

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 822

INTRODUCER: Regulated Industries Committee and Senator Hutson

SUBJECT: Beverage Law

DATE: February 5, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Anderson</u>	<u>McKay</u>	<u>CM</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 822 amends the “tied house evil” law in s. 561.42, F.S., which prohibits an alcoholic beverage manufacturer or distributor from having a financial interest, directly or indirectly, in the establishment or business of an alcoholic beverage vendor, and also prohibits a manufacturer or distributor from giving gifts, loans, property, or rebates to the vendor.

The bill exempts from the “tied house evil” prohibitions a written agreement between a manufacturer or importer of malt beverages and an alcoholic beverage vendor for brand naming rights, including the right to advertise cooperatively. The agreement must be negotiated at arm’s length for no more than fair market value.

Such agreement must be with a vendor who operates a theme park complex; may not involve the sale or distribution of malt beverages; may not permit the vendor to give preferential treatment to the alcoholic beverage brand or brands of the manufacturer or importer; may not limit, directly or indirectly, the sale of alcoholic beverages from another manufacturer or importer, or distributor; and must be registered with the Division of Alcoholic Beverages and Tobacco (division) in the Department of Business and Professional Regulation (DBPR) within 10 days of its execution.

The bill defines a “theme park” as a complex comprising at least 25 contiguous acres owned and controlled by the same business entity, which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually through a controlled entrance to and exit from the theme park complex.

The manufacturer or importer of malt beverages who is a party to a brand naming rights agreement is prohibited from, directly or indirectly, soliciting or receiving from any of its distributors any portion of the payment it owes to the vendor pursuant to the naming rights agreement. The bill also prohibits a brand naming rights agreement from, directly or indirectly, obligating or placing responsibility, financial or otherwise, upon a distributor.

The bill provides an effective date of July 1, 2018.

II. Present Situation:

In Florida, alcoholic beverages are regulated by the Beverage Law,¹ which regulates the manufacture, distribution, and sale of wine, beer, and liquor by manufacturers, distributors, and vendors.² The division administers and enforces the Beverage Law.³

“Alcoholic beverages” are defined in s. 561.01, F.S., as “distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume.” “Malt beverages” are brewed alcoholic beverages containing malt.⁴

Section 561.14, F.S., specifies the license and registration classifications used in the Beverage Law.

- “Manufacturers” are those “licensed to manufacture alcoholic beverages and distribute the same at wholesale to licensed distributors and to no one else within the state, unless authorized by statute.”⁵
- “Distributors” are those “licensed to sell and distribute alcoholic beverages at wholesale to persons who are licensed to sell alcoholic beverages.”⁶
- “Importers” are those licensed to sell, or to cause to be sold, shipped, and invoiced, alcoholic beverages to licensed manufacturers or licensed distributors, and to no one else in this state; provided that ss. 564.045 and 565.095, F.S., relating to primary American source of supply licensure, are in no way violated by such imports.⁷
- “Vendors” are those “licensed to sell alcoholic beverages at retail only” and may not “purchase or acquire in any manner for the purpose of resale any alcoholic beverages from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law.”⁸

Three-Tier System

In the United States, the regulation of alcohol since the repeal of Prohibition has traditionally been based upon a “three-tier system.” The system requires separation of the manufacture,

¹ Section 561.01(6), F.S., provides that the “Beverage Law” means chs. 561, 562, 563, 564, 565, 567, and 568, F.S.

² See s. 561.14, F.S.

³ Section 561.02, F.S.

⁴ Section 563.01, F.S.

⁵ Section 561.14(1), F.S.

⁶ Section 561.14(2), F.S.

⁷ Section 561.01(5), F.S.

⁸ Section 561.14(3), F.S.

distribution, and sale of alcoholic beverages. The manufacturer creates the beverages, and the distributor obtains the beverages from the manufacturer to deliver to the vendor. The vendor makes the ultimate sale to the consumer.⁹ A manufacturer, distributor, or exporter may not be licensed as a vendor to sell directly to consumers.¹⁰

Generally, in Florida, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail.¹¹ Licensed manufacturers, distributors, and registered exporters are prohibited from also being licensed as vendors.¹² Manufacturers are also generally prohibited from having an interest in a vendor and from distributing directly to a vendor.¹³

Tied House Evil Prohibitions

States have enacted statutes designed to prevent or limit the control of retail alcoholic beverage vendors by manufacturers, wholesalers, and importers, or to prohibit "tied-house arrangements," such legislation is referred to as "tied house" or "tied house evil" statutes.¹⁴

Section 561.42, F.S., Florida's "tied house evil" statute, regulates the permitted and prohibited relationships and interactions of manufacturers and distributors with vendors in order to prevent a manufacturer or distributor from having a financial interest, directly or indirectly, in the establishment or business of a licensed vendor, and to prevent a manufacturer or distributor from giving a vendor gifts, loans, property, or rebates.¹⁵ The prohibitions also apply to an importer, primary American source of supply,¹⁶ brand owner or registrant, broker, and sales agent (or sales person thereof).

