



ALCOHOLIC
BEVERAGES
DIVISION
State of Iowa

ALCOHOLIC BEVERAGE CONTROL STUDY

July 1, 2018

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Kim Reynolds *Governor of Iowa*
Adam Gregg *Lieutenant Governor*
Stephen Larson *Administrator*

Dear Members of the Iowa General Assembly:

It is my pleasure to submit the Alcoholic Beverage Control Study you tasked the Alcoholic Beverages Division (ABD) with conducting in Senate File 516, passed during the 2017 legislative session.

During my time as the Administrator, ABD has taken steps to make improvements to meet industry and consumer demands for alcoholic beverage brand diversity, adapted our business processes to meet the needs of our licensees, and increased our regulatory and educational efforts in the Iowa marketplace. ABD accomplished all of this while working to protect the three-tier system of regulating alcoholic beverages and the health, safety, and welfare of Iowans.

Our goal through this study is to provide you with relevant information to help you better understand the complex – but important – system of laws meant to protect the independence of the individual tiers within the three-tier system, often referred to as “tied house” laws.

In particular, we have provided you with:

- A historical overview of the evolution of Iowa’s tied house laws and the exceptions that have been granted to those laws over the years;
- Judicial review and interpretation of Iowa’s tied house laws;
- A breakdown of the key terms comprising Iowa’s tied house laws, and how defining or clarifying certain terms could potentially provide regulatory clarity, business certainty, and consistency in interpretation;
- Examples of how ABD has taken regulatory action under the current tied house laws and the outcomes of those actions;
- Examples of how other states regulate tied house;
- Information on how federal tied house laws interact with Iowa’s tied house laws; and
- Key findings and recommendations for your consideration.

Ultimately, the Iowa Supreme Court, through its decision in the *Auen v. Alcoholic Beverages Division* case in 2004, made clear that ***“it is best left up to the legislature” to determine if Iowa’s tied house laws adequately meet the needs of the modern marketplace and the public policy purpose of Iowa’s alcohol laws to protect the welfare, health, peace, morals, and safety of the people of the state.***

I am hopeful that the information contained within this study can be used as a foundation of work to assist in making that determination, as well as for future requests that may come before you by industry, Iowans, or other entities or interest groups who seek to do business in Iowa.

Your time and consideration as to this extremely important aspect of alcoholic beverage control is greatly appreciated, and ABD stands ready to provide assistance as needed.

I thank you for the opportunity to lead and conduct this study.

Legislative Request for Study

On May 12, 2017, with the signing of Senate File 516 by former Governor Terry Branstad, ABD, in conjunction with other stakeholders ABD deemed necessary, was directed to conduct a study concerning enforcement issues related to alcoholic beverage control. The directive included instructions to consider the manner of properly balancing the appropriate regulation of the manufacturing, distribution, and sale of alcoholic liquor, wine, and beer in the state with emerging market trends in the industry.

Specific areas of study were to include issues relating to the three-tier system of alcohol regulation and Iowa Code section 123.45 (commonly referred to as Iowa's tied house law) ***as it impacts the ability of manufacturers, wholesalers, and retailers to meet changing marketplace conditions and business opportunities.***

ABD was required to submit a final report providing the results of the study, as well as any findings and recommendations, to the General Assembly by July 1, 2018. The Alcoholic Beverage Control Study language is repealed July 1, 2019. The Alcoholic Beverage Control Study can be found in Division III, Section 27 of Senate File 516. For reference, that portion of Senate File 516 is included in Appendix A.

The Three-Tier System of Regulating Alcoholic Beverages

The three-tier system of alcohol regulation is the basic premise that manufacturers, wholesalers, and retailers of alcoholic beverages are broken into three separate tiers and should operate only in their own tier. In a pure three-tier system, manufacturers (producers) make and sell their products to wholesalers (movers), who then sell those products to retailers (sellers), who then sell to consumers.

At the end of Prohibition, the three-tier system was put into place to encourage moderation in alcoholic beverage consumption by consumers. The aggressive retail sales focus of the manufacturer-owned saloon, which arguably brought about Prohibition, promoted over-consumption to the detriment of the consumer in specific and society in general. The three-tier system has been credited with the additional benefits of an orderly marketplace, a level playing field, product availability, safer products, and reliable and efficient tax collection.

At the end of Prohibition, each state decided how much control they wanted to exercise over the alcoholic beverage industry. A part of that determination involved whether to become a "control" state or a "license" state. A "control" state is one in which the state itself holds the position as retailer and/or wholesaler in the three-tier system.

Iowa is a control state. The State of Iowa was the sole wholesaler and off-premises retailer of alcoholic liquor and wine until the mid-1980s. By 1988, the State had completely divested itself of retail off-premises alcoholic liquor and wine stores.

Today, the State of Iowa is the sole wholesaler of alcoholic liquor. The other control states are Alabama, Idaho, Maine, Maryland (Montgomery County), Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, West Virginia, and Wyoming.

The Three-Tier System of Regulating Alcoholic Beverages in Iowa

Prior to analyzing the three-tier system codified throughout Iowa Code chapter 123, it is important to understand the license and permit structure in Iowa. Figure 1 shows all of the alcohol licenses and permits currently available in Iowa, categorized by where they fall within the three-tier system.

Iowa Alcoholic Beverage Licenses and Permits	
<u>Manufacturer:</u> <i>Alcoholic Liquor:</i> In-state: Class "A" Native Distilled Spirits License Manufacturer's License Out-of-state: Distiller's Certificate of Compliance <i>Beer:</i> In-state: Class "A" Beer Permit Special Class "A" Beer Permit (Brewpub) Out-of-state: Brewer's Certificate of Compliance <i>Wine:</i> In state: Class "A" Wine Permit Out of state: Vintner's Certificate of Compliance	<u>Wholesaler:</u> <i>Alcoholic Liquor:</i> In-state: ABD Out-of-state: Distiller's Certificate of Compliance <i>Beer:</i> In state: Class "A" Beer Permit Out of state: Brewer's Certificate of Compliance <i>Wine:</i> In state: Class "A" Wine Permit Out of state: Vintner's Certificate of Compliance
<u>Retailer:</u> <i>Alcoholic Liquor:</i> In state: Class "A" (clubs), Class "B" (hotels), Class "C" (bars & restaurants), Class "D" (trains, planes, boats), Class "E" (off premises) liquor control licenses <i>Beer:</i> In state: Class "B" (on premises consumption), Class "C" (off premises consumption) beer permits <i>Wine:</i> In state: Class "B" (off premises consumption), Class "B" Native (native wine only off premises), Class "C" (on premises consumption), Class "C" Native (native wine only on premises) wine permits, Wine Direct Shipper's Permit Out of state: Wine Direct Shipper's Permit <i>Beer & Wine</i> In state: Special class "C" (on premises consumption) liquor control license	

Figure 1

Although the tied house statute of Iowa Code section 123.45 is often referenced when discussing Iowa's three-tier system, many code sections reinforce the value and importance of the separation between manufacturers, wholesalers, and retailers in the alcoholic beverages marketplace. Iowa Code chapter 123 provides 13 code sections in addition to section 123.45 which support the three-tier system of regulating alcoholic beverages.

Three-Tier Requirements on the Retail Tier

Class "E" liquor control licensees conduct off-premises retail sales of alcoholic liquor to consumers. The alcoholic liquor must be purchased from ABD.

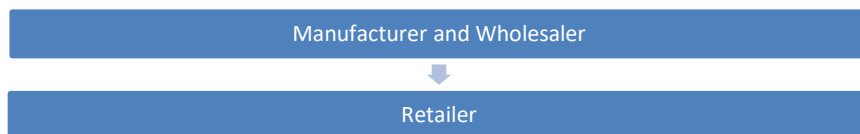
Class "A", "B", and "C" liquor control licensees, which conduct on-premises retail sales of alcoholic liquor, wine, and beer to consumers, must purchase alcoholic liquor from a class "E" liquor control licensee, wine from a class "A" wine manufacturer or wholesaler (a limited ability to purchase wine is also allowed from a class "E" liquor control licensee that also holds a class "B" wine permit), and beer from a class "A" beer manufacturer or wholesaler. Class "D" liquor control licensees (intrastate boats and trains) must also meet these purchasing requirements. A special class "C" liquor control licensee, which conducts on-premises beer and wine sales to consumers, must follow the same requirements as a class "C" above for purchases of wine and beer. The class "C" native distilled spirits liquor control licensee, a native distillery offering on-premises sales of its products by the glass, must purchase those native distilled spirits from a class "E" liquor control licensee.

Retail beer permittees holding class "B" beer permits for on-premises sales to consumers or class "C" beer permits for off-premises sales to consumers must purchase beer from a class "A" beer manufacturer or wholesaler. Special class "A" beer permittees (commonly referred to as "brewpubs") may sell beer they manufacture directly to consumers. Off-premises retail sales directly to consumers by brewpubs must comply with specific "growler" rules, and brewpubs may sell their beer to class "A" beer manufacturers and wholesalers for resale to other retailers.

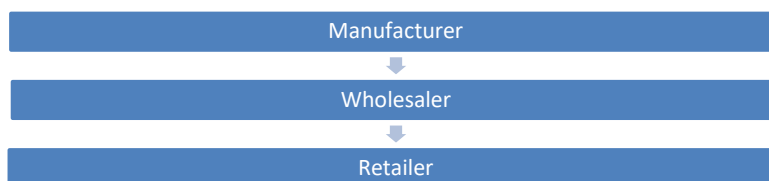
Retail wine permittees holding a class "B" wine permit must purchase wine from a class "A" wine manufacturer or wholesaler. A class "B" native wine permittee and a class "C" native wine permittee must purchase wine from a native winery. A native winery which has a class "C" native wine permit must purchase beer from a class "A" beer manufacturer or wholesaler if they choose to also sell beer.

Three-Tier Requirements on the Manufacturer and Wholesale Tiers

Iowa's manufacturing and wholesaling tiers for beer and wine are combined into the same permit class. Native breweries and native wineries may choose to wholesale their own products or sell their product to a wholesaler who would then sell to a retailer.



Brewpubs must sell the product they make to a wholesaler prior to the product being sold to a retailer.



For in-state sales, liquor manufacturers and native distilleries must sell their products to ABD as the sole wholesaler of all alcoholic liquor in the state. For out-of-state sales, liquor manufacturers and native distilleries may sell to customers outside of the state, subject to regulations of that state. The requirement that all alcoholic liquor sales go through ABD also applies to consumer sales at a native distillery. All sales at the native distillery come through ABD prior to being offered to consumers. In order to sell by the glass, a native distillery must meet the additional requirement of purchasing their product from a class “E” liquor control licensee prior to selling the product by the glass to the consumer. Out-of-state wine, beer, and alcoholic liquor manufacturers and wholesalers must obtain a certificate of compliance with the State of Iowa prior to selling their product to an in-state wholesaler.

Iowa’s “Blended” Three-Tier System

Evidence of the three-tier system of regulating alcoholic beverages and the legislature’s view of its importance to maintaining a safe, reliable, fair, and competitive marketplace can be found throughout Iowa Code chapter 123 (the Alcoholic Beverages Control Act). As indicated above, many sections of chapter 123 reinforce the value and importance of the separation between manufacturers, wholesalers, and retailers in the alcoholic beverages market.

The key code section that reinforces separation between the tiers is Iowa Code section 123.45, often referred to as Iowa’s tied house law.

123.45 Limitations on business interests.

1. A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee, or agent of such a person, shall not do any of the following:

a. Directly or indirectly supply, furnish, give, or pay for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, wine, beer, or food within the place of business of a licensee or permittee authorized under this chapter to sell at retail.

b. Directly or indirectly, extend any credit for alcoholic beverages or beer or pay for any such license or permit.

c. Directly or indirectly, be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.

d. Hold a retail liquor control license or retail wine or beer permit

2. However, a person engaged in the wholesaling of beer or wine may sell only disposable glassware, which is constructed of paper, paper laminated, or plastic materials and designed primarily for personal consumption on a one-time usage basis, to retailers for use within the premises of licensed establishments, for an amount which is greater than or equal to an amount which represents the greater of either the amount paid for the disposable glassware by the supplier or the amount paid for the disposable glassware by the wholesaler. Also, a person engaged in the business of manufacturing beer may sell beer at retail for consumption on or off the premises of the manufacturing facility and, notwithstanding any other provision of this chapter or the fact that a person is the holder of a class "A" beer permit, may be granted not more than one class "B" beer permit as defined in section 123.124 for that purpose.

3. A licensee or permittee who permits or assents to or is a party in any way to a violation or infringement of this section is guilty of a violation of this section.

[C35, §1921-f40, 1921-f115; C39, §1921.040, 1921.117; C46, 50, 54, 58, 62, 66, 71, §123.40, 124.22; C73, 75, 77, 79, 81, §123.45; 81 Acts, ch 57, §1; 82 Acts, ch 1024, §2] 85 Acts, ch 32, §35; 88 Acts, ch 1241, §13; 91 Acts, ch 24, §1; 2015 Acts, ch 30, §42 For provisions relating to authority of the alcoholic beverages division administrator for a limited time to defer final determinations regarding eligibility and to issue temporary licenses or permits for applicants with conflicts with subsection 1, paragraph c or d, see 2017 Acts, ch 170, §27

Subsection 1, paragraphs (c) and (d) specifically prohibit a manufacturer or a wholesaler from holding a retail license or permit and from having any interest, direct or indirect, in the ownership, conduct, or operation of another licensee or permittee authorized under chapter 123 to sell at retail. While it may seem that a prohibition on a manufacturer being interested in a wholesaler is glaringly absent, a review of Iowa's licensing structure above and blended three-tier system below clarifies why this is not a necessary prohibition to include in statute.

↪ **Key Takeaway** Iowa does not operate under a pure three-tier system. A blending of the alcoholic beverages manufacturing, wholesaling, and retailing tiers exists in Iowa, just as it does in other states.

An example of this blending is found in Iowa's manufacturing and wholesaling tiers for beer and wine, which are combined into the same permit classification and, in some cases, compressed from two tiers into one tier. For example, a beer manufacturer holding a class "A" beer permit (often referred to as a brewery) may both manufacture and wholesale its product. The same is true for a native winery holding a class "A" wine permit.

This blending has been present since the inception of the Iowa Liquor Control Act in 1935 following the end of Prohibition, as demonstrated by the following excerpts from the 1935 Code of Iowa:

Alcoholic Liquor and Wine - Manufacturing and Wholesaling

1921-136. Manufacturer's license. Upon application in the prescribed form and accompanied by a fee of two hundred fifty dollars, the commission may in accordance with this chapter, and in

accordance with the regulations, made thereunder, grant a license, good for a period of one year after date of issuance to a manufacturer which shall allow the manufacture, storage and wholesale disposition and sale of alcoholic liquors and wines to the commission and to customers outside of the state. [45ExGA, ch 24, §29.]

