

Florida Beer Wholesalers Association

To: FBWA Members

From: Mitch Rubin

Re: Sealed Containers or “Dry Tastings”

Date: September 24, 2015

Facts: A distributor plans to sell 20 cases of beer to an off-premise retailer and then purchase it back at the everyday retail price to give sealed six packs to consumers who purchase a pizza to take away for tastings off the retailer's premises.

Issue: Whether distributors may sell to and buyback from a retailer sealed containers of beer to give to consumers—“dry tastings”--who purchase a pizza at an off-premise retail venue for the consumers to take away for tasting?

Brief Answer. No. Providing sealed containers to consumers at a retailer's premise is unlawful financial assistance to the retailer and there is no exception in statute or rule. In addition, the sale and buy-back looks like a scheme to provide unlawful financial assistance in the form of free product to the retailer.

Analysis: Section 561.42 (1) prohibits direct and indirect financial assistance to retailers.

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;...

Rule 61A-1.010 further implements the statute.

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 Title 61, 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.

It has long been established that distributors may not provide retailers with free beer. Free beer falls within the statute's prohibited financial assistance of "any gifts or... property of any description..."

Free beer also falls within the Rule's prohibition of "other thing of value.."

(Although this analysis does not depend on the selling and buy back of six-packs for giving to consumers with a pizza purchase, this practice looks as though the distributor is providing the retailer with unlawful financial assistance in the form of free product plus profit.)

The rule, however, recognizes exceptions provided for in statute or elsewhere in the administrative code. The closest exception is for consumer advertising specialties in Section 561.42 (14) (c) & (d) and Rule 61A-1.01012 (2).

Section 561.42, Tied house evil; financial aid and assistance to vendor by manufacturer, distributor, importer, primary American source of supply, brand owner or registrant, or any broker, sales agent, or sales person thereof, prohibited; procedure for enforcement; exception.—

(14) The division shall adopt reasonable rules governing promotional displays and advertising, which rules shall not conflict with or be more stringent than the federal regulations pertaining to such promotional displays and advertising furnished to vendors by distributors, manufacturers, importers, primary American sources of supply, or brand owners or registrants, or any sales agent or sales person thereof; however:

(c) If a manufacturer, distributor, importer, brand owner, or brand registrant of malt beverage, or any sales agent or sales person thereof, provides a vendor with consumer advertising specialties such as ashtrays, T-shirts, bottle openers, shopping bags, and the like, such items may be sold only at a price not less than the actual cost to the industry member who initially purchased them, and may be sold without limitation in total value of such items sold to a vendor.

(d) A manufacturer, distributor, importer, brand owner, or brand registrant of malt beverage, or any sales agent or sales person thereof, may provide consumer advertising specialties described in paragraph (c) to consumers on any vendor's licensed premises.

61A-1.01012 (2) Consumer Advertising Specialties Exception.

When the specialties advertise malt beverages, malt beverage industry members may sell to a vendor consumer advertising specialties of nominal value bearing substantial brand advertising designed to be carried away by the consumer, including trading stamps, nonalcoholic mixers, pouring racks, ashtrays, bottle or can openers, cork screws, shopping bags, matches, printed recipes, pamphlets, cards, leaflets, blotters, post cards, pencils, T-shirts, caps, visors, and similar specialties to vendors at no less than the actual cost of the industry member who initially purchased them, unless the manufacturer or distributor gives the items directly to consumers on the vendor's licensed premises.

Alcoholic beverages are not included in the list of consumer advertising specialties and are not similar to the tchotchke or swag listed as examples.

The next closest exception is for consumer tastings in section 563.09.

563.09 Malt beverage tastings by distributors and manufacturers.—

(1) A manufacturer, distributor, or importer of malt beverages, or any contracted third-party agent thereof, may conduct sampling activities that include the tasting of malt beverage products on:

(a) The licensed premises of a vendor authorized to sell alcoholic beverages by the drink for consumption on premises; or

(b) The licensed premises of a vendor authorized to sell alcoholic beverages only in sealed containers for consumption off premises if:

1. The licensed premises is at an establishment with at least 10,000 square feet of interior floor space exclusive of storage space not open to the general public; or
2. The licensed premises is a package store licensed under s. [565.02](#)(1)(a).

(2) A malt beverage tasting conducted under this section must be limited to and directed toward the general public of the age of legal consumption.

(3) For a malt beverage tasting conducted under this section on the licensed premises of a vendor authorized to sell alcoholic beverages for consumption on premises, each serving of a malt beverage to be tasted must be provided to the consumer by the drink in a tasting cup, glass, or other open container and may not be provided by the package in an unopened can or bottle or in any other sealed container.

(4) For a malt beverage tasting conducted under this section on the licensed premises of a vendor authorized to sell alcoholic beverages only in sealed containers for consumption off premises, the tasting must be conducted in the

interior of the building constituting the vendor's licensed premises and each serving of a malt beverage to be tasted must be provided to the consumer in a tasting cup having a capacity of 3.5 ounces or less.

(5) A manufacturer, distributor, or importer, or any contracted third-party agent thereof, may not pay a vendor, and a vendor may not accept, a fee or compensation of any kind, including the provision of a malt beverage at no cost or at a reduced cost, to authorize the conduct of a malt beverage tasting under this section.

(6)(a) A manufacturer, distributor, or importer, or any contracted third-party agent thereof, conducting a malt beverage tasting under this section, must provide all of the beverages to be tasted; must have paid all excise taxes on those beverages which are required of the manufacturer or distributor; and must return to the manufacturer's or distributor's inventory all of the malt beverages provided for the tasting that remain unconsumed after the tasting. More than one tasting may be held on the licensed premises each day, but only one manufacturer, distributor, importer, or contracted third-party agent thereof, may conduct a tasting on the premises at any one time.

(b) This subsection does not preclude a manufacturer, distributor, or importer, or any contracted third-party agent thereof, from buying the malt beverages that it provides for the tasting from a vendor at no more than the retail price, but all of the malt beverages so purchased and provided for the tasting which remain unconsumed after the tasting must be removed from the premises of the tasting and properly disposed of.

(7) A manufacturer, distributor, or importer of malt beverages that contracts with a third-party agent to conduct a malt beverage tasting under this section on its behalf is responsible for any violation of this section by such agent.

(8) This section does not preclude a vendor from conducting a malt beverage tasting on its licensed premises using malt beverages from its own inventory.

(9) This section is supplemental to and does not supersede any special act or ordinance.

(10) The division may, pursuant to ss. [561.08](#) and [561.11](#), adopt rules to implement, administer, and enforce this section.

The statute authorizing tastings specifically requires open containers and prohibits "an unopened can or bottle or in any other sealed container."

Conclusion: The Beverage Law does not authorize giving sealed containers—"dry tastings"--to consumers at a retailer's licensed premises. It also does not permit selling and buying back for the purpose of giving to the retailer's consumers on the premises.