

**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.)

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

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BILL: SB 900

INTRODUCER: Senator Stargel

SUBJECT: Malt Beverages

DATE: February 10, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>IT</u>	<b>Favorable</b>
2.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 900 provides a framework for the return of malt beverages by a vendor to a distributor. A vendor may return malt beverages to a distributor if the malt beverages are a “damaged product,” an “out-of-code” product,” or an “undamaged product.” However, a distributor is not required to accept a return request.

The bill prohibits the sale of malt beverages on consignment or on any basis other than a bona fide sale. A product may not be returned because it is overstocked or slow-moving, or because there is only limited or seasonal demand for the product.

Under the bill, a vendor may request to return an undamaged product for an exchange of product, a refund, or a credit; damaged product is not eligible for a refund, but does qualify for an exchange or credit. Returns of damaged and undamaged products must be made within 7 days after the delivery date. The bill also specifies the circumstances in which damaged or undamaged malt beverages may be returned outside of the 7-day window.

The bill defines an “out-of-code product” as a malt beverage that has exceeded the manufacturer’s code date indicating the product’s freshness and availability for purchase at retail. Under the bill, a vendor may only return an out-of-code product to a distributor for an exchange of product if specific conditions are satisfied, including that the manufacturer’s code date is printed on the product container and the manufacturer of the products has written policies and procedures that specify the date that product should be removed. The manufacturer’s policies and procedures must be readily available, verifiable, and consistently applied. Out-of-code exchanges may occur at any time after delivery.

The bill requires a malt beverage distributor to keep a written record of each return of malt beverages.

The bill provides an effective date of July 1, 2020.

## II. Present Situation:

In Florida, alcoholic beverages are regulated by the Beverage Law,<sup>1</sup> which regulates the manufacture, distribution, and sale of wine, beer, and liquor by manufacturers, distributors, and vendors.<sup>2</sup> The Division of Alcoholic Beverages and Tobacco (division) in the Department of Business and Professional Regulation administers and enforces the Beverage Law.<sup>3</sup>

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

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.”<sup>5</sup>
- “Distributors” are those “licensed to sell and distribute alcoholic beverages at wholesale to persons who are licensed to sell alcoholic beverages.”<sup>6</sup>
- “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.<sup>7</sup>
- “Vendors” are those “licensed to sell alcoholic beverages at retail only” and who 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.”<sup>8</sup>

### 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, 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.<sup>9</sup> A manufacturer, distributor, or exporter may not be licensed as a vendor to sell directly to consumers.<sup>10</sup>

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

<sup>2</sup> See s. 561.14, F.S.

<sup>3</sup> Section 561.02, F.S.

<sup>4</sup> Section 563.01, F.S.

<sup>5</sup> Section 561.14(1), F.S.

<sup>6</sup> Section 561.14(2), F.S.

<sup>7</sup> Section 561.01(5), F.S.

<sup>8</sup> Section 561.14(3), F.S.

<sup>9</sup> Section 561.14, F.S.

<sup>10</sup> Section 561.22(1), F.S.

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

### **Tied House Evil Prohibitions**

States have enacted laws 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.<sup>14</sup>

Section 561.42, F.S., Florida's "tied house evil" statute, regulates the relationships 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 or property, or rebates.<sup>15</sup> These prohibitions also apply to an importer, primary American source of supply registrant,<sup>16</sup> 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.<sup>17</sup>

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

- Making further sales to vendors that have not fully paid for all previously purchased liquors, and who have been certified as delinquent by the division;<sup>18</sup>
- Directly or indirectly giving, lending, renting, selling, or in any other manner furnishing to a vendor any outside sign, printed, painted, electric, or otherwise;<sup>19</sup> 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.<sup>20</sup>

Section 561.42(14), F.S., further prohibits industry members from 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. A member of the malt beverage industry may provide a vendor with expendable retailer advertising specialties such as trays, coasters, mats, menu cards,

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

<sup>12</sup> Section 561.22, F.S.

<sup>13</sup> Sections 563.022(14) and 561.14(1), F.S.

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

<sup>15</sup> Section 561.42(1), F.S.

<sup>16</sup> See s. 564.045, F.S.

<sup>17</sup> 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.

<sup>18</sup> Section 561.42(3)-(5), F.S.

<sup>19</sup> Section 561.42(10), F.S.

<sup>20</sup> Section 561.42(14)(a), F.S. This paragraph permits a distributor to give advertising glassware to a vendor, subject to limitations.

napkins, cups, glasses, thermometers, and the like. The industry member must sell these items to a vendor only at a price not less than the actual cost to the industry member who initially purchased the items, without limitation in total dollar value of such items sold to a vendor. However, a distributor may give advertising glassware to a vendor, subject to specific invoicing and record-keeping requirements.<sup>21</sup> Industry members may not engage in cooperative advertising with a vendor.<sup>22</sup>

### **Division Rules - Returns of Products**

The Florida Statutes do not address the return of products to distributors by vendors. The division has adopted rules to provide guidance to the industry.