Wine - Manufacturing and Retailing

1921-156. Native wines. Notwithstanding anything in this chapter contained, but subject to any regulations or restrictions which the commission may impose, manufacturers of native wines from grapes, cherries, other fruit juices, or honey grown and produced in Iowa may sell, keep, or offer for sale and deliver the same in such quantities as may be permitted by the commission for consumption off the premises. A manufacturer of native wines shall not sell such wines otherwise than as permitted by this section or allow any wine so sold, or any part thereof, to be drunk upon the premises of such manufacturer. Notwithstanding anything in this chapter contained, any person may manufacture native wine as herein defined for consumption on his own premises. [45ExGA, ch 24, §49.]

Beer - Manufacturing and Wholesaling

1921-105. Authority under class "A" permit. Any person holding a class "A" permit issued by the treasurer of state, as in this chapter provided, shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sale or sales within the state to be made only to persons holding subsisting class "A", "B" or "C" permits issued in accordance with the provisions of this chapter. [45ExGA, ch 25, §14.]

Further examples of the blending of the tiers that exist today include:

- Native distilleries (class "A" native distilled spirits licensees) having an inherent retail privilege allowing them to sell the product they make by the bottle for off-premises consumption, and also having the ability to obtain a retail license (the class "C" native distilled spirits liquor control license) allowing sales by the glass at the native distillery.
- Native wineries having an inherent retail privilege allowing them to sell the product they make by the bottle for off-premises consumption, and also having the ability to obtain a retail permit (the class "C" native wine permit) allowing sales by the glass at the native winery. This, combined with their wholesaling privileges, effectively allows them to operate in all three tiers.
- Breweries having the ability to obtain a retail permit (the class "B" beer permit), allowing them to sell beer for on- or off-premises consumption. This, combined with their wholesaling privileges, effectively allows them to operate in all three tiers.
- Brewpubs (special class "A" beer permittees) are retailers that are able to obtain a manufacturing privilege. They must first hold a class "B" beer permit or a class "C" liquor control license to be eligible to obtain the special class "A" beer permit, which allows for the manufacture of beer. While brewpubs do not have wholesaling privileges, the beer that they make and sell for on-premises consumption is not required to be sold to a wholesaler first, effectively skipping one tier

of the three-tier system. Additionally, growler sales by a brewpub for off-premises consumption do not have to be sold to a wholesaler prior to being sold to the consumer.

- Class “E” liquor control licensees are retailers that sell alcoholic liquor for off-premises consumption. They also act as **wholesalers**, selling alcoholic liquor **to liquor control license holders who sell for on-premises consumption** (i.e. bars, restaurants, casinos, fairs, and festivals). This is often referred to as the “Fourth Tier.”

Codified Exceptions to Iowa’s Three-Tier System

This blending of Iowa’s three-tier system is achieved through codified exceptions to Iowa Code section 123.45 found throughout chapter 123. Numerous, seemingly piecemeal exceptions have been added throughout the years. The result is a patchwork of laws that are difficult for business entities, local authorities, and ABD to analyze and effectively regulate in a consistent manner.

Examples of these exceptions are as follows:

Native Distilled Spirits – Manufacturing and Retailing

123.43A Native distilleries.

RETAIL - As provided in this section, sales of native distilled spirits manufactured on the premises may be made at retail for off-premises consumption when sold on the premises of the native distillery that manufactures native distilled spirits. A native distillery shall not sell more than one and one-half liters per person per day, of native distilled spirits on the premises of the native distillery. However, a native distillery which, combining all production facilities of the business, produces and manufactures not more than one hundred thousand proof gallons of native distilled spirits on an annual basis, may sell not more than nine liters per person per day, of native distilled spirits. Notwithstanding any provision of this chapter to the contrary or the fact that a person is the holder of a class “A” native distilled spirits license, a native distillery which, combining all production facilities of the business, produces and manufactures not more than one hundred thousand proof gallons of native distilled spirits on an annual basis may sell those native distilled spirits manufactured on the premises of the native distillery for consumption on the premises by applying for a class “C” native distilled spirits liquor control license as provided in section 123.30. A native distillery may be granted not more than one class “C” native distilled spirits liquor control license. All native distilled spirits sold by a native distillery for on-premises consumption shall be purchased from a class “E” liquor control licensee. A manufacturer of native distilled spirits may be issued a class “C” native distilled spirits liquor control license regardless of whether the manufacturer is also a manufacturer of native wine pursuant to a class “A” wine permit. A native distillery engaged in the business of manufacturing beer shall not be issued a class “C” native distilled spirits liquor control license.

Beer – Manufacturing and Retailing

123.45 Limitations on business interests.

RETAIL - A person engaged in the business of manufacturing beer may sell beer at retail for consumption on or off the premises of the manufacturing facility and, notwithstanding any other provision of this chapter or the fact that a person is the holder of a class "A" beer permit, may be granted not more than one class "B" beer permit as defined in section 123.124 for that purpose.

Beer – Manufacturing Beer and Retailing Wine

123.131 Authority under class "B" beer permit.

RETAIL WINE - A person holding a class "B" beer permit and a class "A" beer permit whose primary purpose is manufacturing beer may purchase wine from a wholesaler holding a class "A" wine permit for sale at retail for consumption on the premises covered by the class "B" beer permit.

Native Wine – Manufacturing, Wholesaling, Retailing, Employment

123.56 Native wines.

RETAIL - Native wine may be sold at retail for off-premises consumption when sold on the premises of the manufacturer, or in a retail establishment operated by the manufacturer.

WHOLESALE - Sales may also be made to class "A" or retail wine permittees or liquor control licensees as authorized by the class "A" wine permit.

RETAIL - A manufacturer of native wines may ship wine in closed containers to individual purchasers inside this state by obtaining a wine direct shipper license pursuant to section 123.187.

RETAIL - Notwithstanding any other provision of this chapter, a person engaged in the business of manufacturing native wine may sell native wine at retail for consumption on the premises of the manufacturing facility by applying for a class "C" native wine permit as provided in section 123.178B. A manufacturer of native wine may be granted not more than one class "C" native wine permit. A manufacturer of native wine may be issued a class "C" native wine permit regardless of whether the manufacturer is also a manufacturer of native distilled spirits pursuant to a class "A" native distilled spirits license.

EMPLOYMENT - Notwithstanding any other provision of this chapter, a person employed by a manufacturer of native wine holding a class "A" wine permit may be employed by a brewery with a class "A" beer permit provided the person has no ownership interest in either licensed premises.

Beer – Manufacturing and Wholesaling

123.130 Authority under class "A" and special class "A" beer permits.

WHOLESALE - Any person holding a class "A" beer permit issued by the division shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sales within the state to be made only to persons holding subsisting class "A", "B", or "C" beer permits, both a class "C" native wine permit and a class "A" wine permit pursuant to section 123.178B, subsection 4, or liquor control licenses issued in accordance with the provisions of this chapter.

Brewpubs - Beer – Retailing and Manufacturing

123.130 Authority under class "A" and special class "A" beer permits.

RETAIL - A person who holds a special class "A" beer permit for the same location at which the person holds a class "C" liquor control license or class "B" beer permit may manufacture and sell beer to be consumed on the premises, may sell at retail at the manufacturing premises for consumption off the premises beer that is transferred at the time of sale to another container subject to the requirements of section 123.131, subsection 2, may sell beer to a class "A" beer permittee for resale purposes, and may sell beer to distributors outside of the state that are authorized by the laws of that jurisdiction to sell beer at wholesale.

Retailers – Retailing and Wholesaling

123.173 Wine permits – classes – authority.

WHOLESALE - A class "B" or class "B" native wine permittee who also holds a class "E" liquor control license may sell wine to class "A", class "B", class "C", and special class "C" liquor control licensees for resale for consumption on the premises. Such wine sales shall be in quantities of less than one case of any wine brand but not more than one such sale shall be made to the same liquor control licensee in a twenty-four-hour period.

Retailers – Retailing and Wholesaling

123.30 Liquor control licenses – classes.

WHOLESALE - A class "E" liquor control license may be issued and shall authorize the holder to purchase alcoholic liquor from the division only and high alcoholic content beer from a class "A" beer permittee only and to sell the alcoholic liquor and high alcoholic content beer to patrons for consumption off the licensed premises and to other liquor control licensees.

Native Wine – Manufacturing Wine and Retailing Beer

123.178B Authority under class "C" native wine permit.

RETAIL BEER - A person holding a class "C" native wine permit and a class "A" wine permit whose primary purpose is manufacturing native wine may purchase beer from a wholesaler holding a class "A" beer permit for sale at retail for consumption on or off the premises covered by the class "C" native wine permit.

Native Wine and Out-of-State Wine – Manufacturing and Retailing

123.187 Direct shipment of wine – permits and requirements.

RETAIL - A wine manufacturer licensed or permitted pursuant to laws regulating alcoholic beverages in this state or another state may apply for a wine direct shipper permit, as provided in this section. Wine shall only be shipped to a resident of this state who is at least twenty-one years of age, for the resident's personal use and consumption and not for resale.

As indicated by the above exceptions, a person wishing to enter into the alcoholic beverage industry in Iowa cannot look solely to Iowa Code section 123.45 when trying to determine what type of ownership, conduct, or operation is allowed with regard to tied house considerations.

➡ **Key Takeaway** As the legislature reviews the ability of manufacturers, wholesalers, and retailers to meet changing marketplace conditions and business opportunities, bringing all exceptions to tied house within section 123.45 should be considered. This will aid the industry, the regulator, and anyone tasked with ensuring compliance with Iowa's alcohol laws.

Other States' Exceptions to the Three-Tier System

This is an example of how the state of Nebraska attempts to bring the exemptions together in their tied house statute:

Nebraska Revised Statutes, Chapter 53, Section 169 Manufacturer or wholesaler; craft brewery, manufacturer, or microdistillery licensee; limitations.

2) This section does not apply to the holder of a farm winery license. The holder of a craft brewery license shall have the privileges and duties listed in section 53-123.14 and the holder of a manufacturer's license shall have the privileges and duties listed in section 53-123.01 with respect to the manufacture, distribution, and retail sale of beer, and the Nebraska Liquor Control Act shall not be construed to permit the holder of a craft brewery license or of a manufacturer's license issued pursuant to section 53-123.01 to engage in the wholesale distribution of beer. The holder of a microdistillery license shall have the privileges and duties listed in section 53-123.16 with respect to the manufacture of alcoholic liquor, and the Nebraska Liquor Control Act shall not be construed to permit the holder of a microdistillery license to engage in the wholesale distribution of alcoholic liquor.

Using a template such as Nebraska's could also allow retail exceptions that have been granted to manufacturers to carry over when a person enters into another type of alcohol manufacturing business in the state of Iowa.

During the 2017 legislative session in Iowa, the owner of both a native distillery and a native winery sought and received a legislative change to allow the operation of both manufacturing entities without losing the associated retail privilege exceptions granted to each entity.

Oregon's Revised Statutes appear to also address this issue:

Oregon Revised Statutes, Title 37 Alcoholic Liquors; Controlled Substances; Drugs, Chapter 471 Alcoholic Liquors Generally, Subsection 396 Exceptions to prohibition on financial connection between wholesaler and retailer.

(1) The prohibitions of ORS 471.394 (1) do not apply to persons holding winery licenses, grower sales privilege licenses, brewery-public house licenses, distillery licenses or brewery licenses, to the extent that retail sales are authorized by the statutes establishing the privileges of each license.

The state of Washington also specifies in its code that nothing in its tied house code section shall prohibit the associated privileges and exceptions given to manufacturers and wholesalers, and places all of those exceptions in an easy-to-find code section titled "Three tier system – Direct or indirect interests – Allowed activities". It is recommended that the Iowa legislature consider similar clear, concise, easy-to-find terminology and organization in our tied house code section.

Revised Code of Washington, Title 66 Alcoholic Beverage Control, Section 66.28 Miscellaneous Regulatory Provisions, 66.28.295 Three-tier system – Direct or indirect interests – Allowed activities.

Nothing in RCW 66.28.290 shall prohibit:

(1) A licensed domestic brewery or microbrewery from being licensed as a retailer pursuant to chapter 66.24 RCW for the purpose of selling beer or wine at retail on the brewery premises and at one additional off-site retail only location.

(2) A domestic winery from being licensed as a retailer pursuant to chapter 66.24 RCW for the purpose of selling beer or wine at retail on the winery premises. Such beer and wine so sold at retail shall be subject to the taxes imposed by RCW 66.24.290 and 66.24.210 and to reporting and bonding requirements as prescribed by regulations adopted by the board pursuant to chapter 34.05 RCW, and beer and wine that is not produced by the brewery or winery shall be purchased from a licensed beer or wine distributor.

(3) A microbrewery holding a beer and/or wine restaurant license under RCW 66.24.320 from holding the same privileges and endorsements attached to the beer and/or wine restaurant license.

(4) A licensed craft distillery from selling spirits of its own production under RCW 66.24.145.

(5) A licensed distiller, domestic brewery, microbrewery, domestic winery, or a lessee of a licensed domestic brewer, microbrewery, or domestic winery, from being licensed as a spirits, beer, and wine restaurant pursuant to chapter 66.24 RCW for the purpose of selling liquor at a spirits, beer, and wine restaurant premises on the

property on which the primary manufacturing facility of the licensed distiller, domestic brewer, microbrewery, or domestic winery is located or on contiguous property owned or leased by the licensed distiller, domestic brewer, microbrewery, or domestic winery as prescribed by rules adopted by the board pursuant to chapter 34.05 RCW.

(6) A microbrewery holding a spirits, beer, and wine restaurant license under RCW 66.24.420 from holding the same privileges and endorsements attached to the spirits, beer, and wine restaurant license.

(7) A brewery or microbrewery holding a spirits, beer, and wine restaurant license or a beer and/or wine license under chapter 66.24 RCW operated on the premises of the brewery or microbrewery from holding a second retail only license at a location separate from the premises of the brewery or microbrewery.

(8) Retail licensees with a caterer's endorsement issued under RCW 66.24.320 or 66.24.420 from operating on a domestic winery premises.

(9) An organization qualifying under RCW 66.24.375 formed for the purpose of constructing and operating a facility to promote Washington wines from holding retail licenses on the facility property or leasing all or any portion of such facility property to a retail licensee on the facility property if the members of the board of directors or officers of the board for the organization include officers, directors, owners, or employees of a licensed domestic winery. Financing for the construction of the facility must include both public and private money.

(10) A bona fide charitable nonprofit society or association registered under Title 26 U.S.C. Sec. 501(c)(3) of the federal internal revenue code, or a local wine industry association registered under Title 26 U.S.C. Sec. 501(c)(6) of the federal internal revenue code as it existed on July 22, 2007, and having an officer, director, owner, or employee of a licensed domestic winery or a wine certificate of approval holder on its board of directors from holding a special occasion license under RCW 66.24.380.

(11) A person licensed pursuant to RCW 66.24.170, 66.24.240, or 66.24.244 from exercising the privileges of distributing and selling at retail such person's own production or from exercising any other right or privilege that attaches to such license.

