

Florida Beer Wholesalers Association

May 15, 2012

To: Kevin Shaver, Brown Distributing

From: Mitch Rubin

Re: Discounting Wine and Spirits

Question Presented: Which statutes and administrative rules govern a distributor's discounting of wine and spirits to a vendor?

Brief Answer: The discounting of wine, which includes cider, and spirits from a distributor to a vendor is governed by section 561.01 (10), Florida Statutes, and Rules 61A-4.0461, 61A-4.031 F.A.C.

Summary: There is greater flexibility in discounting wine and spirits than in discounting beer. The discounts on wine and spirits may be offered by license series or type. Discounts may be on the price or in the form of free merchandise. Discounts may change daily. Discounts for wine and spirits should be reflected on the invoice. A best practice for offering discounts on wine and spirits and not running afoul of the tied house evil prohibition against accrued, accumulative or retroactive discounts is to create a daily deal sheet that provides the cash and merchandise discounts that are available to specific vendor license series and types on a day and offer the deal to every vendor that meets the qualifications.

Analysis: Under Florida's Beverage Law, any analysis of discounts begins with Tied House Evil section 561.42 (1), Florida Statutes, which provides:

No manufacturer, distributor, importer, primary American source of supply, or brand owner or registrant of any of the beverages herein referred to, whether licensed or operating in this state or out-of-state, nor any broker, sales agent, or sales person thereof, shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof, 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 manufacturer, distributor, importer, primary American

source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof; provided, however, that this does not apply to any bottles, barrels, or other containers necessary for the legitimate transportation of such beverages or to advertising materials and does not apply to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section.

The first part of this subsection prohibits discounts because they are considered assistance to a vendor. The second part recognizes certain exceptions including the extension of credit under certain conditions which are more fully explicated in other subsections.

Section 561.42 (6), Florida Statutes, provides an exception for trade discounts on wine and spirits:

Nothing herein shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales.

Section 561.01 (10), Florida Statutes, defines "discount in the usual course of business:"

"Discount in the usual course of business" means a cash or spirituous or vinous beverage merchandise discount given pursuant to an agreement made at the time of sale. However, such agreement shall not result in an accrued, accumulated, or retroactive discount. The same discounts shall be offered to all vendors of the same license series or type buying similar quantities. Any discount which is in violation of this section shall be considered an arrangement for financial assistance by gift. (Quotation is in original.)

The first sentence of the subsection provides for a cash or product (free merchandise such as buy one get one free) discount at the time of sale for wine and spirits. There is no filing of discount pricing (price posting) on wine or spirits with the Division of Alcoholic Beverages and Tobacco (DABT).

The second sentence prohibits using the cash or merchandise discount to assist any vendor by providing an accrued, accumulated, or retroactive discount.

The third sentence requires that the same discounts be offered to all vendors of the same license series or type buying similar quantities. (It is helpful to contrast discounts for wine and spirits by license series or type buying similar quantities versus the differential pricing of malt beverages, pursuant

to section 563.065, Florida Statutes, on the basis of on-premises, off-premises, by county or by a distributor's warehouses.)

Rule 61A-4.0461, F.A.C. provides:

(1) Pursuant to the provisions of subsection (10) of Section 561.01, Florida Statutes, and subsection (1) and (6) of Section 561.42, Florida Statutes, discounts on sales of alcoholic beverages by distributors to vendors shall be considered a subterfuge to evade the beverage laws by the giving of a financial aid or economic assist to the vendor unless:

(a) The discount is a cash discount given simultaneously at the time of sale;

(b) The same discount is offered to all vendors buying similar quantities in any one business day;

(c) The discount is related to a single transaction; and

(d) In the case of malt beverage sales all of the quantity of malt beverage required to be purchased in order to qualify for the discount is delivered to a single location. However, the total quantity may be subdivided for delivery to a single licensed location or off-premise storage warehouse provided the total volume is delivered to that premise on a single day during the calendar week. The giving away of an alcoholic beverage to a vendor by a distributor would be considered a financial aid and economic assist. Any maneuver, shift or device of any kind by which a discount is given contrary to the provisions of this rule shall be considered a violation of this rule and subsection (1) and (6) of Section 561.42, Florida Statutes.

(2) All such discounts must be allowed to all vendors buying the same quantities of merchandise as reflected by the deal sheet for that business day.

The Rule has not been updated since the requirement for daily deal sheets was repealed in 1997—formerly 61A-4.0471. Prior to 1997, distributors were required to use daily deal sheets (see expression “deal sheet for that business day” in Paragraph (2)), which provided the discounts available on that day. The DABT could compare the deal sheet to various invoices to determine if the same discounts were being offered to all vendors that qualified.

The expression “for that business day” is not in the statute, but is provided for in the Rule. This parameter is what makes the regulatory scheme work for wine and spirits. Monday's discounts are on Monday deliveries. Different

discounts may be available on Tuesday, but distributors can't go back and combine Monday's and Tuesday's orders. Monday's invoice for wine and spirits closed upon the truck leaving the warehouse.

The Rule distinguishes between discounts for wine and spirits and differential pricing for malt beverages in setting out the requirement for discounts on malt beverages. Differential pricing is different than discounting as it is the subject of a different section of statute. While differential pricing must be filed in advance with the DABT, discounts on wine and spirits are not filed with the DABT at all.

There is more flexibility in selling wine and spirits as discounts may be offered by license series or type buying similar quantities versus the differential pricing for malt beverages based on on-premises, off-premises, county or warehouse.

Paragraph (1) (d) of the Rule prohibits free merchandise in the sale of beer, which is statutorily authorized in the sale of wine and spirits.

In addition, Rule 61A-4.031, F.A.C., provides:

Accrued, accumulative or retroactive discounts are prohibited by statute. Therefore, any discount given on the purchase of alcoholic beverages by a vendor must be given only on alcoholic beverages purchased in a single transaction. In order for quantity discounts on malt beverages to be granted, all of the quantity required to be purchased to qualify for the quantity discount must be delivered to a single location i.e., the total volume of malt beverages upon which the discount is based shall not be subdivided for delivery to multiple locations. However, the total quantity may be subdivided for delivery to a single licensed location or off-premise storage warehouse provided the total volume is delivered to that premise on a single day during the calendar week.

- (1) Delivery of all alcoholic beverages purchased in a single transaction must be made during the same calendar week.
- (2) Payment for alcoholic beverages purchased in a single transaction as defined by Rule 61A-1.011, F.A.C., must be made within the period of time prescribed by law.
- (3) Any discount given a vendor for the purchase of alcoholic beverages shall be a cash discount and shall be reflected on the invoice covering such sale.

Rule 4.043 (1) (h), F.A.C., requires that all discounts given on spirits must be reflected on the invoice. While technically there is no such requirement for wine, it would be a bad business practice not to reflect those discounts on the invoice as well.

Conclusion: The sale of wine and spirits from a distributor to a vendor is governed by section 561.01, Florida Statutes, and Rules 61A-4.0461, 61A-4.031 F.A.C. There is greater flexibility in discounting wine and spirits than in discounting beer. The discounts on wine and spirits may be offered by license series or type. Discounts may be on the price or in the form of free merchandise. Discounts may change daily. Discounts for wine and spirits should be reflected on the invoice. A best practice for offering discounts on wine and spirits and not running afoul of the tied house evil prohibition against accrued, accumulative or retroactive discounts is to create a daily deal sheet that provides the cash and merchandise discounts that are available to specific vendor license series and types on a day and offer the deal to every vendor that meets the qualifications.