#### ***Return of Damaged Products***

Products are damaged if they exhibit product deterioration, leaking containers, damaged labels, or missing or mutilated tamper-evident closures.<sup>23</sup>

Under the division's rule, a vendor must request for return of damaged products within 15 days after delivery and may receive an exchange of product, cash, or a credit.<sup>24</sup> A vendor may not return products damaged by the vendor or vendor's customers.<sup>25</sup> A distributor is required to make and keep a record of all exchanges of damaged products for product, cash, or credit.<sup>26</sup> Under current law, each manufacturer, distributor, broker, agent, and importer licensed under the Beverage Law is required to maintain and keep, for a period of 3 years at the licensed place of business, such records of alcoholic beverages received, sold, or delivered within or without this state as may be required by the division.<sup>27</sup>

If the vendor requests a return 15 or more days after delivery, a return may only be for exchange, cash, or credit, under the following circumstances:

- A manufacturer has issued a product recall that affects multiple unaffiliated vendors; or
- A product has deteriorated due to manufacturing or packaging problems.

#### ***Return of Undamaged Products***

A vendor must request for return of undamaged products within 10 days after delivery and may receive cash or a credit within 10 days of the request.<sup>28</sup> A distributor is required to make and keep a record of all undamaged products returned for cash or credit (not an exchange).<sup>29</sup>

If the vendor requests a return 10 or more days after delivery, a return may only be:

- For cash or credit, if the products may no longer be lawfully sold due to a change of law;

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<sup>21</sup> Section 561.42(14)(a), F.S.

<sup>22</sup> Section 561.42(14)(e), F.S.

<sup>23</sup> Rule 61A-1.0107(1), F.A.C. (2018)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Rule 61A-1.0107(2), F.A.C. (2018)

<sup>27</sup> Section 561.55(3)(a), F.S.

<sup>28</sup> Rule 61A-1.0108(1), F.A.C. (2018)

<sup>29</sup> *Id.*

- For cash or credit, if the vendor’s business is terminated (excluding a temporary seasonal shutdown);
- For an equal exchange of product, if there is a change in product, such as a change in formula, proof, label, or container;
- For cash or credit, if the product is discontinued; or
- For cash or credit, if a vendor, who is only open for a portion of the year, has product remaining at closure that will spoil in the off-season.<sup>30</sup>

### **Federal Law**

The Federal Alcohol Administration Act (FAA Act)<sup>31</sup> prohibits consignment sales of alcohol and malt beverages, but does not prohibit the bona fide return of products for “ordinary and usual commercial reasons arising after the merchandise has been sold.” The Alcohol and Tobacco Tax and Trade Bureau (TTB) has crafted regulations that outline permissible reasons a malt beverage may be returned, including that the product is defective, was shipped in error, discontinued, or is prohibited from further sale by a change in the law.<sup>32</sup> More generally, the TTB prescribes regulations for unfair trade practices involving alcohol and malt beverages, but in the case of malt beverages, the TTB’s regulations and the FAA Act apply only if the laws of the State in which the malt beverage products are sold or shipped impose similar requirements.<sup>33</sup>

### **III. Effect of Proposed Changes:**

The bill creates s. 563.061, F.S., to provide a process for returns of malt beverages by a vendor to a distributor for exchange of product, refund, or credit. A vendor may return malt beverages to a distributor, with certain conditions, if the malt beverages are a “damaged product,” an “out-of-code product,” or an “undamaged product.”

#### **Definitions**

The bill defines a “damaged product” to mean:

Malt beverage product delivered to a vendor exhibiting product deterioration, defective seals, leaking, damaged labels, or missing or mutilated tamper-evident closures.

A “manufacturer’s code date” is defined to mean:

A coded best-by date, expiration date, or other designated date or dating system established by a manufacturer to signify the freshness that is printed on the malt beverage container or, in the case of a keg, marked on a cap, collar, tag, or label directly affixed to the keg.

An “out-of-code product” is defined to mean:

<sup>30</sup> Rule 61A-1.0108(2), F.A.C. (2018)

<sup>31</sup> 27 U.S.C. 205(d)

<sup>32</sup> See 27 C.F.R. § 11. See also, Alcohol and Tobacco Tax and Trade Bureau, *Freshness Dating and Allowable Returns of Malt Beverage Products under the FAA Act, No. 2017-2* (Sep. 29, 2017), available at <https://www.ttb.gov/images/pdfs/rulings/2017-2-print.html> (last visited Feb. 10, 2020).