(12) A person holding a certificate of approval pursuant to RCW 66.24.206 from obtaining an endorsement to act as a distributor of their own product or from shipping their own product directly to consumers as authorized by RCW 66.20.360.

(13) A person holding a wine shipper's permit pursuant to RCW 66.20.375 from shipping their own product directly to consumers.

(14) A person holding a certificate of approval pursuant to RCW 66.24.270(2) from obtaining an endorsement to act as a distributor of their own product.

(15) A domestic winery and a restaurant licensed under RCW 66.24.320 or 66.24.400 from entering an arrangement to waive a corkage fee.

Constituent-Specific Exceptions in Other States' Tied House Laws

As legislation passes to appease a constituent or a particular industry, consideration is not always made for application of that law change on other existing entities or future entities. As we observe in Iowa Code chapter 123, piecemeal exceptions lack clarity when applied to other existing and future licensees and permittees in the alcoholic beverage industry. Some states choose another remedy which causes a potentially slippery slope. Carve outs are made in some states to favor very specific constituents. The state of New York appears to address very specific licensees in this tied house exception. A small excerpt from New York's tied house code section is provided below. The exceptions are location specific and constitute 25 pages of consolidated code in New York.

New York Consolidated Code, Alcoholic Beverage Control, Article 8 General Provisions, Subsection 101 Manufacturers and wholesalers not to be interested in retail places.

(a) Be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien or any personal or real property, or by any other means. The provisions of this paragraph shall not apply to (i) any such premises or business constituting the overnight lodging and resort facility located wholly within the boundaries of the town of North Elba, county of Essex, township eleven, Richard's survey, great lot numbers two hundred seventy-eight, two hundred seventy-nine, two hundred eighty, two hundred ninety-eight, two hundred ninety-nine, three hundred, three hundred eighteen, three hundred nineteen, three hundred twenty, three hundred thirty-five and three hundred thirty-six, and township twelve, Thorn's survey, great lot numbers one hundred six and one hundred thirteen, as shown on the Adirondack map, compiled by the conservation department of the state of New York - nineteen hundred sixty-four edition, in the Essex county atlas at page twenty-seven in the Essex county clerk's office, Elizabethtown, New York, provided that such facility maintains not less than two hundred fifty rooms and suites for overnight lodging.

New York also treats retailers of beer differently than retailers of liquor and wine in terms of tied house restrictions.

New York Consolidated Code, Alcoholic Beverage Control, Article 8 General Provisions, Subsection 105 Provisions governing licensees to sell at retail for consumption off the premises.

16. No retail licensee to sell liquors and/or wines for off-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption, by stock

ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means.

The Liquor Authority of the State of New York issued Declaratory Ruling 2010-01252Y upon request for an application of tied house laws to a proposed transaction by a firm to acquire a brewery. The full board of the Liquor Authority ruled that the acquisition of an out-of-state brewery, not licensed or permitted in the state of New York, by a private equity firm which also owns a chain of grocery stores licensed to sell beer for off-premises consumption in New York was permissible.

Rhode Island also provides an exception to a particular licensee.

Rhode Island General Laws, Title 3 Alcoholic Beverages, Chapter 3-7 Retail Licenses,

§3-7-22 Manufacturer's or wholesaler's interest in retailer.

(b) The holder of a license issued pursuant to § 3-6-1.1, et seq., located at 162 West Main Road, Little Compton, Rhode Island may have a direct or indirect interest in a Class B license, provided, that the holder shall remain obligated to comply with § 3-7-18 and § 3-5-11.1.

ABD strives to create a fair and level playing field for all stakeholders involved in the alcoholic beverages industry. Effective regulation relies on this basic premise.

→ **Key Takeaway** The legislature should consider the detrimental effect differential treatment could have on the entire alcohol industry in Iowa when determining an effective course of action when faced with tied-house-related conflicts.

The Structure of Iowa Code Section 123.45

The general structure of Iowa Code section 123.45 states what a manufacturer and wholesaler shall not do.

→ **Key Takeaway** The language does not directly state what a retailer shall not do. One of the basic tenets of Iowa's tied house language was the prevention of the significant pressure and power a manufacturer once held over a retailer. This power was most notable prior to Prohibition in the form of a brewery-owned saloon. In the modern alcoholic beverage marketplace, retailers have gained significant power and pressure on the three-tier system is coming from below. Tied house has been effectively turned on its head in many cases. This is evidenced by nationwide retail-driven trade practice violations and the desire for retailer-specific private label products. Retailers are arguably exerting control over the alcoholic beverage marketplace. Whether Iowa's tied house laws and trade practice rules in chapter 16 of 185 Iowa Administrative Code address this possible shift in power is debatable.

Again, the language of section 123.45 states what a manufacturer and wholesaler shall not do and does not directly state what a retailer shall not do. Actions of retailers are addressed in subsection 3, which states that a licensee or permittee who permits or assents to or is a party in any way to a violation or

infringement of this section is guilty of a violation of this section. Again, this is not a direct statement of what a retailer shall not do in relation to manufacturers and wholesalers.

Other states directly state what a retailer shall not do in their tied house statutes.

Colorado

Colorado Revised Statutes, Title 12 Professions and Occupations, §12-46-104 Licenses - state license fees - requirements

(3) It is unlawful for any manufacturer or wholesaler or any person, partnership, association, organization, or corporation interested financially in or with any of the licensees described in this article to be interested financially, directly or indirectly, in the business of any retail licensee licensed pursuant to this article, or for any retail licensee under this article to be interested financially, directly or indirectly, in the business of any manufacturer or wholesaler or any person, partnership, association, organization, or corporation interested in or with any of the manufacturers or wholesalers licensed pursuant to this article.

Oregon

Oregon provides a separate definition to be used under this tied house code section for “manufacturer or wholesaler.” Subsection 392 of Chapter 471 provides that a manufacturer or wholesaler means a person holding a brewery license, a winery license, a grower sales privilege license, a distillery license, a wholesale malt beverage and wine license, or a warehouse license (wine and malt beverage importer), all of which are issued by the State of Oregon.

Certificate of approval holders, required in Oregon for malt beverage, cider, wine, and distilled liquor manufacturers both in state and out of state, are not listed in this definition of manufacturer or wholesaler. Out-of-state manufacturers of malt beverages, ciders, wines, and distilled liquors do not appear to be subject to Oregon’s tied house prohibitions.

Oregon Revised Statutes, Title 37 Alcoholic Liquors; Controlled Substances; Drugs, Chapter 471 Alcoholic Liquors Generally, Subsection 394 Prohibition on sales at both wholesale and retail; prohibition on financial connection between retailer and wholesaler

(2) Except as provided in ORS 471.396, a manufacturer or wholesaler may not acquire or hold any right, title, lien, claim or other interest, financial or otherwise, in, upon or to the premises, equipment, business or merchandise of a retail licensee.

(3) *Except as provided in ORS 471.396, a retail licensee may not acquire or hold any right, title, lien, claim or other interest, financial or otherwise, in, upon or to the premises, equipment, business or merchandise of any manufacturer or wholesaler. [1995 c.301 §77; 1999 c.351 §56]*

➡ **Key Takeaway** As the legislature reviews the ability of manufacturers, wholesalers, and retailers to meet changing marketplace conditions and business opportunities, the legislature should strongly consider expressly stating what a retailer shall not do within the tied house statute of section 123.45. This change will aid the industry, the regulator, and anyone tasked with complying with Iowa's alcohol laws.

While these few examples demonstrate some possible changes that could be made to section 123.45 to improve clarity, before any change is made it is important to understand the key fundamental principles of tied house prohibitions, the evolution of Iowa's tied house laws over the years, and how today's section 123.45 impacts the modern marketplace.

The Doctrine of a "Tied House"

The Iowa Supreme Court in the *Auen* case, which will be discussed in greater detail later, stated in its holding that the purpose of prohibiting tied house arrangements is "to prevent monopoly or control by manufacturers or distributors of the retail outlets for the sale of intoxicating liquors." The Iowa Supreme Court went on to state "the legislative intent for the enactment of section 123.45 was to maintain the independence of the various levels of the liquor industry and to prevent tied-house arrangements."

The *Merriam-Webster* dictionary defines tied house as a British term meaning "a business house that is under contract to buy from a particular firm; especially a public house rented from or mortgaged to a brewery with whom the proprietor is pledged to do all of his liquor buying."

During the era when tied houses flourished prior to Prohibition, it was common for the tied house to offer free lunch and check-cashing services in order to encourage spending on alcoholic beverages at the saloon. Large beer manufacturers competed with one another through the acquisition of these retail establishments, serving only their product and encouraging excessive consumption. The societal ills resulting from these tied houses were a major contributing factor to Prohibition.

The passage of the Twenty-First Amendment marked the end of the great experiment of Prohibition. With the repeal of Prohibition, alcoholic beverage regulation, including decisions to prohibit production and sales, now rested with each state. Governor Clyde L. Herring appointed a special commission to study and recommend liquor control legislation for Iowa. The second of the six principles presented by the commission in their report to the governor stated that:

"In company with what we believe to be a preponderate majority of the people of Iowa, we consider the saloon as it was known before prohibition an undesirable adjunct to any community, and we are opposed to any solution or attempted solution of the liquor problem that would bring it back into existence, with its well-known attendant evils either under the name of saloon or under any other name."

Governed by this principle, among others, the commission submitted recommendations for liquor control legislation to the governor, as well as to the House and Senate. Both the House and Senate printed the commission study in the Journal of the House and the Journal of the Senate, respectively, during the extra session of the 45th General Assembly. The extra session was convened by the governor partially due to the passage of the Twenty-First Amendment, with liquor control, public safety, and public interest at the

forefront. The liquor control legislation passed during the extra session of the 45th General Assembly serves as the basis for Iowa Code chapter 123 as it exists today.

Amendments to Iowa's Tied House Law

The content of Iowa's tied house law, currently found in Iowa Code section 123.45, has remained relatively unchanged since 1934. However, there have been several revisions made over the years to address changes in the marketplace as new opportunities for tied house arrangements have presented themselves.

1919

Iowa has had tied house laws on the books since before Prohibition. In 1919, tied house prohibitions applied to all manufacturers of intoxicating liquor (defined as alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor) and prohibited persons, firms, associations or corporations and officers, members, stockholders, agents, or employees of a manufacturer from being interested or engaged, either directly or indirectly, in the retail sale of intoxicating liquor (as defined) or from owning, operating, or leasing any portion of the property used to sell at retail intoxicating liquor (as defined).

**CODE OF IOWA 1919 INTOXICATING LIQUORS. Tit. V, Ch. 8. SEC. 917
Regulations Under Police Power.**

Persons interested in distilling or brewing.

No person, firm, association or corporation and no officer, member, stockholder, agent or employee of any such firm, association or corporation engaged in the manufacture, brewing, distilling or refining of intoxicating liquors shall be interested or engaged, either directly or indirectly, in the retail sale of intoxicating liquors, or own, operate or lease any building, erection or place to be used for the sale or keeping for sale of intoxicating liquors at retail, or own or lease or be interested in, either directly or indirectly, any fixtures, furniture, or apparatus to be used in the retail sale of intoxicating liquors, or furnish the license bond required by law or pay for such bond or guarantee the bond of such person engaging in the sale of intoxicating liquors contrary to the conditions above prohibited shall be punished as provided in the following section. [S., '13, § 2383-b.]

It should be noted that the tied house statute at its infancy – and to this day – does not reference “Iowa licensed or permitted” manufacturers. In fact, at this time, manufacturers and wholesalers do not appear to be licensed by the State. The code section appeared under police powers and was not regulated by a state entity. Instead, applications for permits to sell and dispense intoxicating liquors for pharmaceutical and medical purposes went through the clerk of the district court.

➡ **Key Takeaway** The tied house language was at this time, and still is, applicable to all manufacturers, whether they are licensed by the State of Iowa or not. This distinction is important as we evaluate how other states regulate tied house.

While this statute was repealed and deemed obsolete with the institution of national Prohibition, its structure was applied to some extent following Prohibition in the Iowa Liquor Control Act.

1934

In 1934, tied house legislation was reintroduced with the end of Prohibition. Included in the broader Iowa Liquor Control Act, the focus was on tied house arrangements between beer manufacturers, bottlers, wholesalers, jobbers, or agents and beer permittees authorized to sell at retail. Tied house legislation appears in two separate code sections, both pertaining to beer.

➡ **Key Takeaway** The focus was only on the three-tier system of beer because the State was the sole wholesaler and retailer of wine and spirits at the time, eliminating any possible tied-house influence over a wine or liquor retailer by a wine or liquor manufacturer or wholesaler.

CODE OF IOWA 1935 TITLE VI - INTOXICATING LIQUORS - BEER AND MALT LIQUORS, Ch 93-F2

1921-f115. Brewers, etc.—prohibited interest. No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter. [45ExGA, ch 25,§24.]

1921-f101. Prohibited interest. It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit. [45ExGA, ch 25,§10.]

➡ **Key Takeaway** The language “engaged in the business” as to manufacturers and wholesalers, and “directly or indirectly be interested in the ownership, conduct or operation of the business” as to retailers, **appears here and remains today, 84 years later.** Note that the word “employee” is absent, although it appeared in 1919, and the word “jobbers” is used here. The *Merriam-Webster* dictionary defines “jobber” as “a person who works by the job.”

Although the language as to manufacturing, bottling, or wholesaling does not specifically indicate “Iowa permitted or licensed” manufacturer or wholesaler and is thus broad, the words “another permittee authorized under the provisions of this chapter to sell beer at retail” are introduced here and may indicate an intent that the manufacturer or wholesaler also hold a manufacturing permit authorized under the provisions of this chapter.

Additionally, at this point in time, out-of-state manufacturers and wholesalers were not issued a license, permit, or certificate by the State of Iowa, and, therefore, were not subject to the jurisdiction of the State

of Iowa under the Iowa Liquor Control Act. The broad language of the tied house statutes may have been intentional to encompass *all* manufacturers and wholesalers, regardless of their location and Iowa's jurisdiction. Or the broad language may have been used with the understanding that only in-state manufacturers and wholesalers were subject to Iowa's jurisdiction under the Iowa Liquor Control Act and the reference to manufacturers and wholesalers meant those subject to regulation.

Section 1921-f101 states, "It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit." This language indicates that the person does hold a permit from the State and they are not allowed to be directly or indirectly interested in another class of permit. This language would seem to be redundant given the language of section 1921-f115 since Iowa permittees would be persons engaged in the business of manufacturing. If we apply the fundamental rule of statutory construction, as the Iowa Supreme Court did in *In Re Chapman*, 890 N.W.2d 853, 857 (Iowa 2017), we should not construe a statute to make any part of it superfluous. "We presume the legislature included all parts of the statute for a purpose, so we will avoid reading the statute in a way that would make any portion of it redundant or irrelevant." *Id.* at 853.