The tied house evil statute also prohibits any distributor or vendor from receiving any financial incentives from any manufacturer. It further prohibits manufacturers or distributors from assisting retail vendors by gifts or loans of money or property or by the giving of rebates. These prohibitions do not, however, apply to any bottles, barrels, or other containers necessary for the legitimate transportation of such beverages, to advertising materials, or to the extension of credit for liquors sold, if made strictly in compliance with the provisions of s. 561.42, F.S.¹⁷

Section 561.42, F.S., also prohibits licensed manufacturers and distributors from:

- Making further sales to vendors that the division has certified as not having fully paid for all liquors previously purchased;¹⁸
- Directly or indirectly giving, lending, renting, selling, or in any other manner furnishing to a vendor any outside sign, printed, painted, electric, or otherwise;¹⁹

⁹ Section 561.14, F.S.

¹⁰ Section 561.22(1), F.S.

¹¹ Section 561.14(3), F.S. However, see the exceptions provided in ss. 561.221 and 565.03, F.S.

¹² Section 561.22, F.S.

¹³ Sections 563.022(14) and 561.14(1), F.S.

¹⁴ 45 AM. JUR. 2d *Intoxicating Liquors*, s. 94 (2017).

¹⁵ Section 561.42(1), F.S.

¹⁶ See s. 564.045, F.S.

¹⁷ Section 564.42(1). Section 561.42(2), F.S., permits distributors to extend credit for the sale of liquors to any vendor up to, but not including, the 10th day after the calendar week within which such sale was made.

¹⁸ Section 561.42(4), F.S.

¹⁹ Section 561.42(10), F.S.

- Providing neon or electric signs, window painting and decalcomanias, posters, placards, and other advertising material herein authorized to be used or displayed by the vendor in the interior of the licensed premises;²⁰ and
- Providing expendable retail advertising specialties, unless sold to the vendor at not less than the actual cost to the industry member who initially purchased them.²¹

III. Effect of Proposed Changes:

CS/SB 822 creates s. 561.42(15), F.S., to provide an exemption from the tied house evil prohibitions to permit a manufacturer or importer of malt beverages and vendor to enter into a written agreement for brand naming rights, including the right to advertise cooperatively. The agreement must be negotiated at arm's length for no more than fair market value.²²

Such written agreement:

- Must be with a vendor who operates a theme park complex;
- May not involve the sale or distribution of malt beverages;
- May not permit the vendor to give preferential treatment to the alcoholic beverage brand or brands of the manufacturer or importer;
- May not limit, directly or indirectly, the sale of alcoholic beverages from another manufacturer, importer, or distributor; and
- Must be registered with the division within 10 days of its execution.

The bill defines a "theme park" as a complex comprising at least 25 contiguous acres owned and controlled by the same business entity, which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually through a controlled entrance to and exit from the theme park complex.²³

²⁰ Section 561.42(12), F.S.

²¹ Section 561.42(14)(a), F.S.

²² "Arm's length" is not defined by the bill. Black's Law Dictionary defines the term "arm's-length transaction" as a "transaction between two unrelated and unaffiliated parties", and as a "transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises". BLACKS LAW DICTIONARY (14th ed. 2014), when defining forms of the term "transaction".

"Arms length" or "arms-length" is used eight times in the Florida Statutes; where used, those terms are not defined. *See* s. 155.40(4)(b), F.S., (in defining "fair market value" in connection with the sale or lease of county, district, or municipal hospitals); s. 193.114(1)(n), F.S., (as to property tax assessment rolls); s. 212.14(4), F.S., (as to the security required for sales tax dealer registrations); s. 215.4401, F.S., (in connection with the real estate investment portfolio of the State Board of Administration); s. 287.055(2)(l), F.S., (in defining "negotiate" under the "Consultants' Competitive Negotiation Act"); s. 400.462(11), F.S., (in defining "fair market value" in connection with home health agency regulation); s. 456.053(3)(g), F.S., (in defining "fair market value" in connection with financial arrangements between health care providers); and s. 718.117, F.S., (in defining "fair market value" in connection with condominium terminations).

²³ This definition of "theme park" is similar to the definition of the term "theme park or entertainment complex" in s. 509.013(9), F.S., which relates to public lodging and public food services establishments. Comparable terms are also defined in the Beverage Law. Section 561.01(18), F.S., defines the term "entertainment/resort complex;" s. 565.02(6), F.S., defines the term "theme park complex;" and s. 565.02(7), F.S., defines the term "marine exhibition complex." Each of these definitions also provide that the locations must be comprised of at least 25 contiguous acres owned and controlled by the same business entity, which contains permanent exhibitions and a variety of recreational activities and have a minimum of 1 million visitors annually. However, the definitions in ss. 561.01(18), 565.02(6), and 565.02(7), F.S., have additional requirements not included in s. 509.013(9), F.S., or in SB 822, including the requirement that the 1 million annual visitors pay admission fees.

The bill also prohibits a manufacturer or importer of malt beverages who is a party to a brand naming rights agreement from, directly or indirectly, soliciting or receiving from any of its distributors any portion of the payment due from the manufacturer or importer of malt beverages to the vendor pursuant to the naming rights agreement.

A brand naming rights agreement may not, directly or indirectly, obligate or place responsibility, financial or otherwise, upon a distributor.

The bill provides an effective date of July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 561.42 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries Committee on January 10, 2018:

The committee substitute prohibits a brand naming rights agreement from, directly or indirectly, obligating or placing responsibility, financial or otherwise, upon a distributor.

- B. **Amendments:**

None.