

A wooden scale of justice is positioned on the right side of the image, set against a dark blue background. The scale's vertical post and horizontal beam are visible, with a dark, rounded weight hanging from the beam. The lighting highlights the texture of the wood.

# **BUILDING BRAND LOYALTY**

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**AVOIDING LEGAL PITFALLS IN  
AN INCREASINGLY DIGITAL AGE**

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# Agenda

This program will focus on unfair and deceptive advertising issues that craft breweries might encounter in the following areas:



- ◇ Loyalty Programs
- ◇ Co-Promotions
- ◇ Social Media Advertising
- ◇ Deceptive Advertising in Packaging / labeling



# Governing Bodies

## PRINCIPAL AGENCIES THAT REGULATE BREWERY MARKETING

This discussion will focus primarily on FTC and FCC oversight of advertising, but will also touch on some state specific regulations



Federal Trade Commission (FTC)



Federal Communications Commission (FCC)



Alcohol and Tobacco Tax and Trade Bureau (TTB)



Washington State Liquor and Cannabis Board (LCB) // Washington State Attorney General

# Loyalty Programs



## SMS

Commercial texting is regulated by the FCC by and through the Telephone Consumer Protection Act (TCPA). Violations of the TCPA are steep (up to \$2000 per text message).

- Must obtain express written consent before sending text messages
- Retain proof of consent and verify
- Messages must remain within the scope of the consent
- Provide opt out
- Hour limitations for contact
- Platform use does not provide a safe harbor defense against violations of TCPA
- But see *Facebook v. Duguid*

## EMAIL

FCC regulates the transmission of electronic commercial messages by and through the CAN-SPAM ACT.

- Unlike Text messages, there is no opt in requirement, but without an explicit opt-in the message must be identified as an ad in a “clear and conspicuous” manner
- Avoid deceptive subject lines – must accurately reflect the content of the message
- Obligation to provide opt out info and honor opt out requests
- Opt out must be available for 30 days after email transmission and the opt out request must be honored within 10 days of being made
- Platform use does not provide a safe harbor defense

# *Facebook v. Duguid*

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## Supreme Court Decision, April 2021

- TCPA restricts calls and texts made with an automatic telephone dialing system (ATDS). ATDS is defined as “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator and (B) to dial such numbers”.
- In 2015 the FCC released a Declaratory Ruling that broadened the TCPA’s reach by claiming that equipment that requires additional software to perform the functions of ATDS still meet the definition of an ATDS.
- Many courts, including the 9th circuit courts, ruled that dialing systems that did not use a random or sequential number generator to place calls or texts nevertheless fell under the definition of ATDS.
- Duguid sued Facebook in 2015 in the 9<sup>th</sup> Circuit Court for violating the TCPA, when he received daily text messages about a Facebook account that he never established. The 9<sup>th</sup> Circuit ruled in favor of the Plaintiff (Duguid) and Facebook appealed to the Supreme Court.
- The Supreme Court interpreted the TCPA statutory definition of ATDS literally and determined that since Facebook did not use a random or sequential number generator to send texts to Duguid, that there was no violation of the TCPA.

## Does this mean that businesses can freely send SMS without fear of liability? **NOT QUITE**

Many states, including Washington, reacted by passing state ‘mini TCPA’ laws

*HB 1497* was enacted into law and became effective On June 9, 2022 which governs commercial telephone solicitation and both: (a) lacks the ATDS requirement and (b) covers calls (and texts) to cell phones. Applies to unsolicited calls and SMS:

- Telephone solicitation only allowed between 8am and 5pm
- Must provide identifying information and opt-out

# Co- Promotions/ Cause Marketing

## **BENEFITS**

Aligning your brand with a charitable or good cause develops brand loyalty and broadens potential consumer base. According to a 2015 Cone Communications Millennial CSR Study:

- Companies that address social and environmental issues see an 88% increase in brand loyalty
- 90% of consumers would switch brands to one associated with a social or environmental cause.

## **METHODOLOGY**

Co-promotional cause marketing can be affected utilizing multiple methods:

- Co-sponsored events
- Donations of a portion of proceeds
- Joint product development, etc.

**CONE**  
COMMUNICATIONS

2015 Millennial CSR Study

# Risk Mitigation

- ◇ Does joint promotion encourage consumption of or advertise beer
- ◇ If making donations as part of co-promotions, be clear about the donation and notify consumers about changes
- ◇ Verify marketing is honest, and not deceptive



# Social Media Advertising

## KEY ISSUES

- Avoiding Advertising to Youth
- Platform Specific Requirements
- Unfair and Deceptive Advertising
- Influencers



# Self-Regulatory Codes – Beer Institute

## OBLIGATION TO AVOID MARKETING TO UNDERAGE AUDIENCES

- Advertising materials should avoid elements that appeal primarily to persons below legal drinking age
  - special attractiveness to such persons beyond their general attractiveness for persons of legal drinking age
- Is there a dialogue between the brewer and user?
  - If not, then the advertisement should be placed where at least 73.6% of the audience is expected to be adults of legal drinking age
  - If so, must use age gating technology to verify that the user is of legal drinking age – either through active age confirmation or registration