There are several ways we can interpret the inclusion of the language in section 1921-f101. If we presume the language is not redundant, then it may be clarifying. It may clarify that the legislature meant to address permittees and a direct or indirect interest in another permittee. It is possible that this is the language which eventually became section 1, paragraph (d) of the current section 123.45, which states the person shall not hold a retail liquor control license or retail wine or beer permit. If this is the case, and its origin was section 1921-f101, we may gain legislative intent of the original language and determine whether that intent was carried over to changes in the law.

Section 1921-f115 is applicable to all beer manufacturers, bottlers, and wholesalers as written and specifies the types of direct and indirect interests that are not allowed. Those interests are ownership, conduct, or operation of the business of another permittee authorized under the chapter to sell beer at retail.

↪ **Key Takeaway** Section 1921-f101 more broadly states that no person or persons shall have direct or indirect interest in more than one class of permit. Again, "more than one class of permit" indicates that the person holds a manufacturing and/or wholesaling license or permit. Additionally, use of the word "another" in section 1921-f115 should be viewed such that it is not irrelevant given the rules of statutory construction.

The Iowa Supreme Court stated in *Auen* "when interpreting our statutes, our goal is to determine legislative intent." *Auen v. Alcoholic Beverages Div.*, 679 N.W. 2d 586 590 (Iowa 2004). Given that this tied house language has remained relatively unchanged since the end of Prohibition, it is important to analyze legislative intent at its inception and determine what, if any, changes to intent occurred over the years.

1963

In 1963, the legislature continued to split beer out from "alcoholic beverages" in tied house statute. Chapter 123 regulated alcoholic beverages defined as alcohol, spirits, and wine.

**CODE OF IOWA 1966 ALCOHOLIC BEVERAGES—IOWA LIQUOR CONTROL ACT
CHAPTER 123**

123.40 Interest in Liquor Business.

No person engaged in the business of manufacturing, bottling, or wholesaling any alcoholic beverages nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving, or dispensing of any alcoholic beverages or food within the place of business of another licensee authorized under the provisions of this chapter to sell at retail; nor shall he directly or indirectly extend any credit for any alcoholic beverages or pay for any such license, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another licensee authorized under the provisions of this chapter to sell at retail. Any licensee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter. [C35,§1921-f40; C39,§ 1921.040; C46, 50, 54, 58, 62,§123.40; 60GA, ch 114,§14, ch 115,§7]

**CODE OF IOWA 1966 ALCOHOLIC BEVERAGES—BEER AND MALT LIQUOR CHAPTER
124**

124.22 Brewers, etc. – prohibited interest or extension of credit.

No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly extend credit to any permittee for beer or be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter. [C35,§1921-f115; **C39,§1921.117**; C46, 50, 54, 58, 62,§124.22; 60GA, ch 117,§1]

124.7 Prohibited interest. It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit. [C35,§1921-f101; C39, §1921.102; C46, 50, 54, 58, 62,§124.7]

→ **Key Takeaway** As private retailers gained access to consumers via on-premises sales of wine and liquor, the tied house statute of chapter 123 began to address manufacturers of wine and liquor. The possibility of a tied house is now present with regard to these two types of alcoholic beverages, which likely facilitated adding tied house language to chapter 123. Prior to this point in time, the wholesale and retail tiers for all wine and liquor were held solely by the State of Iowa. There was no need to address tied

house prior to 1963 for manufacturers of wine and liquor because there was no opportunity to hold any interest or influence over a wine and/or liquor wholesaler or retailer.

Also at this time, alcoholic beverages still did not include beer as defined in chapter 124. Chapter 124 regulated beer and malt liquors. The beer tied house section, 124.22, appears to be replicated for alcoholic beverages in chapter 123. However, chapter 124 still includes section 124.7 (likely transferred over from section 1921-f101), which still states it shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit. This language indicates an intent to regulate beer permittees manufacturing, wholesaling, or retailing in Iowa. Iowa Code section 124.3(7) defined “permit” or “license” to mean an authorization issued by the state tax commission or by the city or town council of any city or town or by the board of supervisors of any county.

➡ **Key Takeaway** At this time, Iowa Code section 124.5 granted power to the state tax commission to issue class “A” beer permits and to revoke the same for cause. Cities or towns or boards of supervisors of a county had the authority to issue class “B” and “C” beer permits. It seems unlikely that any coordination between the state tax commission and local cities, towns, and boards of supervisors was taking place to regulate the tied house prohibition in sections 124.22 and 124.7. On the other hand, a single regulatory entity, the Liquor Control Commission, had the power in chapter 123 to issue and grant permits, liquor control licenses, and other licenses related to alcoholic beverages (defined as alcohol, spirits, and wine), and to revoke all such licenses and permits for cause under chapter 123.

As to beer, there is some indication that the legislature intended to regulate permittees of the State of Iowa as opposed to all beer manufacturers and wholesalers. This can be found in the language of section 124.7. Arguably, the use of the words “another permittee authorized under the provisions of this chapter” in section 124.22 also indicates a possible intent to regulate beer permittees. This language was carried over into section 123.40 and made applicable to alcoholic beverages. “Another licensee authorized under the provisions of this chapter to sell at retail,” does not coincide with the broad, non-licensed/permitted language at the beginning of the statute.

1971

In 1971, Iowa Code chapter 124 was repealed and the language concerning beer was incorporated into Iowa Code chapter 123. On January 1, 1972, the Iowa Beer and Liquor Control Department’s Annual Report 1971-1972 stated that the department assumed the additional responsibility of administering the issuance of class “A” beer permits. There were 123 class “A” wholesale distributors of beer listed in the annual report. There is no indication in the annual report of whether some of those class “A” beer permit holders were breweries. Local authorities were still issuing retail beer permits and retaining the fees associated with the permits. It is unlikely that coordination occurred between the Iowa Beer and Liquor Control Department and each local authority independently issuing retail beer permits to determine if tied house prohibitions existed prior to issuing permits.

CODE OF IOWA 1973 ALCOHOLIC BEVERAGES—IOWA LIQUOR CONTROL ACT CHAPTER 123

123.45 Interest in Liquor Business. No person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages or beer, nor any jobber or agent of such person, shall directly or indirectly supply, furnish, give, or pay for any

furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, beer, or food within the place of business of a licensee or permittee authorized under the provisions of this chapter, to sell at retail; nor shall he directly or indirectly extend any credit for alcoholic beverages or beer or pay for any such license or permit,, nor directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under the provisions of this chapter to sell at retail. Any licensee or permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter.

123.126 Prohibited interest. It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of beer permit.

Tied house is now codified in section 123.45 and encompasses alcoholic liquor, wine, and beer manufacturers, bottlers, and wholesalers. A similar provision to the previous section 124.7 is incorporated into Iowa Code chapter 123 at section 123.126 at this time and remains applicable only to beer. Section 123.126 is later repealed in 1978 and the language making it unlawful for any person or persons to be either directly or indirectly interested in more than one class of beer permit does not appear to be added to any other code section at this time. There are 3,655 on-premises liquor licenses listed in the Annual Report for 1971-1972 and no reference to liquor (still includes wine in the definition) manufacturers. It isn't until the 1974 Annual Report that we see that 3 in-state liquor manufacturers (includes wine) are licensed in the state, with 3,876 on-premises liquor licenses being issued. The 3 in-state liquor manufacturers may or may not indicate that these are new licenses. It is possible that this information wasn't previously being reported.

↩ **Key Takeaway** Certificates of compliance for distillers (includes vintners because wine is still considered a liquor) and brewers are also created at this time. These certificates of compliance are for manufacturers, distillers, vintners, brewers, and importers of alcoholic beverages (beer, wine, and liquor) shipping, selling, or having alcoholic beverages brought into this state for resale. It is important to note that up until this point, the Iowa Beer and Liquor Control Department was solely regulating in-state manufacturers and in-state wholesalers through licensure. Out-of-state manufacturers and wholesale importers were not subject to licensure with the State of Iowa until 1971. That means that applications were not being submitted to the State containing ownership information for out-of-state manufacturers and wholesalers. Without this information, it is very unlikely that tied house ownership issues were being regulated as to out-of-state manufacturers and wholesalers.

In the 1974 Iowa Beer and Liquor Control Department Annual Report, 113 distillers, vintners, and importers received certificates of compliance with the department. In the report, 23 breweries and importers received certificates of compliance to sell beer in Iowa. Compare that with 658 vintner's certificates of compliance, 229 distiller's certificates of compliance, and 191 brewer's certificates of compliance active in ABD's licensing system today. The applications for the 1,078 certificates of compliance for these out-of-state manufacturers and importers contain ownership information that is evaluated to determine whether cross tier ownership issues exist.

➡ **Key Takeaway** Before 1971, Iowa beer manufacturers had the authority to import beer under their manufacturing permit. Wine and spirits came into the state through the Iowa Beer and Liquor Control Department as the state's sole wholesaler of wine and spirits. This distinction is important because language as to manufacturers and wholesalers was quite likely applicable to in-state manufacturers and wholesalers when referenced in the code because those were the entities subject to the jurisdiction of the State of Iowa via licensure. The language of section 123.45 is sufficiently broad enough to encompass the out-of-state manufacturers and wholesalers subject to licensure beginning in 1971 through the requirement to obtain a certificate of compliance, but whether an analysis of applicability and intent as to section 123.45 was analyzed at this time is questionable.

1988

In 1988, the legislature added "representative," "broker," and "employee" of a manufacturer, bottler, or wholesaler of alcoholic beverages to the ban on tied house arrangements. This had the effect of making the statute even more restrictive because employees of a manufacturer, bottler, or wholesaler of alcoholic beverages may not be interested in the ownership, conduct, or operation of a retailer. Remember, the word "employee" was used in 1919, but was not used in 1934 following the repeal of Prohibition.

CODE OF IOWA 1989 ALCOHOLIC BEVERAGES—IOWA ALCOHOLIC BEVERAGES CONTROL ACT CHAPTER 123

123.45 Limitations on business interests. A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee, or agent of such person, shall not directly or indirectly supply, furnish, give, or pay for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, wine, beer, or food within the place of business of a licensee or permittee authorized under this chapter to sell at retail, nor shall the person directly or indirectly extend any credit for alcoholic beverages or beer or pay for any such license or permit, nor directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail, nor hold a retail liquor control license or retail wine or beer permit.

Additionally, the language "nor hold a retail liquor control license or retail wine or beer permit" was added. Although similar to the beer prohibited interest language that was repealed in 1978, the restriction applies to all manufacturers, bottlers, and wholesalers as written rather than stating, as the language did prior, "may not be directly or indirectly interested in more than one class of license or permit".

The State of Iowa is completely out of the retail business for wine and liquor by 1988. The changes made in 1963 by creating a tied house provision as to liquor and wine, when retail on-premises wine and liquor permits and licenses were created, paved the way for the transition by the State of Iowa out of the retail wine and liquor tiers completely. The possibility of a tied house as to wine and liquor is already addressed in the code. It is possible that the "hold a retail liquor control license or retail wine or beer permit"

language was added here to reinforce tied house restrictions now that off-premises retail wine and liquor sales are privatized. The State maintains its position in the wholesale tier for alcoholic liquor only.

2015

In 2015, the code editor made a non-substantive change to break section 123.45 into subsections to provide clarity and ease of use. The statute as it appears today is as follows:

123.45 Limitations on business interests.

1. A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee, or agent of such a person, shall not do any of the following:

a. Directly or indirectly supply, furnish, give, or pay for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of alcoholic beverages, wine, beer, or food within the place of business of a licensee or permittee authorized under this chapter to sell at retail.

b. Directly or indirectly extend any credit for alcoholic beverages or beer or pay for any such license or permit.

c. Directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.

d. Hold a retail liquor control license or retail wine or beer permit.

2. However, a person engaged in the wholesaling of beer or wine may sell only disposable glassware, which is constructed of paper, paper laminated, or plastic materials and designed primarily for personal consumption on a one-time usage basis, to retailers for use within the premises of licensed establishments, for an amount which is greater than or equal to an amount which represents the greater of either the amount paid for the disposable glassware by the supplier or the amount paid for the disposable glassware by the wholesaler. Also, a person engaged in the business of manufacturing beer may sell beer at retail for consumption on or off the premises of the manufacturing facility and, notwithstanding any other provision of this chapter or the fact that a person is the holder of a class "A" beer permit, may be granted not more than one class "B" beer permit as defined in section 123.124 for that purpose.

3. A licensee or permittee who permits or assents to or is a party in any way to a violation or infringement of this section is guilty of a violation of this section.

[C35, §1921-f40, 1921-f115; C39, §1921.040, 1921.117; C46, 50, 54, 58, 62, 66, 71, §123.40, 124.22; C73, 75, 77, 79, 81, §123.45; 81 Acts, ch 57, §1; 82 Acts, ch 1024, §2]
85 Acts, ch 32, §35; 88 Acts, ch 1241, §13; 91 Acts, ch 24, §1;
2015 Acts, ch 30, §42

Administrative Rule Change

In August 2000, ABD filed a Notice of Intended Action indicating its intent to amend Iowa Administrative Code rule 185 – 16.2 (now IAC rule 185 – 16.41) to define “interest in the ownership” as contained in Iowa Code section 123.45 more narrowly and exclude remote corporate connections that do not affect the retail business directly or indirectly. The notice by ABD stated:

“Over the past five years, numerous jurisdictions have examined this issue under similar statutory provisions and concluded that the corporate connection of the manufacturer, bottler, or wholesaler may be so remote that rigid application of the statutory prohibition to an applicant for a license or permit is unreasonable.”

The City of Des Moines requested the rule change as part of its efforts to recruit a “Gameworks” facility for a downtown development. Gameworks was a bar/entertainment facility remotely owned by the distiller Seagram’s.

The proposed rule read as follows:

185 Iowa Administrative Code 16.2(2) For the purposes of this rule, a subsidiary or an affiliate of an industry member shall not be considered to have any interest in the ownership, conduct or operation of a retailer provided all of the following conditions are satisfied:

- a. The industry member and the retail establishment do not share any common officers or directors.
- b. The industry member does not control the retail establishment.
- c. The industry member is not involved, directly or indirectly, in the operation of the retail establishment.
- d. The retail establishment is free from control or interference by the industry member with respect to the retailer’s ability to make choices as to the types, brands and quantities of alcoholic beverages purchased and sold.
- e. The retail establishment sells brands of alcoholic beverages that are produced or distributed by competing industry members with no preference given to the industry member that holds a financial interest in the retailer.
- f. There is no exclusion, in whole or in part, of alcoholic beverages sold or offered for sale by competing industry members that constitutes a substantial impairment of commerce.
- g. The retail establishment shall not purchase more than 20 percent of the total annual liquor sales, 20 percent of the total annual wine sales, and 20 percent of the total annual beer sales (measured by gallons) from the industry member.
- h. The primary business of the retail establishment is not the sale of alcoholic beverages.

i. All purchases of alcoholic beverages by the retail establishment are made pursuant to Iowa's three-tier system as provided for in Iowa Code chapter 123.

