

December 13, 2011

To: FBWA Members

From: Mitch Rubin, Executive Director

Re: Accumulated & Retroactive Discounts Are Prohibited

Facts: Over the past several months, a vendor ordered beer from a distributor each week. The distributor delivered the beer and was timely paid. The vendor, however, often chose or failed to order sufficient quantities to obtain the discounts posted in advance by the distributor with the Division of Alcoholic Beverages and Tobacco (DABT). The vendor has requested a payment from the distributor in an amount equal to the missed quantity discounts.

Question Presented: Whether a distributor may credit, rebate, reimburse or otherwise pay the vendor an amount equal to what the vendor might have saved had the vendor ordered the necessary quantities to receive the posted discounts?

Brief Answer: No. A distributor is prohibited from giving rebates or accumulated discounts of any kind to a vendor after the order has been delivered. A distributor who gives and a vendor who accepts an unlawful rebate are both subject to administrative penalties for each occurrence and the violations attach to the respective licenses.

Applicable Statutes and Rules: Section 561.42(1), Florida Statutes, and Rule 61A-1.010, Florida Administrative Code, prohibits a distributor from giving to a vendor rebates or accumulated discounts.

Section 561.42(1), in relevant part, provides:

... nor shall such ... distributor... assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such ... distributor....

Rule 61A-1.010, Approved Advertising and Promotional Gifts, further implements section 561.42(1). In relevant part, it provides:

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures,

furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C., or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

Section 563.065, however, authorizes certain discounts, including quantity discounts, for beer so long as the quantity discounts are posted with the DABT so that they are available to all vendors who wish to participate.

Rule 61A-4.031, Delivery to Vendors and Accumulated Discounts, implements section 563.065 providing that beer orders consist only of delivery on a single day. This Rule provides that the order must be closed after the last delivery of the day to the vendor and all discounts granted must be reflected on the invoice.

Rule 61A-2.022, Penalty Guidelines, provides the penalties for violation of the Beverage Law.

Application of Law to Facts: Section 561.42(1) and Rule 61A-1.010 prohibit assistance to vendors. Quantity discounts would be considered prohibited assistance except for section 563.065 and Rule 61A-4.031 authorizing them under limited circumstances--delivery of the minimum quantity on a single day with any discount reflected on the invoice. Rule 61A-4.031's requirements to close the order after delivery to the vendor and show the discount on the invoice are intended to prevent rebates and accumulated discounts through the combining of orders. Both the distributor's giving and the vendor's accepting of accumulated discounts or rebates are subject to administrative fines and penalties per occurrence, which administrative actions attach to the license.

Contrast these facts with the situation where a vendor actually purchased on a single day a quantity sufficient to qualify for the posted quantity discount. If a vendor actually purchased the requisite quantity on a single day's delivery, a distributor could document the mistake and make an adjustment.

Conclusion: The giving and accepting of credit, accumulated discounts or rebates is a violation of section 561.42(1) and Rule 61A-1.010 and subject

to administrative penalties that attach to the license. A distributor is prohibited from combining orders after the delivery is complete, except for all deliveries made on a single day, and from giving to a vendor any credit, accumulated discount or rebate. A vendor is prohibited from accepting from a distributor any credit, accumulated discount or rebate. The facts described in this Memo should be distinguished from the situation where a vendor actually purchased on a single day a quantity sufficient to qualify for the posted quantity discount but did not receive it. If a vendor actually purchased the requisite quantity on a single day's delivery, a distributor could document the mistake and make an adjustment.