## PLATFORM SPECIFIC TECHNOLOGIES AND RULES

- Tik-Tok branded content policy prohibits promotion of alcohol
- FB and Twitter employ precision targeting to significantly reduce risk of marketing to underage audiences

# Deceptive Advertising



## WHAT MAKES AN AD DECEPTIVE

An ad that contains a statement or omits information that is material and is likely to mislead consumers acting reasonably under the circumstances

### **MATERIAL**

Information is “material” if it is important to a consumer’s decision to buy or use the product

Source: FTC Policy Statement on Deception

# INFLUENCERS

## THE FTC'S ENDORSEMENT AND TESTIMONIAL GUIDES

- Developed in 1972, revised in 1980 and in 2009 – FTC has issued various guidance and FAQ in recent years, especially pertaining to social media
- Covers: “*any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser*”

# Key Principles

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- Honest Experience
  - The endorsement must reflect the honest opinions, findings, beliefs or experiences of the endorser
- The endorsement must not convey claims that would be deceptive or unsubstantiated if made directly by the advertiser
  - Puffery is permitted, but be cautious of ‘joke’ claims or hyperbole that may be taken literally: “*will put hair on your chest*”, “*the most refreshing*”
- Any **material connection** between the influencer and the brewery that might materially affect the weight or credibility of the endorsement must be fully and **clearly** disclosed
  - i.e., the connection is not reasonably expected by the audience
- Breweries and influencers can be liable for failure to disclose material connections and for false statements made by the influencer

# Understanding “Material Connection”

## COMPENSATION

- Paid
- Free product
- Free entry to event

## INCENTIVISED

- Discounts, coupons
- Sweepstakes entry

Less obvious but important  
material connections:

## AFFILIATION

- Employee
- Agency
- Relative

# Acceptable Disclosures

## Likely Acceptable Disclosures:

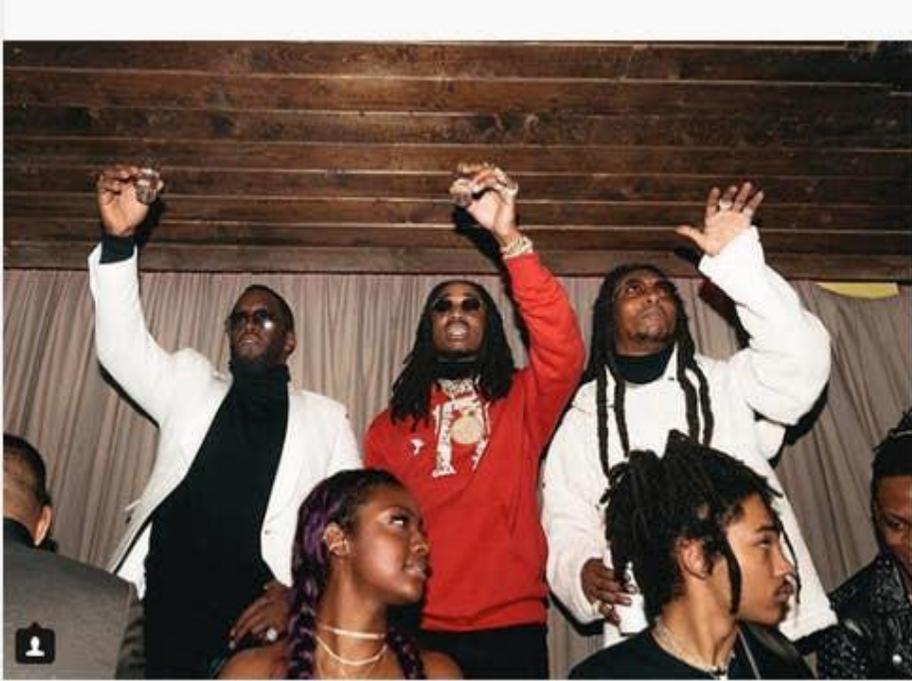
- #Ad (alone or first)
- #sponsored
- I'm happy to be working with #Brewery
- #BreweryAmbassador
- Other Up-front disclosure

**MUST COME BEFORE THE CLICK**

## Likely Insufficient Disclosures:

- #ad (hidden between other ##)
- #spon
- #Brewery
- #ambassador
- Click for the disclosure

Disclosure violations often slip under the radar, or are brought to FTC by watchdog groups, but in October 2021, FTC sent warning letters to five of the largest beer manufacturers putting them on notice of advertising rules pertaining to unfair or deceptive practices in endorsements. The letters don't make claims of recipient violations, but they do serve to notify recipients that the FTC will be scrutinizing endorsements and testimonials in greater detail.