<sup>33</sup> 27 C.F.R. § 11.4

Malt beverage product that has exceeded the manufacturer's code date and, according to the manufacturer's policies, must be removed and replaced with fresh products for purchase in the retail market.

An "undamaged product" is malt beverage product that is not a damaged or out-of-code.

### **Prohibitions**

The bill prohibits the sale of malt beverages on consignment or on any basis other than a bona fide sale. A return of malt beverages to a distributor is only allowed for the ordinary and usual commercial reasons authorized by the bill. A product may not be returned because it is overstocked or slow-moving or because there is only limited or seasonal demand, including, but not limited to, product packaged in holiday decanters or distinctive bottles.

### **Returns of Undamaged Product**

Under the bill, a vendor may request to return undamaged product to a distributor for exchange of product or for credit, depending on the reason for the return. A distributor may not accept a return of undamaged product unless the vendor requests the return within 7 days<sup>34</sup> after the delivery date. A distributor may accept a return of undamaged product for:

- Credit or refund, if there is a change in regulation or administrative procedure prohibiting the sale of a particular brand or container size;
- Credit or refund, if a vendor terminates operations (excluding a temporary seasonal shutdown);
- Exchange of product, if a vendor requests return of a product for purposes of quality control or freshness, and the product has not yet exceeded the manufacturer's code date;
- Exchange of product or credit, if a manufacturer has issued a product recall that affects multiple vendors who are not affiliated with one another through having common ownership, through being members of the same pool buying group, or through being members of the same advertising cooperative;
- Credit or refund, if the production or importation of a product is discontinued; or
- Credit or refund, if a vendor is only open for a portion of the year and has product remaining at closure, which, with respect to quality control or freshness, would become unsuitable for sale during the off-season, according to the manufacturer's code date.

### **Returns of Damaged Products**

The bill permits damaged product to be returned to a distributor, if:

- The return is for exchange of product or for a credit;
- The distributor verifies that the product is damaged before accepting the return;
- The product was not damaged by the vendor or its employees, agents, or customers; and
- The vendor makes the request within 7 days<sup>35</sup> after the delivery date.

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<sup>34</sup> See Florida Administrative Code Rule 61A-1.0108(1), which permits returns of undamaged products within 10 days of delivery.

<sup>35</sup> Florida Administrative Code Rule 61A-1.0107(1), permits returns of undamaged products within 15 days of delivery.

### **Returns of Out-of-Code Product**

The bill permits a vendor to return out-of-code product to a distributor for an exchange of product. A distributor may accept out-of-code product at any time, if:

- The distributor first verifies that the product is an out-of-code product;
- The manufacturer has written policies and procedures that specify the date that product should be removed;
- The manufacturer's policies and procedures are readily available, verifiable, and consistently applied by the manufacturer;
- The manufacturer's code date is printed on the product container or, in the case of a keg, marked on a cap, collar, tag, or label affixed to the keg; and
- Out-of-code product returned to a distributor does not reenter the retail market.

### **Exchanges of Product**

The bill requires that an exchange of product must be in exact quantities with product of near or equal value made by the same manufacturer and in the same size individual container or keg, unless a credit is authorized at the time of return.

### **Distributor Requirements**

Under the bill, a distributor is not required to accept returns of product. If a distributor accepts a return of product, the distributor must:

- Provide the exchange of product, the credit, or the refund to the vendor, as authorized under the bill, at the same time the distributor picks up the product being returned; and
- Pick up damaged or undamaged products being returned within 14 days after receipt of the vendor's request.

### **Recordkeeping Requirement**

The bill requires a distributor to keep and maintain a transaction record of each return for 3 years. The distributor must provide a copy of the transaction record to the vendor in a format accessible by and legible to the vendor.

### **Other Provisions**

The bill provides that bona fide returns for exchange of product, credit, or refund are not considered gifts, loans, or other forms of financial aid or assistance as prohibited by s. 561.42, F.S.

As provided in s. 561.29, F.S., the bill authorizes the division to impose a civil penalty of \$1,000 per violation against a distributor or vendor who violates s. 563.061, F.S., or any rule adopted under this section.

The bill authorizes the division to adopt rules to administer and enforce s. 563.061, F.S.

**Effective Date**

The bill provides an effective date of July 1, 2020.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Vendors in possession of undamaged, damaged, or out-of-code malt beverage products could return the products for a refund, an exchange of product, or a credit subject to the conditions in the bill.

**C. Government Sector Impact:**

The Division may need to engage in rulemaking to amend timeframes for return or exchange of product, as currently outlined in Florida Administrative Code Rules 61A-1.0107 and 61A-1.0108.

**VI. Technical Deficiencies:**

None.



**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 563.061 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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