

**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 Regulated Industries

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BILL: SB 1062

INTRODUCER: Senator Brodeur

SUBJECT: Cooperative Advertising Agreements

DATE: February 26, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1062 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 a 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 and associated cooperative advertising. The agreement must be negotiated at arm’s length for no more than fair market value.

The agreement for brand naming rights and associated cooperative advertising must be with a vendor who operates a theme park complex licensed to sell alcoholic beverages for consumption on the premises. The theme park complex must be owned, managed, controlled, and operated by the licensed vendor, and comprise at least 25 contiguous acres with permanent exhibitions, a variety of recreational activities, have a controlled entrance to, and exit from, the theme park complex, and have a minimum of one million visitors annually who pay admission fees.

The agreement may not involve the sale or distribution of malt beverages, may not result in preferential treatment to the alcoholic beverage brand or brands of the manufacturer or importer who is a party to the agreement, and may not limit the sale of alcoholic beverages from another manufacturer, importer, or distributor. Within 10 days after execution of the agreement, the vendor must file with the Division of Alcoholic Beverages and Tobacco (division) within the Department of Business and Professional Regulation (DBPR) a description of the agreement which includes the location, dates, and the name of the manufacturer or importer that entered into the agreement.

The manufacturer or importer of malt beverages that 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, 2021.

## 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 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 1 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 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

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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.

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>

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 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.<sup>14</sup>

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.<sup>15</sup> The prohibitions also apply to an importer, primary American source of supply,<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 the division has certified as not having fully paid for all liquors previously purchased;<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>

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

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

<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(4), F.S.

<sup>19</sup> 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;<sup>20</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>21</sup>

### III. Effect of Proposed Changes:

The bill creates s. 561.42(15), F.S., to exempt 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 and associated cooperative advertising.

The agreement for brand naming rights and associated cooperative advertising must be:

- Negotiated at arm’s length for no more than fair market value. The bill does not define the term “at arm’s length.”<sup>22</sup>
- With a vendor who operates a theme park complex licensed to sell alcoholic beverages for consumption on the premises.

The theme park complex must be owned, managed, controlled, and operated by the licensed vendor, and comprise at least 25 contiguous acres with permanent exhibitions, a variety of recreational activities, have a controlled entrance to, and exit from, the theme park complex, and have a minimum of one million visitors annually who pay admission fees.

Additionally, the agreement may not:

- Involve the sale or distribution of malt beverages;
- Result in preferential treatment to the alcoholic beverage brand or brands of the manufacturer or importer who is a party to the agreement; or
- Limit the sale of alcoholic beverages from another manufacturer or importer, or distributor.

Within 10 days after execution of the agreement, the vendor must file with the division a description of the agreement which includes the location, dates, and the name of the manufacturer or importer that entered into the agreement. The bill does not require that the actual agreement be filed with the division in order for the division to verify compliance with the conditions under s. 561.42, F.S., as amended by this bill.

<sup>20</sup> Section 561.42(12), F.S.

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

<sup>22</sup> “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 (14<sup>th</sup> ed. 2014).

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

Under the bill, 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, 2021.

**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:

A manufacturer or importer of malt beverages and a theme park that enter into a cooperative advertising agreement and engage in cooperative advertising may mutually benefit financially from such an agreement.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The division noted that “[t]he bill exempts agreements for brand naming rights between manufacturers or importers of malt beverages and vendors whose businesses are located within large theme parks from the prohibitions of the Tied House Evil Law. The term ‘brand naming rights’ is not defined by the bill, and the bill does not specify the scope of activities or financial transactions that are included or excluded from the allowable brand naming rights agreements. Accordingly, the exemption may operate broadly and may include unforeseen financial arrangements that would be otherwise impermissible pursuant to Florida law for any other manufacturer or vendor of alcoholic beverages.”

The department also expressed concern regarding how to determine whether the agreement resulted from an arm’s length transaction and how the fair market value would be determined for enforcement purposes.<sup>23</sup>.

**VIII. Statutes Affected:**

This bill substantially amends section 561.42 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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<sup>23</sup> Department of Business & Professional Regulation, *2021 Agency Legislative Bill Analysis for HB 73*, at pp. 6-7 (Jan. 20, 2021). HB 73 by Representative Tomkow is the companion to SB 1062.