16.2(3) A retail establishment shall file verification with the alcoholic beverages division that it is in compliance with the conditions set forth in this rule upon application, renewal or request of the agency.

16.2(4) This rule is not subject to waiver or variance in specific circumstances.

This rule is intended to implement Iowa Code sections 123.45 and 123.186

Administrative Rules Review Committee (November 14, 2000)

From the minutes of the meeting, when the final amended rule was submitted to the Administrative Rules Review Committee, ABD Administrator Lynn Walding stated that the amendments to the rule provide an opportunity for development and preserve the three-tier system. Representative Danny C. Carroll stated that the law prohibits any interest in a retail establishment and he made a motion to file an objection to the proposed rule on the grounds that ABD exceeded the authority delegated to it by the legislature. Senator H. Kay Hedge observed that the committee cannot change the law; therefore, the legislature or the courts will ultimately resolve the question. Senator Merlin E. Bartz indicated that although he did not support the motion to object, he intended to file a bill to nullify the rule. After a vote of five in favor of the objection and five opposed, the motion to file objection to the rule failed to pass by operation of law and the rule interpreting Iowa Code section 123.45 became effective December 2000.

Judicial Review - *Auen v. Alcoholic Beverages Div., Iowa Dept of Commerce*

The Iowa Wholesale Beer Distributors Association, along with several Iowa wholesale beer distributors, sought judicial review of amended Iowa Administrative Code rule 185 – 16.2(2) (2000). In October 2002, the district court upheld the amendment as a valid exercise of ABD's rule making authority. The beer wholesalers appealed to the Iowa Supreme Court. The Iowa Supreme Court held that the legislature vested interpretation of the statute governing ownership interests of persons engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer with ABD but ABD's rule was an illogical interpretation of the ownership interest statute. Specific findings by the Court include:

- The legislature specifically gave the power to ABD to adopt rules governing the conditions and qualifications necessary for the obtaining of licenses and permits. To determine the conditions and qualifications necessary for obtaining licenses and permits, ABD must interpret the limitations on business interests as contained in section 123.45. The Court concluded that the legislature clearly vested the interpretation of section 123.45 with the agency.
- A tied house is a retail outlet that is owned or controlled by a manufacturer, wholesaler, or other entity in the chain of alcohol beverage distribution. By rule, ABD interpreted the statute to exclude remote connections in that an interest of a subsidiary or affiliate in a retailer, coupled with a lack of actual control by an industry member over its subsidiary or affiliate, is not an "interest in ownership" prohibited by section 123.45.

- The Court disagreed and stated, “A remote or *de minimis* ownership interest is an indirect ownership interest, which is prohibited by statute.” The Court further stated that, “If the legislature wanted to exclude remote connections between industry members, their subsidiaries or affiliates, and retailers of these beverages, it would have done so by amendment.”
- At the time the ban on tied house arrangements was enacted, the legislature drew a bright-line rule defining the allowable relationships between manufacturer, wholesaler, or other entity in the chain of alcohol beverage distribution and the retailer of these beverages. By choosing the language “directly or indirectly be interested in the ownership,” the legislature meant to prohibit any ownership interest, no matter how remote or *de minimis*, by a manufacturer, wholesaler, or other entity in the chain of alcohol beverage distribution and the retailer of these beverages.
- The Court also stated, “We are sympathetic to the ABD’s position that modern corporate relationships not anticipated by the legislature when these statutes were enacted may unnecessarily exclude desirable operators of retail establishments from locating their businesses in Iowa. Nevertheless, it is best left up to the legislature to determine if this policy is outdated, not the ABD.”

Terminology Used in Iowa Code Section 123.45

Several key terms are present in Iowa Code section 123.45. The interpretation of these key terms varies as the source of the definition varies and the purpose and intent of the legislature is determined.

“A person”

Iowa Code section 123.3(33) provides the definition of “person.”

123.3 Definitions.

As used in this chapter, unless the context otherwise requires:

33. “Person” means any individual, association, partnership, corporation, club, hotel or motel, or municipal corporation owning or operating a bona fide airport, marina, park, coliseum, auditorium, or recreational facility in or at which the sale of alcoholic liquor, wine, or beer is only an incidental part of the ownership or operation.

The use of the words “A person” in section 123.45 creates a much broader limitation than words such as “A licensee or permittee”. The definition of person has remained relatively unchanged since its inception in 1934 following Prohibition.

CODE OF IOWA 1935 TITLE VI - INTOXICATING LIQUORS - BEER AND MALT LIQUORS, Ch 93-F2

1921-f5. Definitions.

“Person” includes any natural person, association, partnership, corporation, and club. [45ExGA, ch 25,§24.]

A person engaged in the business of manufacturing beer in 1935 likely had a much different connotation than a person engaged in the business of manufacturing alcoholic beverages in today's marketplace. In 1935, there were 766 breweries in the United States.¹ After the repeal of Prohibition, Iowa's brewing industry consisted of 4 breweries. That number fell to one brewery in 1961 when Dubuque Star Brewery was the only brewery operating in the state.²

↩ **Key Takeaway** At this time, Iowa was only subjecting in-state manufacturers and wholesalers to licensure with the state. It is likely that tied house law was being applied solely to the one brewery operating in the state – if at all – during this period. Out-of-state entities were not subject to the requirement to obtain a brewer's, vintner's, or distiller's certificate of compliance with the State of Iowa until 1971. Because out-of-state manufacturers and wholesalers were not subject to licensure, it is unlikely that cross-tier ownership was being regulated with regard to those entities. Without an application and ownership information to determine eligibility, the regulatory authority would not be aware of any cross-tier ownership issues to regulate.

The total number of breweries in the United States was also shrinking from 1935 to 1980. The period following WWII between the years 1945 to 1980 proved to be a timeframe of consolidation in the beer industry. The 766 American breweries which started brewing again in 1935 shrunk to 468 in 1945, and fell to 101 in 1980.³ By 1981, the five largest brewers in the country were selling 75.9 percent of the beer manufactured in the United States.⁴ With this consolidation came a conglomeration of business entities and structures that did not exist pre- or post-Prohibition. Yet the language of the tied house statute remained relatively unchanged during this period.

As we previously detailed, 1963 saw the addition of liquor and wine manufacturers and wholesalers to the tied house prohibition, but the language appears to be modeled after the language used for beer manufacturers. A person engaged in the business of manufacturing beer or any other alcoholic beverage product today is likely a much different entity than the Dubuque Star Brewery operation, which was the sole brewery in the state of Iowa from 1961-1985.⁵

"Engaged"

"A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer" is the beginning phrase of the tied house prohibition language.

¹ Stack, Martin (2003). "A Concise History of American's Brewing Industry". EH.Net Encyclopedia, edited by Robert Whaples. July 4, 2003 URL <http://eh.net/encyclopedia/a-concise-history-of-americas-brewing-industry/>, accessed May 8, 2018.

² Strategic Economics Group (2015). "The Economic Impact of the Craft Beer Industry in Iowa". URL https://www.traveliowa.com/UserDocs/2014_Iowa_Craft_Beer_Economic_Impact_Report.pdf, accessed May 8, 2018.

³ Stack (2003).

⁴ Stack (2003).

⁵ Strategic Economics Group (2015). "The Economic Impact of the Craft Beer Industry in Iowa". URL https://www.traveliowa.com/UserDocs/2014_Iowa_Craft_Beer_Economic_Impact_Report.pdf, accessed May 8, 2018.

“Engaged” is not defined in Iowa Code chapter 123. *Black’s Law Dictionary* defines “engage” as a verb meaning “to employ or involve oneself; to take part in; to embark on.” The *Merriam-Webster* dictionary defines “embark” as “to make a start.” These meanings could imply action and involvement in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, but passive ownership may also apply. Ownership would appear to indicate involvement even if the involvement is passive and ownership appears to be “making a start” in the business.

➡ **Key Takeaway** The lack of a definition in the code for this word creates an all-inclusive interpretation. The word “engaged” has existed in Iowa tied house code since before Prohibition. It is likely that the concept of being “engaged” in a business in 1919 was much different than being “engaged” in a business in 2018 and what being “engaged” will mean in the future.

“Interested”

The language of section 123.45 states “interested in the ownership, conduct, or operation.” “Interested,” like “engaged,” is not defined in Iowa Code 123. The *Merriam-Webster* dictionary defines “interested” as “having the attention engaged” or “being affected or involved.”

Terms Used in Other States

As stated above, the use of the words “person engaged” is much broader than “licensee engaged” or “permittee engaged.” Many states utilize tied house language with terms related to licensure in the state as a prerequisite to applicability of the tied house statute prohibitions.

Minnesota

**Minnesota Statutes 2017, Trade Regulations, Consumer Protection,
Chapter 340A**

340A.301 Manufacturers, Brewers, and Wholesalers Licenses

Subd. 8. Interest in other business. (a) Except as provided in this subdivision, a holder of a license as a manufacturer, brewer, importer, or wholesaler may not have any ownership, in whole or in part, in a business holding a retail intoxicating liquor or 3.2 percent malt liquor license. The commissioner may not issue a license under this section to a manufacturer, brewer, importer, or wholesaler if a retailer of intoxicating liquor has a direct or indirect interest in the manufacturer, brewer, importer, or wholesaler.

South Dakota

South Dakota also addresses the potential conflict that sales to a retail licensee by a manufacturer or wholesaler could technically constitute a direct or indirect interest in the operation of the business of a licensee or permittee authorized to sell at retail. South Dakota eliminates that potential conflict in their language by using the words “other than by reason of sales to the licensee.”

**South Dakota Codified Laws 2018, Licensing Policies and Procedures,
Chapter 35-2**

35-2-6.4 Manufacturers and wholesalers not to engage in retail business. Except as provided in § 35-5-3.2, no distiller, manufacturer, or wholesaler licensee under this title nor any officer, director, stockholder, agent, or employee thereof or any relative of the licensee, officer, director, stockholder, agent, or employee may be in any way financially interested, either directly or indirectly, or participate in the operation of the business of any retailer licensee other than by reason of sales to the licensee.

Wisconsin

Wisconsin Statutes 2017, Chapter 125 Alcohol Beverages, Subchapter III Intoxicating Liquor

125.69 Restrictions on dealing between manufacturers, rectifiers, wholesalers and retailers.

(1) Interest Restrictions

(a) No intoxicating liquor manufacturer, rectifier, winery, out-of-state shipper permittee, or wholesaler may hold any direct or indirect interest in any "Class A" license or establishment and no "Class A" licensee may hold any direct or indirect interest in a wholesale permit or establishment.

(b) 1. Except as provided under subds. [4.](#) and [5.](#), no intoxicating liquor manufacturer, rectifier, winery, out-of-state shipper permittee, or wholesaler may hold any direct or indirect interest in any "Class B" license or permit or establishment or "Class C" license or establishment and no "Class B" licensee or permittee or "Class C" licensee may hold any direct or indirect interest in a manufacturer, rectifier, winery, out-of-state shipper, or wholesale permit or establishment.

Maine

Maine Revised Statutes, Title 28-A: Liquors, Part 3: Licenses for Sale of Liquor, Subpart 1: General Provisions, Chapter 29 License Restrictions

§707 Licensee not to be indebted, obligated or involved

3. Retail licensee; interest in wholesaler or certificate of approval. Except as authorized in section 1355-A, a retail licensee may not have any financial interest, direct or indirect, in any:

A. Maine manufacturer's or wholesaler's license; or

B. Certificate of approval issued to an out-of-state manufacturer or foreign wholesaler of malt liquor or wine.

4. Certificate of approval holder or Maine manufacturer; interest in wholesaler or retail license. Except as authorized in section 1355-A, a certificate of approval holder or in-state manufacturer may not have any financial interest, direct or indirect, in any:

A. Maine wholesale license; or

B. Maine retail license.

5. Wholesale licensee; interest in certificate of approval holder, Maine manufacturer or retail license. No wholesale licensee may have any financial interest, direct or indirect, in any:

A. Certificate of approval issued to an out-of-state manufacturer or foreign wholesaler of malt liquor;

B. Maine manufacturer license; or

C. Maine retail license.

Colorado

Colorado Revised Statutes, Title 12 Professions and Occupations, Article 46 Fermented Malt Beverages

12-46-104. Licenses - state license fees - requirements

(3) It is unlawful for any manufacturer or wholesaler or any person, partnership, association, organization, or corporation interested financially in or with any of the licensees described in this article to be interested financially, directly or indirectly, in the business of any retail licensee licensed pursuant to this article, or for any retail licensee under this article to be interested financially, directly or indirectly, in the business of any manufacturer or wholesaler or any person, partnership, association, organization, or corporation interested in or with any of the manufacturers or wholesalers licensed pursuant to this article.

Enforcement of Iowa's Tied House Laws

ABD Regulatory Compliance Actions

ABD's Regulatory Compliance Bureau has consistently worked with licensees and permittees, as well as potential applicants, to resolve apparent conflicts with Iowa Code section 123.45. The following is a list of potential conflicts identified by ABD and the actions taken to resolve those conflicts:

Conflict Identified	Resolution
Owner of an Iowa brewery with a taproom consulted with ABD Compliance Unit about obtaining ownership in an out-of-state distillery.	Owner was advised that ownership in the out-of-state distillery was prohibited by section 123.45.
Ownership in an Iowa winery and Iowa distillery.	Owner closed the Iowa winery.
Iowa beer wholesaler had an ownership interest in an Iowa casino.	Owner divested the interest in the Iowa casino.

