STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA FINE WINE AND SPIRITS, LLC, d/b/a TOTAL WINE AND MORE,	)	
Petitioner,	)	
vs.	)	Case Nos. 07-1857RX
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Respondent,	)	
and	)	
ABC LIQUORS, INC., d/b/a ABC WINE AND SPIRITS,	)	
Intervenor.	)	

FINAL ORDER

By agreement of the parties, the case was submitted to Administrative Law Judge Bram D.E. Canter to be decided on the parties' Pre-Hearing Stipulation, Joint Exhibits, and Proposed Final Orders, without a formal evidentiary hearing.

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STATEMENT OF THE ISSUES

The issues in this case are whether Florida Administrative Code Rule 61A-1.010[1/] is an invalid exercise of delegated legislative authority, and whether the 1997 repeal of Rule 61A-4.058 was an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On April 25, 2007, Petitioner Florida Fine Wine & Spirits, LLC d/b/a Total Wine and More (TWM), filed a Petition Seeking an Administrative Determination of the Invalidity of an Existing Rule to challenge the validity of Rule 61A-1.010, entitled

"Approved Advertising and Promotional Gifts." TWM subsequently amended its petition to add a challenge to ABT's 1997 repeal of Rule 61A-4.058, entitled "Promotional Displays and Advertising."

This case was consolidated with a related case (DOAH Case No. 07-1858RU) initiated by TWM's simultaneous filing of a Petition Seeking an Administrative Determination of the Invalidity of an Agency Statement Defined as a Rule. In this Petition, TWM alleges that ABT established a new policy to prohibit in-store servicing of distilled spirits, as evidenced by statements made by two ABT officials in email messages sent to TWM and others in April 2007, and that the new policy meets the definition of a rule and violates Subsection 120.54(1), Florida Statutes (2006),[2/] because it was not adopted as a rule.

The unopposed petition of ABC Liquors, Inc., d/b/a ABC Fine Wine & Spirits (ABC), to intervene in the consolidated cases was granted.

A final hearing was scheduled within 30 days as required by Subsection 120.56(1)(c), Florida Statutes, but the hearing was continued by agreement of the parties. Thereafter, the parties waived the final hearing in the consolidated cases and agreed to have the cases decided based on the parties' Pre-Hearing Stipulation, Joint Exhibits, and Proposed Final Orders. A separate Final Order is being issued for each of the cases.

The Parties' Joint Exhibits 1 through 49 were admitted into evidence. The Joint Exhibits include the transcripts of the depositions of Steven Hougland, ABT's director, and Renee Alsobrook, deputy general counsel of the Department of Business and Professional Regulation. The parties filed Proposed Final Orders, which have been duly considered.

FINDINGS OF FACT

A. The Parties

1. Petitioner TWM is a licensed retail vendor of alcoholic beverages. It operates nine stores in Florida that sell alcoholic beverages, including distilled spirits, by the package. TWM was created in March 2005.

2. Respondent ABT is the state agency authorized by Section 561.02, Florida Statutes, to regulate the alcoholic beverage industry, including manufacturers, distributors and vendors of alcoholic beverages within the State of Florida.

3. Intervenor ABC is a licensed retail vendor of alcoholic beverages, holding in excess of 100 licenses authorizing the sale of alcoholic beverages, including distilled spirits, by the package.

B. The Governing Statutes

4. Florida has a three-tiered system of alcoholic beverage distribution. Manufacturers produce the product and sell to distributors, distributors sell the product at wholesale to

licensed vendors, and vendors sell the product to the general public at retail. § 561.14(1)-(3), Fla. Stat.

5. The federal government and many states, including Florida, enacted "Tied House Evil" laws to prevent the "evils" that arose from relationships between vendors of alcoholic beverages and manufacturers and distributors which caused the vendors to be controlled by or "tied" to the distributors and manufacturers. Winn Dixie Stores, Inc., v. Schenck Co., 662 So. 2d 1021, 1023 (Fla. 5th DCA 1995); Musleh v. Fulton Distributing Co. of Florida, 254 So. 2d 815, 817 (Fla. 1st DCA 1971).

