

Florida Beer Wholesalers Association

August 8, 2012

To: FBWA Members

From: Mitch Rubin

Re: Merchandising Elements & Delivery Thereof—Unrelated to Product Sold

Facts: A chain vendor has requested assistance in the form of a merchandising element and delivery thereof. The merchandising element is unrelated to the products that the importer, manufacturer or distributor (hereinafter industry member) sells.

Issue: Whether an industry member may deliver to a vendor for a nominal fee a merchandising element unrelated to the products sold?

Brief Answer: No. It is axiomatic that an industry member may not assist a vendor by providing a good, including a merchandising element, or service, including a delivery service, to a vendor that is unrelated to the products that the industry member sells to the vendor.

Analysis: Section 561.42 (1), Florida Statutes, prohibits an industry member from assisting a vendor. It also prohibits a vendor from accepting any assistance. In relevant part, it provides:

nor shall such manufacturer, distributor, importer...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...

Rule 61A-1.010, Florida Administrative Code, reiterates the prohibition against industry members giving and vendors accepting and elaborates on the statutory meaning of “assist any vendor by any gifts or loans of money or property of any description...whatsoever...” The Rule 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.

(2) As used in Rules 61A-1.010 through 61A-1.0108, F.A.C., “industry member” means manufacturer; distributor; importer; primary American source of supply; brand owner or registrant; and any broker, sales agent, or sales person of any of the aforementioned licensees.

(3) For purposes of Rules 61A-1.010 through 61A-1.0108, F.A.C., a licensee is categorized based on its license, type of beverages it is dealing in, conduct, and the form of assistance being provided. For example, a wine distributor who is selling a malt beverage product must comply with the malt beverage restrictions in Rules 61A-1.010 through 61A-1.0108, F.A.C., and Section 561.42, F.S.

Rule 61A-1.010 (1) provides that industry members are prohibited from furnishing any services to a vendor unless there is a specific statutory or regulatory exception.

The closest exceptions are for Inside Signs Advertising Brands in Rule 61A-1.01013 and the Merchandise Exception in Rule 61A-1.01027. Neither authorize a delivery service or the giving of advertising materials (merchandising element) unrelated to products sold.

Rule 61A-1.01013 (1), Inside Signs Advertising Brands, specifically provides that inside signs are limited to those “advertising brands.”

Rule 61A-1.01027, Merchandise Exception, is limited to products the industry member is a *bona fide* seller of. Industry members are not *bona fide* sellers of merchandising elements. That is, industry members are not in the sign business. Even if industry members were in the sign and delivery business, the sign and its delivery would have to be sold at fair market value.

It is worth noting that even a service that is related to products sold may not be authorized under the Beverage Law. Hence the need for statutory and regulatory exceptions such as: in-store servicing of beer, shelf plans and draft cleaning.

Conclusion: Florida’s Beverage law prohibits industry members from providing the merchandising element and the delivery thereof.