Conflict Identified	Resolution
Owner of an Iowa winery applied for an Iowa brewery permit.	Owner withdrew the Iowa brewery permit application.
Iowa casino owner has an ownership interest in an out-of-state winery.	Licensing agreement seeking resolution via divestment or legislative change.
Employee of an Iowa winery also employed at an Iowa brewpub.	Employee resigned at the Iowa brewpub.
Temporary Iowa retail licensee board of directors members are employed by an Iowa wine wholesaler.	Members resigned their positions on the Iowa retail licensee board of directors.
Temporary retail licensee for local Iowa event has an ownership interest in an Iowa brewery.	Owner divested the interest in the Iowa brewery.
Iowa country club board member is employed by an Iowa beer wholesaler.	Board member resigned from the board of the Iowa country club.
Iowa liquor manufacturer is employed at an Iowa bar holding a retail liquor license.	Resigned employment from the Iowa bar.
Owner of an Iowa brewery has an ownership interest in another Iowa brewery.	Owner is limited to one taproom at one Iowa brewery.
Owner of Iowa retail gas stations holding retail beer permits has an ownership interest in an out-of-state winery	Iowa Court of Appeals upheld denial of the retail beer permits, divestment is in process (<i>Valero case</i>).
Owner of Iowa retail gas stations holding retail beer permits and liquor licenses has an ownership interest in wineries in another country.	Licensing agreement entered into by owner and ABD stating legislative change or divestment as of July 1, 2019.
Applicant for an Iowa winery permit held an Iowa retail beer permit for another business.	Owner cancelled the Iowa retail beer permit.
Temporary Iowa retail licensee/local art society president is an employee at an Iowa brewery.	Study language allowed ABD Administrator discretion to issue the license.
Owner of an out-of-state brewery applied for an Iowa brewery permit.	Owner divested ownership interest in out-of-state brewery.
Partial owner of an Iowa brewery had an ownership interest in an out-of-state brewery.	Partial owner divested ownership interest in the Iowa brewery.
Employee of an Iowa brewery had ownership interests in several Iowa restaurants holding retail liquor licenses.	Employee divested ownership interests in the Iowa restaurants.
Partial owner of an Iowa brewery was employed by an Iowa retail store chain holding many retail liquor licenses.	Partial owner divested the ownership interest in the Iowa brewery.
Partial owner of an Iowa brewery owns another Iowa brewery.	Partial owner divested the ownership interest in one of the Iowa breweries.
Partial owner of an Iowa brewery had a partial interest in an Iowa brewpub and another Iowa business holding a retail liquor license.	Partial owner divested the interest in the Iowa brewpub and the Iowa business holding a retail liquor license.
Partial owner of an Iowa brewery had partial ownership of a casino.	Partial owner divested the ownership interest in the Iowa casino.

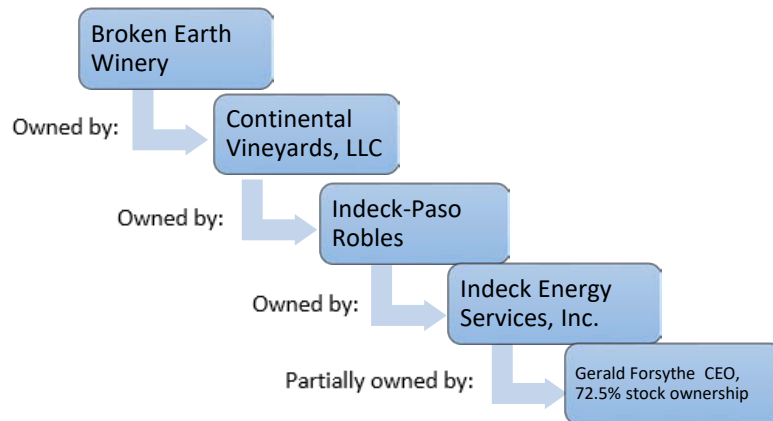
Conflict Identified	Resolution
Owner of an out-of-state meadery (winery) consulted with ABD Compliance Unit about opening an Iowa winery.	Owner was told about a potential conflict with section 123.45 and did not apply for an Iowa winery permit.
Partial owner of an Iowa restaurant had an ownership interest in an out-of-state winery.	Partial owner divested the interest in the out-of-state winery.
Partial owner of an Iowa brewery had a partial ownership interest in an out-of-state winery.	Partial owner divested the interest in the Iowa brewery.
Partial owner of an Iowa liquor manufacturer consulted with ABD Compliance Unit about opening an Iowa distillery.	Partial owner is divesting interest in the Iowa liquor manufacturer.
Partial owner of a temporary Iowa retail licensee has partial ownership in an Iowa brewery.	Partial owner divested the interest in the Iowa brewery.
Owner of an Iowa distillery is also the owner of an Iowa winery.	Owner sought and received legislative change in 2017 to allow ownership in both with associated retail exceptions allowed.

Investigations of potential tied house issues can be extremely difficult, especially given the complex ownership structures present in today's marketplace. An example of this is the administrative action ABD took against the owner of two gas stations with retail beer permits in Iowa who also had an ownership interest in an out-of-state winery.

[New Midwest Rentals, LLC v. Alcoholic Beverages Division](#)

ABD initially issued a retail beer permit to New Midwest Rentals, LLC d/b/a Valero #202 on September 27, 2011, and a retail beer permit to New Midwest Rentals, LLC d/b/a Valero #204 on November 11, 2011. At the time of issuance, there were no known conflicting ownership issues identified by ABD.

On April 25, 2012, ABD received an application for a wine direct shipper license from Continental Vineyards, LLC d/b/a Broken Earth Winery located in California. Indeck-Paso Robles, LLC was listed on the ownership screen as 100 percent owner of Continental Vineyards, LLC. Also listed on the ownership screen was Gerald Forsythe. When Gerald Forsythe's name was cross-referenced in the eLicensing system, it was discovered that he was also listed on the ownership screen as 100 percent owner of New Midwest Rentals, LLC, which held the two retail beer permits. To provide a better understanding of the ownership interest in question, the ownership structure of Broken Earth Winery is as follows:



When ABD discovers that a retail licensee or permittee has a prohibited interest in a manufacturer or a wholesaler, ABD works with the licensee or permittee to get the conflicting interest resolved. ABD agreed to renew the two beer permits for the two Valero stores in 2012 to give Gerald Forsythe additional time to divest one of his conflicting ownership interests. From the time ABD discovered the conflicting ownership interest, approximately 18 months passed.

When the two beer permits came up again for renewal in 2013, the conflicting ownership interest had not been resolved. On October 4, 2013, ABD sent a letter formally denying the renewal application filed by New Midwest Rentals, LLC d/b/a Des Moines Valero #202 for beer permit BC0029785 (this permit was subsequently cancelled when the business closed on 11/30/2014). On November 26, 2013, the ABD sent a letter formally denying the renewal application filed by New Midwest Rentals, LLC d/b/a Des Moines Valero #204 for beer permit BC0029805. The basis of the denials was a prohibited ownership and managerial interest by Valero owner, Gerald Forsythe, in Broken Earth Winery in California under Iowa Code section 123.45. New Midwest Rentals timely appealed the denials.

The appeal was held before Administrative Law Judge Margaret LaMarche. The ALJ issued a Proposed Decision on March 27, 2014, affirming ABD's denial. New Midwest Rentals appealed the ALJ's decision to ABD. ABD Administrator Stephen Larson issued a final agency decision on October 3, 2014, affirming and adopting the Proposed Decision. New Midwest Rentals filed for judicial review and the Polk County District Court reversed and remanded the ABD decision "to interpret section 123.45 in accordance with the use of the proper rules of statutory construction to determine whether Gerald Forsythe's ownership interest in both the Broken Earth Winery and the Valero stores with a retail beer permit is prohibited under Iowa Code section 123.45." ABD again ruled that the ownership interest was prohibited.

Upon a second judicial review petition by New Midwest Rentals, the Polk County District Court, on November 9, 2016, affirmed ABD's Final Order on Remand that denied renewal of the beer permit. *New Midwest Rentals, LLC d/b/a Valero #204, 3733 Easton Blvd., Des Moines, Iowa 50317 v. Iowa Department of Commerce, Alcoholic Beverages Division* was appealed to the Iowa Court of Appeals. On February 7, 2018, the Iowa Court of Appeals affirmed ABD's Final Decision and vacated the portion of the second Polk County District Court Decision which found section 123.45 ambiguous, stating the "law of the case doctrine" prevented that issue from being reconsidered. New Midwest Rentals did not appeal the Iowa Court of Appeals decision.

➡ **Key Takeaway** The Iowa Appellate Court holding that Gerald Forsythe’s ownership interest in both the Broken Earth Winery and the Valero retail stores is prohibited under section 123.45 is applicable jurisprudence in the state of Iowa.

Licensing Agreements

Senate File 516 became effective on July 1, 2017, allowing the administrator the ability to exercise discretion and defer on final determinations of eligibility with regard to potential violations of subsection 1, paragraphs (c) and (d) of 123.45. ABD identified a potential tied house violation in September 2016 concerning a large retail gas station chain holding 115 off-premises retail liquor licenses with optional wine and beer off-premises sales privileges or standalone off-premises beer permits in the state of Iowa. Newspaper articles indicated that the owner of the large retail gas station chain purchased two Italian wineries.

Discussions began with the retail licensee to resolve the potential tied house ownership conflict. Beginning in February of 2017, the licensee and ABD began entering into licensing agreements for new licenses issued for new retail locations. The licensee agreed to seek legislative clarification that clearly confirms their compliance with Iowa Code section 123.45. The agreement stated that if clarifying language did not become effective on or before July 1, 2017, the licensee would submit a compliance plan to ABD.

On July 1, 2017, Senate File 516 became effective, allowing the ABD administrator, during the time frame of the Alcoholic Beverage Control Study and consideration of the issue by the legislature, the discretion to defer on a final determination regarding eligibility, and to issue temporary licenses or permits with conditions. This discretionary power is repealed effective July 1, 2019.

Upon the study language becoming law on July 1, 2017, updated licensing agreements were entered into utilizing the administrator’s ability to defer on a final determination regarding eligibility as the conditional basis for issuing licenses. The licensee again agreed in these licensing agreements to seek legislative clarification that clearly confirms their compliance with Iowa Code section 123.45. The licensee and ABD also agreed to evaluate any legislation advanced by the legislature during the 2019 legislative session and signed into law by the governor to determine if the licensee has a conflict with section 123.45.

➡ **Key Takeaway** Should clarifying legislation not become effective on or before July 1, 2019, the licensee is required to present a plan to ABD by no later than August 1, 2019, that provides for compliance consistent with ABD’s interpretation of Iowa Code section 123.45.

The Reach of Iowa’s Tied House Law

The broad language used in Iowa Code section 123.45 has implications that reach farther than just ownership. The code section can also potentially limit the choices a person makes in their employment within the alcoholic beverages industry, as well as choices made regarding investing for retirement.

Employment Opportunities

As illustrated previously, ABD's Regulatory Compliance Bureau has worked with licensees and permittees, as well as potential applicants, who have had an apparent conflict with Iowa Code section 123.45 with regard to employment. These conflicts arise from the aforementioned change made to section 123.45 in 1988 when the word "employee" was added to whom the tied house prohibitions were applicable to.

In 2009, an exception to the employment prohibitions within section 123.45 was added to section 123.56.

123.56 Native wines.

6. Notwithstanding any other provision of this chapter, a person employed by a manufacturer of native wine holding a class "A" wine permit may be employed by a brewery with a class "A" beer permit provided the person has no ownership interest in either licensed premises.

The exception allows a person employed by a manufacturer of native wine to also be employed by a brewery, provided the person has no ownership interest in either licensed premises. This is a very limited exception, and one that would not provide relief in other benign employment situations, such as a truck driver for a beer wholesaler wanting to pick up a shift bartending, or a waitress in a restaurant wanting to pursue an opportunity to learn distilling at a native distillery. In both instances, these individuals would be in conflict with Iowa Code section 123.45. Additionally, conflicts have been identified when employees of breweries, wineries, and wine and beer wholesalers serve on the board of directors for local art societies, country clubs, or any other type of social organization looking to obtain a retail permit for community events.

Several states – including Wisconsin, Alabama, Idaho, Maine, Maryland, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Arkansas, Colorado, Delaware, Kansas, Nevada, and North Dakota – do not appear to include "employee" in their tied house prohibition language. Other states have addressed employee-related issues in their tied house laws and exceptions.

Vermont

Vermont allows employees of a wholesaler to also be employed by retail licensees as long as the employee does not exercise any control over, or participate in, the management of the retail licensee's business or business decisions and that neither employment relationship results in the exclusion of competitor products.

Vermont Statute, Title 7 Alcoholic Beverages, Chapter 9 Licensing, Subchapter 1 General Provisions §203 Restrictions: financial interests; display of license; employees

(b) An individual who is an employee of a wholesale dealer that does not hold a solicitor's license may also be employed by a first- or second-class licensee on a paid or voluntary basis, provided that the employee does not exercise any control over, or participate in, the management of the first- or second-class licensee's business or business decisions, and that neither employment relationship results in the exclusion of any competitor wholesale dealer or any brand of alcoholic beverages of a competitor wholesale dealer.

Oregon

The state of Oregon addresses members of boards of directors in their tied house exception language. A member of a board of directors of a manufacturer would fall under Iowa's tied house laws, depending on the circumstances, as a "representative," "employee," and/or "agent." A member of a board of directors of a retail licensee would fall under Iowa's tied house laws as a person directly or indirectly interested in the ownership, conduct, or operation of a retail licensee or permittee.

Oregon Revised Statutes, Title 37 Alcoholic Liquors; Controlled Substances; Drugs, Chapter 471 Alcoholic Liquors Generally, Subsection 396 Exceptions to prohibition on financial connection between wholesaler and retailer.

(8) Notwithstanding ORS 471.394, a member of the board of directors of a parent company of a corporation that is a manufacturer may serve on the board of directors of a parent company of a corporation that is a retail licensee if:

(a) The manufacturer or parent company of a manufacturer is listed on a national security exchange;

(b) All purchases of alcoholic beverages by the retail licensee are made from holders of wholesale malt beverage and wine licenses, brewery licenses or winery licenses in this state;

(c) The interest of the member of the board of directors does not result in the exclusion of any competitor's brand of alcoholic beverages on the licensed premises of the retail licensee; and

(d) The sale of goods and services other than alcoholic beverages by the retail licensee exceeds 50 percent of the gross receipts of the business conducted by the retail licensee on the licensed premises.

Retirement and Investment Accounts

The Iowa Supreme Court's holding in the *Auen* case found that by choosing the language "directly or indirectly interested in the ownership," the legislature meant to prohibit *any* ownership interest – no matter how remote or *de minimis* – by a manufacturer, wholesaler, or other entity in the chain of alcohol beverage distribution and the retailer of these beverages. Although ABD's Regulatory Compliance Bureau has not yet encountered a situation where retirement and investment accounts have been investigated for an ownership interest, it seems likely given the language of *Auen* that this remote and/or *de minimis* ownership interest is prohibited by section 123.45. If the legislature did not mean to prohibit such ownership, the language of section 123.45 does not address that exclusion from the code.

Several states address stock ownership and minor investment by removing them from the purview of their tied house code sections.

Missouri

The state of Missouri specifically exempts ownership of less than 10 percent of the outstanding shares in a corporation from being considered a part of the definition of "financial interest."

Missouri Revised Statutes, Title XX: Alcoholic Beverages, Chapter 311 Liquor Control Law,

§311-061 Stock Ownership not deemed financial interest, when.- Notwithstanding the definition of "financial interest" contained in section 311.060, service as a member of the board of directors of a corporation, the stock of which is traded on the New York or American Stock Exchange or NASDAQ, or ownership of less than ten percent of the outstanding shares in such corporation, shall not constitute a financial interest in such corporation or a subsidiary thereof.

Maine

The state of Maine exempts an even smaller investment percentage, limiting exemptions to investments "not amounting to more than 1%" of securities of a corporation "engaged in liquor business."

Maine Revised Statutes, Title 28-A: Liquors, Part 3: Licenses for Sale of Liquor, Subpart 1: General Provisions, Chapter 29 License Restrictions

§707 Licensee not to be indebted, obligated or involved

6. Minor investment. Minor investment in securities of a corporation engaged in liquor business not amounting to more than 1% shall not be held to be an interest forbidden by this subsection.