6. Florida's Tied House Evil law, set forth in Subsection 561.42(1), Florida Statutes, provides:

> No licensed manufacturer or distributor of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the beverage laws; nor shall such licensed manufacturer or distributor 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 licensed manufacturer or distributor; 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.

7. "In-store servicing" of alcoholic beverages refers generally to distributors or manufacturers placing stock on shelves, rotating stock, and affixing prices on the vendor's premises. ABT interprets Subsection 561.42(1), Florida Statutes, as prohibiting in-store servicing of alcoholic beverages because it constitutes a gift of "free labor" to the vendor. TWM does not dispute ABT's interpretation of Subsection 561.42(1), Florida Statutes, as prohibiting in-store servicing, but TWM contends that subsequent legislation resulted in the removal of the prohibition.

8. In 1975, Section 561.423, Florida Statutes, created an exception for in-store servicing of beer and malt beverages:

> Nothing in s. 561.42 or any other provision of the Beverage Law shall prohibit a distributor of beer or malt beverages from providing in-store servicing of malt beverages. "In-store servicing" as used herein means quality control procedures which include, but are not limited to: rotation of malt beverages on the vendor's shelves, rotation and placing of malt beverages in vendor's coolers, proper stacking and maintenance of appearance and display of malt beverages on vendor's shelves, price stamping of malt beverages on vendor's licensed premises, and moving or resetting any product or display in order to display a distributor's own product when authorized by the vendor.

9. In 1977, Subsection 561.424(2), Florida Statutes, created an exception for in-store servicing of wine:

> Nothing in s. 561.42 or any other provision of the Alcoholic Beverage Law shall prohibit a distributor of wine from providing in-store servicing of wine sold by such distributor to a vendor. "In-store servicing" as used herein means: placing the wine on the vendor's shelves and maintaining the appearance and display of said wine on the vendor's shelves in the vendor's licensed premises; placing the wine not so shelved or displayed in a storage area designated by the vendor, which is located in the vendor's licensed premises; rotation of vinous beverages; and price stamping of vinous beverages in a vendor's licensed premises. <u>This section shall not apply to distilled spirits</u>. (Emphasis added)

10. No similar statute was created to expressly authorize in-store servicing of distilled spirits by distributors.

11. The Legislature's creation of express exceptions for in-store servicing of beer and wine and the use of the wording, "This section shall not apply to distilled spirits," in Subsection 561.424(2), Florida Statutes, indicate a legislative intent to treat distilled spirits differently and to prohibit in-store servicing of distilled spirits.[3/]

12. The only evidence in the record that tends to explain why distilled spirits were treated differently from beer and wine with regard to in-store servicing is a statement made by Charles Bailes of ABC in a letter to Ms. Alsobrook that,

"Historically, in-store servicing of perishable products such as wine and beer have been allowed so as to maximize freshness and minimize the chances of consumers purchasing spoiled merchandise." Mr. Bailes goes on to state that distilled spirits are not perishable.

C. Rule 7A-4.058

13. In 1984, Subsection 561.42(12), Florida Statutes, was amended to add the following:

> The Division shall make 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 vendors by distributors and manufacturers.

14. ABT responded to the 1984 directive in Subsection 561.42(12), Florida Statutes, by promulgating Rule 7A-4.058, entitled "Promotional Displays and Advertising," which became effective in January 1985. The rule adopted certain federal regulations by reference:

> (1) The Division adopts by reference the provisions of subpart D, Chapter 6, of Title 27, Code of Federal Regulations, regulations 6.81 through 6.101 inclusive.
>
> (2) It shall be a violation of Section 561.42, F.S., for any vendor to accept or for any manufacturer or distributor to give a retailer promotional displays, advertising or other such items, services or assistance governed by the regulations adopted by subsection (1) when given in a manner not in

> strict conformity with the adopted regulations.

15. Subpart D was entitled "Exceptions" and established exceptions to the federal Tied House Evil law. It included exceptions that clearly related to promotional displays and advertising, such as "Product Displays," "Inside Signs," "Retailer Advertising Specialties," "Consumer Advertising Specialties," and "Advertising Services." However, Subpart D also included exceptions on subjects that did not appear to involve promotional displays or advertising, such as "Educational Seminars" (for the employees of vendors), "Participation in Retailer Association Activities," "Joint Ventures," "Coil Cleaning Service," and "Stocking, Rotation and Pricing Services."

