcoholic Beverage Tastings at Retail Accounts"](#)

## **Washington, D.C.**

[Quick Guide: Advertisements, Discounts, Gifts, and Other Promotions](#)

# Colorado Advertising a Retailer(s)



- A winery **may utilize social media** to provide information to the public that benefits an individual retailer if that information were not allowed in traditional advertising mediums.
- Supplier **can** offer a “thing of value” to a retailer. For example, paying for a winemaker dinner announcement at the retailer’s location in the media.
  - » Regulations 47-316(C), 47-322(B) and 47-322 (C)

# Colorado: Advertising Event at Retailer



Situation: A winery is hosting a wine sampling event at a hotel. The event is open to the public.

The winery pays Google Ads for the advertisement and could be seen on social media. Ad includes:

- Name of hotel
- Location
- Time
- Wine Varietal



# Green Light



# Best Practices



- **Have a Social Media Policy**
  - a) Who can post?
  - b) What they have to do when they post?
  - c) What kind of content needs to be reviewed before posting or sharing?
  - d) Regular review of social media posts.

# Best Practices



- **Know Your Exceptions + Do's and Don'ts** – retailer locators, event-based exceptions, responsible content.
- **Decide How Conservative/Creative You Want to Be** – “But everyone else is doing it!” Every business has different risk profiles.
- **Engage with Your Audience about YOUR BRAND, Not Your Retailers' Brand!**



# Wine Institute's Advertising Guidelines



Wine Institute logo and navigation menu (HOME, DTC SHIPPING, WHOLESALE, ABOUT, RESOURCES, LOGOUT).

## Wine Compliance Rules

Wine Institute + Compli Collaboration

Wholesale Laws for Wineries

Direct Shipping Laws for Wineries

FAQs

This information is intended for winegrower licensees only.

### COMPLIANCE ALERTS

**!** Virginia Law Impacts Wineries' Ability to Establish Wholesaler Sales Territories

OCTOBER 16, 2018

Despite opposition from Wine Institute and a coalition of industry stakeholders, a new law making a



# #THANKYOU

*For any additional information, please contact Tracy Genesen-*  
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