Oregon

The state of Oregon provides exemptions for "institutional investors," which are banks, mutual funds, pension funds, and private investment firms, to have financial interests in retail licensees and wholesalers or manufacturers provided certain conditions are met.

Oregon Revised Statutes, Title 37 Alcoholic Liquors; Controlled Substances; Drugs, Chapter 471 Alcoholic Liquors Generally, Subsection 396 Exceptions to prohibition on financial connection between wholesaler and retailer.

(7) Notwithstanding ORS 471.394, an institutional investor with a financial interest in a wholesaler or manufacturer may hold, directly or indirectly, an interest in a retail licensee unless the institutional investor controls, is controlled by, or is under common control with, a wholesaler or manufacturer. Notwithstanding ORS 471.394, an institutional investor with a financial interest in a retail licensee may hold, directly or indirectly, an interest in a wholesaler or manufacturer unless the institutional investor controls, is controlled by, or is under common control with, a retail licensee. The provisions of this subsection apply only to an institutional investor that is a state or federally chartered bank, a state or federally chartered mutual savings bank, a mutual fund or pension fund, or a private investment firm. The principal business activity of the institutional investor must be the investment of capital provided by depositors, participants or investors. The institutional investor must maintain a diversified portfolio of investments. The majority of the institutional

investor's investments may not be in businesses that manufacture, distribute or otherwise sell alcoholic beverages. The institutional investor, and the officers, directors, substantial shareholders, partners, employees and agents of the institutional investor, may not participate in management decisions relating to the sale or purchase of alcoholic beverages made by a licensee in which the institutional investor holds an interest.

Texas

The state of Texas has encountered the institutional investment question and has found difficulty regulating this area of the law given that institutional investments are not specifically addressed by the legislature in their tied house statute.

In *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission* 518 S.W.3d 318, (Tex. 2017), the Texas Supreme Court affirmed the Texas Alcoholic Beverage Commission (TABC), the county judge serving as the administrative law judge, the district court, and the court of appeals by finding that a 20 percent stock ownership in two Heineken companies, which in turn own breweries by publicly-owned company, FEMSA, which also owns 100 percent of Cadena which sought retail alcohol permits for their Oxxo gas stations operating in Texas was a violation of Texas tied house laws.

Although the court declined to issue an advisory opinion requested by amici on whether one share would constitute an impermissible cross-tier ownership interest under Texas tied house law, the court did say when addressing the dissenting opinion that "the legislature provided a broadly inclusive statute but pared its reach by leaving its enforcement to the TABC. The TABC, an administrative agency, is afforded a great deal of discretion and deference...Indeed, that we are only now interpreting this statute for the first time, more than 80 years after it was enacted, suggest that the TABC has to date reasonably and effectively used that discretion and avoided pursuing the attenuated scenarios that trouble the dissent."

The *Cadena* decision was delivered on April 28, 2017. The one share question and the question of the TABC's reasonable discretion presented itself in Texas a few months later. In September 2017, Texas Administrative Law Judge Robert Jones Jr. issued an opinion while acknowledging that the decision could shut down the state's alcoholic beverage industry.⁶ The background of this case is as follows: Nearly six years prior, McLane applied for a license to distribute alcohol in Texas. McLane is owned by Berkshire Hathaway, which owns a 2 percent interest in Walmart, a holder of many retail licenses in Texas. The TABC denied the wholesale permit to McLane based on the impermissible cross-tier ownership. About the same time that McLane applied for the wholesale license, Core-Mark, another large wholesaler already licensed in the state of Texas, applied for and received its renewal for its wholesale license. McLane protested Core-Mark's application by noting that the publicly traded Core-Mark was owned by large institutional investors such as Vanguard and T. Rowe Price, which hold interests in Nordstrom's and Bed, Bath, and Beyond, retailers holding Texas retail licenses and an interest in Molson Coors Brewing Co., which holds a Texas manufacturing permit. The ALJ agreed with McLane, finding an impermissible cross-tier ownership interest as to Core-Mark, and adding that he "sympathizes with the absurdity of the

⁶ Dexheimer, E. (2018, March, 27) Texas alcohol agency reverses judge, preserving state booze industry. *My Statesman*, p.1. Retrieved from <http://www.mystatesman.com>

outcome in this case” which would disqualify hundreds of companies with shared institutional owners. The ALJ explained that he was bound to follow Texas law as it was written.

The TABC reversed the ALJ’s opinion. The TABC Executive Director wrote in a statement, “It is not the agency’s belief that the Texas legislature intended to create a statute that through certain interpretations, would lead to large-scale disruption of the alcoholic beverage industry.” The Deputy Executive Director of the TABC wrote that if the TABC had not reversed the ALJ’s decision, it would have resulted in no alcoholic beverage industry in Texas. Core-Mark was allowed to keep operating. McLane has not decided whether to appeal.

In the future, the TABC clarified that it would permit hands-off ownership of different tier companies by institutional investors, such as mutual funds. As to single owners of companies across tiers, the TABC declined to define how much would be unacceptable, only saying that it would review each case on a case-by-case basis.⁷

The dissent in the *Cadena* case, in a way, foretold what was to come with the Core-Mark ruling and reversal. The dissent reasoned that by defining “interest” as broadly encompassing any commercial or economic interest that provides a stake in the financial performance of an entity engaged in the manufacture, distribution, or sale of alcoholic beverages as the Texas Court of Appeals did, effectively, *the interpretation includes all which invariably excludes all*. The dissent found that the majority holding vests the TABC with enormous power, selectively applying standard-less criteria in a manner that treats similarly-situated applicants dissimilarly, thus picking winners and losers in the marketplace. The dissent articulated that “virtually all applicants are implicated by such a sweeping reading of ‘interest,’ a reading that bans any indirect interest of any degree – except when it doesn’t.”

The dissent was addressing the fact that the State of Texas holds retail licenses through its public universities, which sell alcohol at sporting and university events while also owning billions of dollars in cross-tier investments. The dissent noted that the TABC reaffirmed that the tied house code recognized no *de minimis* exception at oral arguments before the Texas Supreme Court and in a post-argument letter to the Court.

➡ **Key Takeaway** The high courts in both Texas and Iowa have, through tied house cases that have come before them, taken very similar positions on how broad the term “interest” is within the corresponding tied house statutes.

Compare:

Texas: Interest - “broadly encompasses any commercial or economic interest that provides a stake in the financial performance of an entity engaged in the manufacture, distribution, or sale of alcoholic beverages.” *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission*

Iowa: Directly or indirectly be interested in the ownership – “the legislature meant to prohibit any ownership interest, no matter how remote or *de minimis*.” *Auen v. Alcoholic Beverages Div., Iowa Dept of Commerce*

⁷ Dexheimer, E. (2018, March, 27) Texas alcohol agency reverses judge, preserving state booze industry. *My Statesman*, p.1. Retrieved from <http://www.mystatesman.com>

As of June 30, 2017, the Iowa Public Employees' Retirement System (IPERS) held investments of \$1.964 billion in companies of Iowa interest. In the top 10 holdings of public equities portfolio, Amazon.com, Inc. was the third-largest holding by IPERS, with \$67,473,000 as of June 30, 2017⁸. Amazon's subsidiary, Whole Foods Market, Inc., holds a retail liquor license in the state of Iowa. IPERS' real estate portfolio had a fair value of \$1.791 billion on June 30, 2017. The real estate portfolio consists of 26 percent industrial, 25 percent office, 11 percent retail, 6 percent hotel, and 32 percent apartment real property. It is likely that IPERS' investments involve the alcoholic beverages industry to some degree and that impermissible cross-tier interests are implicated.

Federal Tied House Law

The interaction between the federal alcohol code and regulation and the state alcohol code and rule is different than most types of law. As is often said with regard to the alcoholic beverage industry, alcohol is different. It is not regulated like any other commodity. The passage of the Twenty-First Amendment and the subsequent ratification by each state was a firm indication that the federal government was choosing to no longer occupy the field of alcohol regulation and the states were choosing to accept that role.

Federal Prohibition was repealed and each state was given the ability to regulate in a manner that suits the citizens of that state. This delegation of authority is validated by Section 2 of the Twenty-First Amendment. This understanding of the relationship between federal alcohol law and state alcohol law is important because it is different than many other laws where the application of the Supremacy Clause of the Constitution would allow federal law to supersede state law. A state's power to regulate the alcoholic beverage industry does have its limitations as the *Granholm v. Heald* United States Supreme Court Case illustrates.

Granholm v. Heald

In the *Granholm v. Heald*, 544 U.S. 460 (2005), United States Supreme Court case, Justice Anthony Kennedy asserted that the wine direct shipment laws of both New York and Michigan violated the Commerce Clause because neither state substantiated that its objectives could not be obtained by other nondiscriminatory mechanisms, and that Section 2 of the Twenty-First Amendment was not a justifiable ground to regulate interstate commerce in a discriminatory manner, such as giving preferential treatment to in-state wineries.

The Court went on to say that states have broad power to regulate liquor under Section 2 of the Twenty-First Amendment. This power, however, does not allow states to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a state chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. *Id.*, at 30.

⁸ FY 2017 Comprehensive Annual Financial Report (2017, June 30) Retrieved from URL: <https://www.ipers.org/sites/default/files/CAFR%20FY2017.pdf>

The *Granholm* decision has brought about many questions with regard to state regulations that favor in-state manufacturers. Legal scholars' debate whether *Granholm's* reach extends to state regulations which, for example, allow in-state wineries to operate one or more retail outlets as exceptions to the three-tier system. Does the *Granholm* decision mean that out-of-state wineries are entitled to the same exceptions?

In Iowa, native wineries are allowed one retail location to serve wine and beer by the glass to consumers, and an unlimited number of additional retail locations to sell wine for off-premises consumption. Out-of-state wineries do not have these same privileges. Native wineries are also allowed to sell directly to retailers, while out-of-state wineries must sell to an in-state wholesaler who then sells to a retailer. Iowa breweries are allowed one retail location to sell beer for off-premises consumption and to serve wine and beer by the glass to consumers, while out-of-state breweries are not allowed that privilege. Iowa breweries are allowed to sell at wholesale directly to retailers, while out-of-state breweries must sell to an in-state wholesaler who then sells to a retailer.

Although there is no immediate answer as to whether the *Granholm* decision applies to these in-state manufacturer privileges, *Granholm* is most certainly legal authority applicable to each state's three-tier system of regulating alcoholic beverages and must be analyzed when addressing changing marketplace conditions and business opportunities in the three-tier system. An analysis of Iowa's current three-tier system and section 123.45 should include consideration of this influential Supreme Court decision before any changes are proposed.

Federal Tied House Law vs. Iowa's Tied House Law

Under the federal tied house law, the act of a person engaged in manufacturing or wholesaling alcoholic beverages merely acquiring or holding any interest in any license with respect to the premises of a retailer when the retailer is engaged in the sale of distilled spirits, wine, or malt beverages is not enough to constitute a tied house violation. In contrast, Iowa's tied house law, section 123.45, prohibits a manufacturer or wholesaler from merely holding an interest, directly or indirectly, in a retailer.

United States Code, 2006 Edition, Supplement 5, Title 27 - INTOXICATING LIQUORS CHAPTER 8 - FEDERAL ALCOHOL ADMINISTRATION ACT SUBCHAPTER I - FEDERAL ALCOHOL ADMINISTRATION §205 Unfair competition and unlawful practices.

A person (individual, partnership, joint stock company, business trust, association, corporation, or other form of business enterprise)

Engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits,

Induces a retailer by acquiring or holding any interest in any license with respect to the premises of the retailer, engaged in the sale of distilled spirits, wine, or malt beverages, and that

Retailer, engaged in the sale of distilled spirits, wine, or malt beverages, is induced, directly or indirectly or through an affiliate, to purchase distilled spirits, wine, or malt beverages

from such person, engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits to the:

- **Exclusion** in whole or in part of other persons selling distilled spirits, wine or malt beverages; or
- **Substantially to restrain** or prevent transactions in distilled spirits, wine or malt beverages; or if the
- **Direct effect** prevents, deters, hinders or restricts other persons selling distilled spirits, wine or malt beverages.

The federal code also requires an inducement by the manufacturer or wholesaler to the retailer, either directly or indirectly or through an affiliate. The inducement causes the retailer to purchase distilled spirits, wine, or malt beverages from the person to the exclusion, in whole or in part, of other sellers of distilled spirits, wine, or malt beverages or the inducement substantially restrains or prevents transactions in distilled spirits, wine, or malt beverages, or the direct effect of the inducement prevents, hinders or restricts other persons selling distilled spirits, wine, or malt beverages.

The federal regulation found at Title 27, Code of Federal Regulations, Intoxicating Liquors, Chapter II – Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice, Subchapter A Liquors, Part 6 “Tied House” provides further guidance by stating that the part does not apply to transactions between an industry member and a retailer wholly owned by that industry member. When an industry member wholly owns a retailer, that is not considered an interest which may result in a violation “by acquiring or holding any interest in any license with respect to the premises of a retailer.” The regulation does provide that any interest in a retail license acquired by a separate corporation in which the industry member or its officials hold ownership or are otherwise affiliated is an interest in a retail license.

The federal code and regulation do not apply tied house prohibitions to industry members which wholly own a retailer within the same corporation. The rationale for this may be that you cannot induce yourself to do something, or, in the alternative, you will induce yourself and the federal government is not going to regulate it. This appears contradictory to what most states’ tied house laws attempt to prohibit. This is important to keep in mind when considering whether a state’s tied house laws should be fashioned after the federal laws. It is possible that the federal government recognizes that states have stricter tied house laws and they see their role as more of a secondary authority in this area, instead possibly choosing to focus more in the area of trade practices rather than ownership. To further emphasize the states’ authority in this the area, the regulation states “Nothing in this part shall operate to exempt any person from the requirements of any State law or regulation.”

Federal Tied House Law vs. Other States’ Tied House Laws

As the analysis above provides, the federal code and regulation with regard to tied house ownership is less restrictive than Iowa’s. Wholly-owned retailers, under the same corporate umbrella as an industry member, are not viewed as tied house ownership concerns at the federal level. The federal code and regulation require a finding of inducement and exclusion elements beyond merely holding an interest in a retailer.

Several states have adopted tied house statutes that appear to be fashioned after, or incorporate portions of, the federal tied house code and regulation.

Oregon

As previously discussed, the state of Oregon has addressed many potential tied house issues in their exceptions. Oregon has included the exclusion elements of the federal code and regulation in their tied house exceptions, as well as “control over” and “participation in the management of” criteria. Oregon, like Washington, also starts with the basic premise that cross-tier ownership is lawful.

Oregon Revised Statutes, Title 37 Alcoholic Liquors, Controlled Substances; Drugs, Chapter 471 Alcoholic Liquors Generally, Subsection 396 Exceptions to prohibition on financial connection between wholesaler and retailer.