16. Section 6.99 of the federal regulations, entitled "Stocking, Rotation and Pricing Services," provided:

> Industry members may, at a retail establishment, stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products of other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized.

Because stocking, rotation, and pricing services are synonymous with in-store servicing, ABT's adoption of Section 6.99 by reference in Rule 7A-4.058, authorized in-store servicing of

distilled spirits by distributors and manufacturers in Florida, in apparent conflict with the governing statutes.

17. The adoption by reference of Section 6.99 also conflicted with Section 561.423 and Subsection 561.424(2), Florida Statutes, because these statutes only authorized in-store servicing of beer and wine by distributors, but the federal regulation authorized in-store servicing by "industry members," a term that includes manufacturers.

18. Soon after the adoption of Rule 7A-5.048, ABT's 1986 compliance guidelines included a statement that "27 CFR 6.99 and F.S.S. 561.424" authorize "manufacturers or distributors of distilled spirits or wine to stock, rotate and affix the price to their products at a licensed retailer's premises." ABT's 1988, 1993, and 1995 compliance guidelines contained the same statement.[4/]

E. Promotional Displays and Advertising

19. The term "promotional displays and advertising" is not defined in Chapter 561, Florida Statutes, but insight into the Legislature's intended meaning for the term can be gleaned from the 1985 amendment of Subsection 561.42(12), Florida Statutes. Following the sentence that directs ABT to adopt rules regarding promotional displays and advertising, the 1985 amendment added "provided, however," followed by eight new paragraphs dealing

with specific situations involving promotional displays and advertising:"

(a) If a manufacturer or distributor of malt beverage provides a vendor with expendable retailer advertising specialties such as trays, coasters, mats, menu cards, napkins, cups, glasses, thermometers, and the like, such items shall be sold at a price not less than the actual cost to the industry member who initially purchased them, without limitation in total dollar value of such items sold to a vendor.

(b) Without limitation in total dollar value of such items provided to a vendor, a manufacturer or distributor of malt beverage may rent, loan without charge for an indefinite duration, or sell durable retailer advertising specialties such as clocks, pool table lights, and the like, which bear advertising matter.

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

(d) A manufacturer or distributor of malt beverage may provide consumer advertising specialties described in paragraph (c) to consumers on any vendor's licensed premises.

(e) Coupons redeemable by vendors shall not be furnished by distributors of beer to consumers.

(f) Manufacturers or distributors of beer shall not conduct any sampling activities that include tasting of their product at a

> vendor's premises licensed for off-premises sales only.
>
> (g) Manufacturers and distributors of beer shall not engage in cooperative advertising with vendors.
>
> (h) Distributors of beer may sell to vendors draft equipment and tapping accessories at a price not less than the cost to the industry member who initially purchased them, except there is no required charge, and a distributor may exchange any parts which are not compatible with a competitor's system and are necessary to dispense the distributor's brands. A distributor of beer may furnish to a vendor at no charge replacement parts of nominal intrinsic value, including, but not limited to, washers, gaskets, tail pieces, hoses, hose connections, clamps, plungers, and tap markers.

None of the examples in the statute suggest that in-store servicing of alcoholic beverages comes within the Legislature's intended meaning of promotional displays and advertising.

20. The common meanings of the words "stocking," "rotation," and "pricing" do not match up with the common meanings of the words "promotional displays" and "advertising." As noted above, there were other federal exceptions adopted by reference in Rule 7A-4.058 that involved neither promotional displays nor advertising. ABT offered no explanation for the agency's indiscriminate adoption by reference of all the federal regulations in Subpart D, including those regulations that were not related to promotional displays and advertising. ABT now

acknowledges that the 1985 rule was "non-compliant" with statutory law.

21. TWM presented no evidence to show that stocking, rotation, and pricing are, as a matter of fact, forms of promotional displays or advertising. Instead, TWM argues that ABT's 1985 adoption by reference of Section 6.99 and ABT's subsequent representations that in-store servicing of distilled spirits was authorized in Florida, "determined" and "defined" in-store servicing as a promotional display or advertising.