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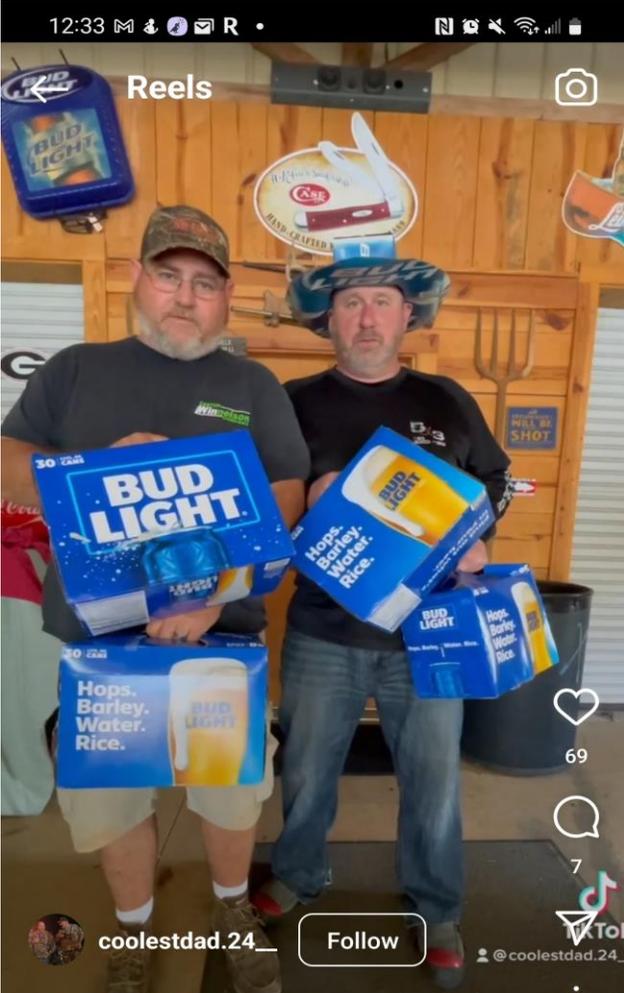
ovawestant <https://youtu.be/ZE4OUIbH5as>. Check me out guys I'm a 19 year old rapper from Baltimore.  
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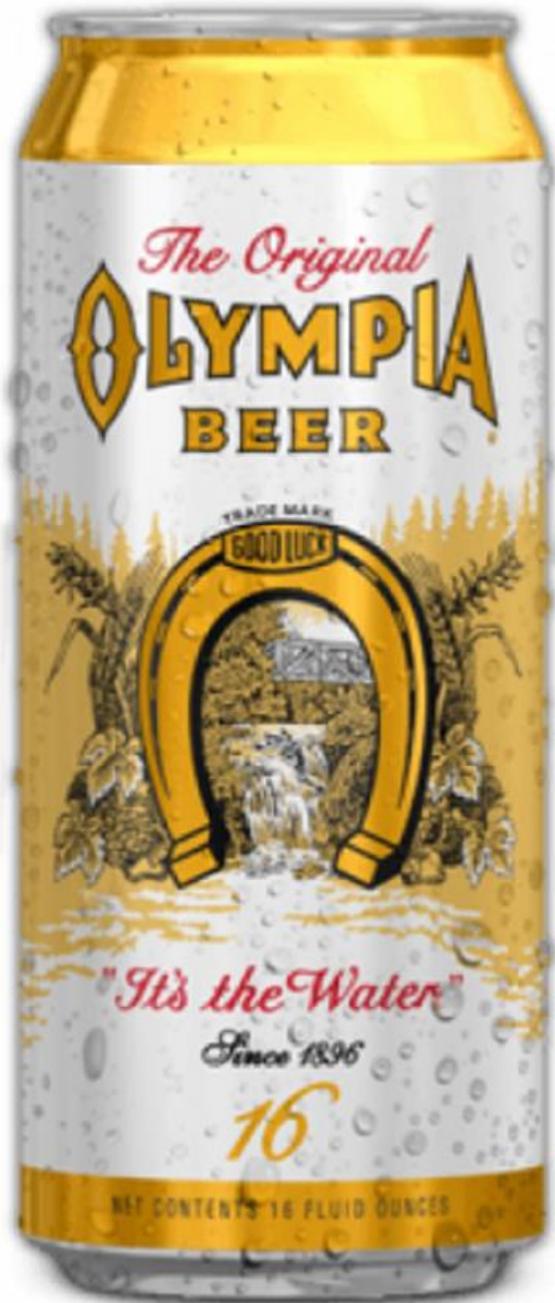


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Life of the party! #fyp #budlight #question ...  
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# Deceptive Advertising in Packaging/Labeling

## LIABILITY TO CONSUMERS

The same definition of 'deceptive' applies to packaging and labeling, and consumers have and do bring class action lawsuits against breweries for damages. Here, Pabst was sued in a class action lawsuit for the statement "It's the Water", which could lead a reasonable consumer to believe that the beer is brewed using water from the Olympia area.

# Thank you!

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