22. The evidence shows that from 1985 to 1995, ABT's actions were consistent with the agency's interpretation of the term "promotional displays and advertising" as including in-store servicing. However, ABT changed its position sometime after 1995. In 1997, ABT repealed Rule 7A-4.058 (which had been renumbered Rule 61A-4.058). In the same year, ABT adopted Rule 61A-1.010, which did not adopt any federal regulations by reference and abandoned the subject of stocking, rotation, and pricing services, along with some of the other subjects covered by the federal regulations previously adopted by reference. In 1998, ABT issued an industry bulletin to industry representatives on the specific subject of in-store servicing, in which ABT explained that in-store servicing of distilled spirits was not authorized.

23. TWM alleges that ABT admitted there have been no changes in relevant law or policy since 1995, but the evidence cited by TWM shows no such admissions. The repeal of Rule 61A-4.058, the adoption of Rule 61A-1.010, and the 1998 industry bulletin are obvious changes in relevant law and policy. The governing statutes did not change, but their interpretation by ABT changed.

F. The Repeal of Rule 61A-4.058 (formerly Rule 7A-4.058)

24. TWM claims that the repeal of Rule 61A-4.058 was invalid because ABT misrepresented the effect of the repeal in a document it filed with the Joint Administrative Procedures Committee (JAPC) in conjunction with the repeal. TWM has made no claim that the repeal of Rule 61A-4.058 violated any other applicable procedural requirement in Section 120.54, Florida Statutes.

25. The alleged misrepresentation was the following statement:

> Rule 61A-4.058, FAC, concerning promotional displays and advertising of alcoholic beverages, has been incorporated into the proposed amendment of Rule 61A-1.010, FAC (to be proposed simultaneously with this recommended repeal).

26. TWM claims this statement by ABT was a misrepresentation because ABT did not incorporate all of Rule 61A-4.058 into Rule 61A-1.010. The new rule did not incorporate

Section 6.99 of the federal regulations pertaining to stocking, rotation, and pricing services, which was adopted by reference in the old rule. ABT contends that the statement was not a misrepresentation because it accurately informs JAPC that Rule 61A-1.010 incorporates that part of Rule 61A-4.058 dealing with promotional displays and advertising, and Section 6.99 did not pertain to promotional displays and advertising.

27. Subsection 120.536(2), Florida Statutes (1996), required each state agency to submit a report to the Department of State by October 1, 1997, identifying each rule adopted before October 1, 1996, that exceeded the agency's rulemaking authority. ABT did not identify Rule 61A-4.058 in the report it filed pursuant to this statute. TWM asserts that because ABT did not identify Rule 61A-4.058 in the report, ABT must have considered Rule 61A-4.058 in its entirety to be compliant with the governing statutes in 1997. ABT responds by noting that Rule 61A-4.058 was repealed before the report was filed, and there was no need for the report to mention a rule that no longer existed. The evidence on this point is ambiguous and insufficient to show ABT's intent when it repealed Rule 61A-4.058 in 1997.

28. Because the author of the subject statement was not deposed, the parties' arguments about the statement's intended meaning are matters of speculation. ABT's interpretation of the

statement is supported by the undisputed fact that the new rule did not incorporate all of the federal regulations formerly adopted by reference. However, the statement did not fully describe the effect of the repeal of Rule 61A-4.058 because the statement did not identify the federal regulations previously adopted by reference that were not being incorporated into the new rule.

G. Rule 61A-1.010

29. Rule 61A-1.010 was adopted in 1997 after two public hearings attended by industry representatives. TWM has made no claim that the required rulemaking procedures were not followed in the adoption of the rule.

30. The rule states in relevant part:

> 61A-1.010 Approved Advertising and Promotional Gifts
>
> (1) The division hereby adopts the "Approved Advertising and Promotional Gifts Chart, "herein incorporated by reference and effective 6/5/97. This chart, produced by the division, provides for the description, special conditions, and restrictions on items which shall not be considered unlawful gifts, loans of money or property, or rebates for purposes of Section 561.42, F.S. This chart is available from the Division of Alcoholic Beverages and Tobacco, 1940 North Monroe Street, Tallahassee, FL 32399-1020.
>
> (2) Any other gifts, loans of money or property, or rebates not included in the "Approved Advertising and Promotional Gifts Chart", or specifically authorized by

> Florida Statutes, shall not be provided to a vendor.

The rule cites Section 561.11, Florida Statutes, as the specific authority for the rule. The rule cites Sections 561.08 and 561.42, Florida Statutes, as the law being implemented.

31. There is no dispute that in-store servicing of distilled spirits is not listed on the chart that Rule 61A-1.010 incorporates by reference. TWM refers to the rule as a "de facto" prohibition of in-store servicing of distilled spirits and claims the rule is invalid because it conflicts with Subsection 561.42(12), Florida Statutes, which TWM contends authorizes in-store servicing of distilled spirits.

H. The 1998 Industry Bulletin

32. In 1998, ABT issued Industry Bulletin 98-04 to industry representatives on the specific subject of in-store servicing. The 1998 bulletin points out that there is no statutory exception for in-store servicing of distilled spirits as there is for beer and wine. The bulletin states "Unauthorized services to a vendor would be considered a gift of financial assistance, unless the vendor paid for the services provided to them [sic]."

33. The 1998 bulletin concludes by stating that because of the "confusion about these in-store servicing provisions," no enforcement action would be taken against a vendor, distributor,

or manufacturer for unauthorized services provided before the date of the bulletin.

34. However, the 1998 bulletin and any other efforts made by ABT to inform and educate the regulated industry about its change of position were not completely successful. In-store servicing of distilled spirits by distributors continues to some extent today.[5/]

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56, Florida Statutes.

36. Subsections 120.56(2) and (3), Florida Statutes, respectively, provide that any person substantially affected by a proposed rule or an existing agency rule may seek an administrative determination of the invalidity of the rule. Standing was not a disputed issue in this case, and the parties' factual stipulations in the Joint Pre-hearing Stipulation are sufficient to establish TWM's standing to initiate these proceedings and ABC's standing to participate as a party.

37. The agency has the burden to prove by a preponderance of the evidence that its proposed rule is not an invalid exercise of delegated legislative authority. § 120.56(2)(a), Fla. Stat. The petitioner has the burden to prove by preponderance of the evidence that an existing rule is an

invalid exercise of delegated legislative authority.

§ 120.56(3)(a), Fla. Stat.

38. Subsection 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" to include the following relevant circumstances:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.

The Repeal of Rule 61A-4.058

39. Subsection 120.52(16), Florida Statutes, defines the term "rule" to include the repeal of a rule. An agency's repeal of a rule constitutes rulemaking and must be accomplished in accordance with the rulemaking requirements applicable to proposed rules in Subsection 120.54(2), Florida Statutes, if the effect of the repeal is to implement, interpret, or prescribe law or policy. Federation of Mobile Home Owners of Fla., Inc. v. Fla. Manuf. Housing Ass'n, Inc., 683 So. 2d 586, 591 (Fla. 1st DCA 1996).

40. The logical corollary to the principle that the repeal of a rule is a rule, is that a person who challenges the repeal of a rule is subject to the same requirements as a person who

challenges a proposed rule. One such requirement is that the challenge must be filed within 21 days after the date of publication of the notice of the repeal in the Florida Administrative Weekly. § 120.56(2), Fla. Stat. TWM's challenge of ABT's repeal of Rule 61A-4.058 was filed ten years after the publication of the notice and is, therefore, barred.

41. Even if TWM's challenge of the repeal of Rule 61A-4.058 was timely, it is concluded that the alleged misrepresentation in the rulemaking documents filed with JAPC does not constitute a material failure of ABT to follow the rulemaking requirements of Section 120.54, Florida Statutes. It was not material because (1) the contemporaneous rulemaking proceedings for Rule 61A-1.010 served to inform interested persons of the effect of the repeal of Rule 61A-4.058, and (2) TWM did not exist at the time the alleged misrepresentation was made, so TWM was not misled by the statement.

42. TWM also contends that the repeal of Rule 61A-4.058 was invalid because ABT did not cite a statute that directed ABT to repeal the incorporation by reference of federal regulations on promotional displays and advertising. This basis for invalidating the repeal was not identified in TWM's Petition or in the parties' Joint Pre-Hearing Stipulation. It is improper for TWM to raise the issue for the first time in its Proposed Final Order.

43. ABT proved that the 1997 repeal of Rule 61A-4.058 was not an invalid exercise of delegated legislative authority.

The Challenge to Rule 61A-1.010.

44. TWM's claim that Rule 61A-1.010 is an invalid exercise of legislative authority depends on TWM's argument that the rule conflicts with Rule 61A-4.058 (which TWM argues is still in effect because its repeal in 1997 was invalid), or with Subsection 561.42(12), Florida Statutes, because, according to TWM, the statute authorizes in-store servicing of distilled spirits.

45. It was concluded above that the repeal of Rule 61A-4.058 was not invalid. It is also concluded that ABT's interpretation of Subsection 561.42(12), Florida Statutes, as not authorizing in-store servicing of distilled spirits, is a reasonable interpretation.

46. Subsection 561.42(12), Florida Statutes, did not direct ABT to adopt all the federal exceptions to the federal Tied House Evil law. It only directed ABT to adopt rules governing promotional displays and advertising that were not in conflict with or more stringent than the federal regulations on the same subject. ABT asserts that in-store servicing is not encompassed by the term "promotional displays and advertising" in Subsection 561.42(12), Florida Statutes. As the party with the burden of proof, TWM was required to demonstrate that ABT is

wrong and in-store servicing is, in fact, a form of promotional display or advertising. TWM did not make this demonstration.

47. TWM is correct in asserting that evidence of past agency action that does not conform with the agency's current interpretation of a statute, or evidence that an agency communicated a different interpretation of a statute in the past, is important and merits careful consideration. The historical evidence was carefully considered by the undersigned to determine whether the governing statutes are ambiguous. It is concluded that the governing statutes are not ambiguous. It is ABT's 1985 adoption by reference of federal regulations not related to promotional displays and advertising that is difficult to understand, not ABT's subsequent and current interpretation of the governing statutes as prohibiting in-store servicing of distilled spirits.

48. TWM's argument that ABT's past actions control the statutory meaning of the term "promotional displays and advertising" is, in essence, an argument that because ABT called the Legislature's apple an orange, it became an orange, and it can never be treated as an apple again. However, an agency can correct its mistakes, including its past misinterpretations of statutory law. An agency has the right to change its mind for any reason, so long as its decision comports with Chapter 120, Florida Statutes. Agency for Health Care Administration v.

Florida Coalition of Professional Laboratory Organizations, 718 So. 2d 869, 872 (Fla. 1st DCA 1998).

49. Each agency rule must be accompanied by "a reference to the specific rulemaking authority pursuant to which the rule is adopted and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific." § 120.54(3)(a)1. Fla. Stat. TWM contends that Rule 61A-1.010 does not comply with this requirement because the rule cites no authority for its omission of in-store servicing as an authorized activity. However, Subsection 561.42, Florida Statutes, is cited as the law being implemented by the rule and, as explained above, that statute is sufficient authority for the rule's omission of in-store servicing as an approved activity.

50. TWM failed to prove that Rule 61A-1.010 is an invalid exercise of delegated legislative authority.

ORDER

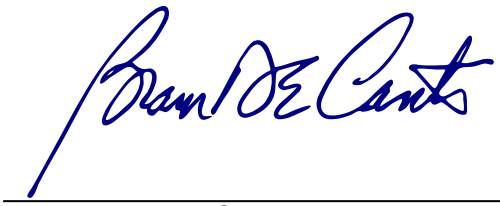
Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that:

1. The 1997 repeal of Florida Administrative Code Rule 61A-4.058 was not an invalid exercise of delegated legislative authority; and

2. Florida Administrative Code Rule 61A-1.010 is not an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 20th day of July, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 20th day of July, 2007.

ENDNOTES

1/ All references to "Rule" in this Final Order are to rules published in the Florida Administrative Code.

2/ Unless otherwise noted, all references to the Florida Statutes are to the 2006 codification.

3/ TWM asserts that ABT "admits" that there is no statute which prohibits in-store servicing of distilled spirits, but, in context, ABT was merely acknowledging that no statute contains the words "in-store servicing of distilled spirits is prohibited."

4/ No compliance guidelines produced after 1995 were offered into evidence.

[5/] No evidence was presented to quantify the extent of the current practice of in-store servicing of distilled spirits.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.