(5) Notwithstanding ORS 471.394, a manufacturer or wholesaler, and any officer, director or substantial stockholder of any corporate manufacturer or wholesaler, may hold, directly or indirectly, an interest in a full or limited on-premises sales licensee, provided that the interest does not result in exercise of control over, or participation in the management of, the licensee’s business or business decisions, and does not result in exclusion of any competitor’s brand of alcoholic liquor.

(6) Notwithstanding ORS 471.394, a full or limited on-premises sales licensee, and any officer, director or substantial stockholder of any corporate full or limited on-premises sales licensee, may hold, directly or indirectly, an interest in a manufacturer or wholesaler, provided that the interest does not result in exercise of control over, or participation in the management of, the manufacturer’s or wholesaler’s business or business decisions, and does not result in exclusion of any competitor’s brand of alcoholic liquor.

Washington

The state of Washington approaches tied house much differently than other states by starting with the basic premise that tied house is lawful unless there is, or more than likely will be, undue influence, or if the result of the direct or indirect financial interest will adversely impact public health and safety. The code also outlines “financial interest” by providing guidance on how entities must be structured and licensed in order for the tied house interest to be lawful.

The following tied house language was created in 2011 to replace previous language repealed in 2009.

Revised Code of Washington, Title 66 Alcoholic Beverage Control, Section 66.28 Miscellaneous Regulatory Provisions, 66.28.290 Three-tier system - Direct or indirect interests between industry members, affiliates, and retailers.

(1) Notwithstanding any prohibitions and restrictions contained in this title, it shall be lawful for an industry member or affiliate to have a direct or indirect financial interest in another industry member or a retailer, and for a retailer or affiliate to have a direct or indirect financial interest in an industry member unless

such interest has resulted or is more likely than not to result in undue influence over the retailer or the industry member or has resulted or is more likely than not to result in an adverse impact on public health and safety. The structure of any such financial interest must be consistent with subsection (2) of this section.

(2) Subject to subsection (1) of this section and except as provided in RCW 66.28.295:

(a) An industry member in whose name a license or certificate of approval has been issued pursuant to this title may wholly own or hold a financial interest in a separate legal entity licensed pursuant to RCW 66.24.320, 66.24.330, 66.24.350, 66.24.360, 66.24.371, 66.24.380, 66.24.395, 66.24.400, 66.24.425, 66.24.452, 66.24.495, 66.24.540, 66.24.550, 66.24.570, 66.24.580, 66.24.590, 66.24.600, and 66.24.610, but may not have such a license issued in its name; and

(b) A retailer in whose name a license has been issued pursuant to this title may wholly own or hold a financial interest in a separate legal entity licensed or holding a certificate of approval pursuant to RCW 66.24.140, 66.24.170, 66.24.206, 66.24.240, 66.24.244, 66.24.270(2), 66.24.200, or 66.24.250, but may not have such a license or certificate of approval issued in its name; and

(c) A supplier in whose name a license or certificate of approval has been issued pursuant to this title may wholly own or hold a financial interest in a separate legal entity licensed as a distributor or importer under this title, but such supplier may not have a license as a distributor or importer issued in its own name; and

(d) A distributor or importer in whose name a license has been issued pursuant to this title may wholly own or hold a financial interest in a separate legal entity licensed or holding a certificate of approval as a supplier under this title, but such distributor or importer may not have a license or certificate of approval as a supplier issued in its own name.

The language repealed in 2009 is provided below. It appears this prior language is similar to other states' current tied house statutes, providing a prohibition against tied house as a default and then providing some flexibility for corporate entities. Thorough research into the state of Washington's decision to repeal this language and enact the language above was not done as a part of this study, but it appears that the state of Washington was perhaps addressing similar tied house conflicts that potentially exist in the state of Iowa.

Revised Code of Washington, Title 66 Alcoholic Beverage Control, Section 66.28 Miscellaneous Regulatory Provisions, 66.28.010 Three-tier system - Direct or indirect interests between industry members, affiliates, and retailers.

(1)(a) No manufacturer, importer, distributor, or authorized representative, or person financially interested, directly or indirectly, in such business; whether resident or nonresident,

shall have any financial interest, direct or indirect, in any licensed retail business, unless the retail business is owned by a corporation in which a manufacturer or importer has no direct stock ownership and there are no interlocking officers and directors, the retail license is held by a corporation that is not owned directly or indirectly by a manufacturer or importer, the sales of liquor are incidental to the primary activity of operating the property as a hotel, alcoholic beverages produced by the manufacturer or importer or their subsidiaries are not sold at the licensed premises, and the board reviews the ownership and proposed method of operation of all involved entities and determines that there will not be an unacceptable level of control or undue influence over the operation of the retail licensee; nor shall any manufacturer, importer, distributor, or authorized representative own any of the property upon which such licensed persons conduct their business; nor shall any such licensed person, under any arrangement whatsoever, conduct his or her business upon property in which any manufacturer, importer, distributor, or authorized representative has any interest unless title to that property is owned by a corporation in which a manufacturer has no direct stock ownership and there are no interlocking officers or directors, the retail license is held by a corporation that is not owned directly or indirectly by the manufacturer, the sales of liquor are incidental to the primary activity of operating the property either as a hotel or as an amphitheater offering live musical and similar live entertainment activities to the public, alcoholic beverages produced by the manufacturer or any of its subsidiaries are not sold at the licensed premises, and the board reviews the ownership and proposed method of operation of all involved entities and determines that there will not be an unacceptable level of control or undue influence over the operation of the retail licensee.

The state of Washington defines "undue influence" as:

RCW 66.28.285

Three-tier system-Definitions.

(6) "Undue influence" means one retailer or industry member directly or indirectly influencing the purchasing, marketing, or sales decisions of another retailer or industry member by any agreement written or unwritten or any other business practices or arrangements such as but not limited to the following:

(a) Any form of coercion between industry members and retailers or between retailers and industry members through acts or threats of physical or economic harm, including threat of loss of supply or threat of curtailment of purchase;

(b) A retailer on an involuntary basis purchasing less than it would have of another industry member's product;

(c) Purchases made by a retailer or industry member as a prerequisite for purchase of other items;

- (d) A retailer purchasing a specific or minimum quantity or type of a product or products from an industry member;
- (e) An industry member requiring a retailer to take and dispose of a certain product type or quota of the industry member's products;
- (f) A retailer having a continuing obligation to purchase or otherwise promote or display an industry member's product;
- (g) An industry member having a continuing obligation to sell a product to a retailer;
- (h) A retailer having a commitment not to terminate its relationship with an industry member with respect to purchase of the industry member's products or an industry member having a commitment not to terminate its relationship with a retailer with respect to the sale of a particular product or products;
- (i) An industry member being involved in the day-to-day operations of a retailer or a retailer being involved in the day-to-day operations of an industry member in a manner that violates the provisions of this section;
- (j) Discriminatory pricing practices as prohibited by law or other practices that are discriminatory in that product is not offered to all retailers in the local market on the same terms.

An "adverse impact on public health and safety" is defined as meaning "that an existing or proposed practice or occurrence has resulted or is more likely than not to result in alcohol being made significantly more attractive or available to minors than would otherwise be the case or has resulted or is more likely than not to result in overconsumption, consumption by minors, or other harmful or abusive forms of consumption."

The alcohol regulatory entity in Washington, the Washington State Liquor and Cannabis Board, is granted the authority to evaluate whether an "undue influence" or an "adverse impact on public health and safety" is more likely than not to result from a cross-tier financial interest.

RCW 66.28.300

~~Three-tier system—Undue influence—Determination by board.~~

Any industry member or retailer or any other person seeking a determination by the board as to whether a proposed or existing financial interest has resulted or is more likely than not to result in undue influence or has resulted or is more likely than not to result in an adverse impact on public health and safety may file a complaint or request for determination with the board. Upon receipt of a request or complaint the board may conduct such investigation as it deems appropriate in the circumstances. If the investigation reveals the financial interest has resulted or is more likely than not to result in undue influence or has resulted or is more likely than not to result in an adverse impact on public health and safety the board may issue an administrative violation notice or a notice of intent to deny the license to the industry member, to the retailer, or both. If the financial interest was acquired through

a transaction that has already been consummated when the board issues its administrative violation notice, the board shall have the authority to require that the transaction be rescinded or otherwise undone. The recipient of the administrative notice of violation or notice of intent to deny the license may request a hearing under chapter 34.05 RCW.

Granting this type of discretion to the regulatory entity allows for the ability to evaluate cross-tier financial interests when necessary. Due process rights are also protected by this determination. By providing by code that cross-tier financial interest is fundamentally permitted rather than prohibited, the wide net capturing all is eliminated. The Washington legislature narrows the Board's focus to only those cross-tier financial interests that affect commerce and/or public health and safety.

New Hampshire

The state of New Hampshire takes an approach to tied house which falls in line with the federal code and regulation by addressing unfair competition and interference with commerce by incorporating in their license applications, qualifications, and renewal code section the following language:

Title XIII Alcoholic Beverages, New Hampshire Revised Statutes, Chapter 178 Liquor Licenses and Fees The commission shall not issue a license under this chapter unless it is satisfied that:

(c) The applicant has accurately disclosed its interests in other business activities, and there is no substantial likelihood that these interests would interfere with the operation of the proposed business in a lawful manner and in accordance with the provisions of this chapter. Any application may be denied if the proposed licensee, or a person with a substantial ownership interest in the applicant, has other business interests in this or any other state which the commission believes would create unreasonable opportunities for unfair competition or unlawful activities, or which would unduly hinder the commission in exercising its regulatory and financial responsibilities.

The discretion the legislature has given the New Hampshire Liquor Commission allows the licensing authority to issue a license where there may be a traditional tied house conflict that another state may prohibit outright.

Utah

The state of Utah has adopted the federal approach to tied house by excluding a fully-owned interest in a retail license acquired by the same corporation of the industry member from their tied house code section. Utah has also adopted the "inducement" and "exclusion in whole or in part" pieces of the federal code when analyzing unlawful prohibitions related to ownership.

Utah Code, Title 32B Alcoholic Beverage Control Act, Chapter 4 Criminal Offenses and Procedure Act, Part 7 Trade Practices Act

§704 Tied House - Prohibitions

(1)(a) It is unlawful for an industry member, directly or indirectly, or through an affiliate, to induce a retailer to

purchase an alcoholic product from the industry member or from the department to the exclusion in whole or in part of a product sold or offered for sale by another person by acquiring or holding an interest in a license with respect to the premises of a retailer, except when the license is held by a retailer that is completely owned by the industry member.

(b) Interest in a retail license includes an interest acquired by a corporate official, partner, employee, or other representative of the industry member.

(c) An interest in a retail license acquired by a separate corporation in which the industry member or the industry member's officials hold ownership or are otherwise affiliated is an interest in a retail license.

(d) Less than complete ownership of a retail business by an industry member constitutes an interest in a retail license within the meaning of Subsection (1)(a).

In Utah, it is unlawful for an industry member to induce a retailer to purchase an alcoholic product from the industry member to the exclusion, in whole or in part, of a product sold by another person by holding an interest in a retail license. It is difficult to determine if Utah enforces this code section by looking only at whether an interest in a retail license is held or if a showing of inducing the retailer to purchase the industry member's product to the exclusion, in whole or in part, of a product sold by another is also required.

Vermont

The state of Vermont allows manufacturers of malt beverages to have a financial interest in retail licensees, and retail licensees to have a financial interest in manufacturers of malt beverages, as long as the retail licensee does not purchase, possess, or sell the malt beverages produced by the manufacturer with which there is a financial interest.

Vermont Statute, Title 7 Alcoholic Beverages, Chapter 9 Licensing, Subchapter 1 General Provisions §203 Restrictions: financial interests; display of license; employees

(a)(2) Notwithstanding subdivision (1) of this subsection and except as otherwise provided in section 271 of this title, a manufacturer of malt beverages may have a financial interest in the business of a first- or second-class license, and a first- or second-class licensee may have a financial interest in the business of a manufacturer of malt beverages, provided the first- or second-class licensee does not purchase, possess, or sell the malt beverages produced by a manufacturer with which there is any financial interest. Any manufacturer of malt beverages that has a financial interest in a first- or second-class licensee and any first- or second-class licensee that has a financial interest in a manufacturer of malt beverages, as permitted under this subdivision, shall provide to the Department of Liquor Control and the applicable wholesale dealer written notification of that financial interest and the licensees involved. A wholesale dealer

shall not be in violation of this section for delivering malt beverages to a first- or second-class licensee that is prohibited from purchasing, possessing, or selling those malt beverages under this section.

By prohibiting sales of the manufacturer's products, the federal code and regulation analysis of inducement and exclusion and/or substantial restraint in trade and/or the direct effect of preventing, hindering, or restricting trade is not necessary. In this way, Vermont recognizes that the financial interest will likely create inducement and exclusion issues, so the ownership interest is allowed as long as the product is not sold by the retailer.

Arizona

The state of Arizona takes a similar approach to Vermont, but applies restrictions to all manufacturers, not just brewers.

Arizona Revised Statutes, Title 4 Alcoholic Beverages, Chapter 2 Regulations and Prohibitions, Article 1 Licenses, §4-243.04 On-sale retail licensees; ownership interests; conditions

A. Notwithstanding section 4-243, a distiller, vintner, brewer, rectifier, blender or other producer of spirituous liquor may have a direct or indirect ownership interest or a financial interest in the license, premises or business on an on-sale retail licensee if each of the following conditions are met:

1. The retail licensee purchases all spirituous liquor for sale at the premises from wholesalers that are licensed in this state.

2. The retail licensee does not purchase or sell any brand of spirituous liquor produced by the distiller, vintner, brewer, rectifier, blender or other producer of spirituous liquor or by any of its subsidiaries or affiliates.

3. The sale and service of spirituous liquor at the premises is an independent business that is owned, managed and supervised by a person or entity that is not employed by and does not have an ownership interest in the retailer's license, premises or business and is not employed by and does not have an ownership interest in the distiller, vintner, brewer, rectifier, blender or other producer of spirituous liquor. The person owning, managing and supervising the sale and service of spirituous liquor on the premises of the on-sale retail licensee shall be properly licensed by the department and shall have entered into a commercial lease or operating or management agreement with the owner or operator of the premises. This paragraph does not prohibit the sale and service of spirituous liquor by employees of the owner or operator of the premises who act under the supervision of the independent licensee. This paragraph does not prevent the payment of rent, rent calculated as a percentage of gross receipts or a percentage of gross receipts from the sale of spirituous liquor to the owner or operator of the premises.

The manufacturer's product may not be sold by the retailer, and all alcoholic beverages sold by the retailer must be purchased from licensed wholesalers. Arizona adds the additional requirement that an "independent business" must own, manage, and service the sale and service of alcoholic beverages at the premises.

Ohio

The state of Ohio has adopted the "exclusion" and "inducement" pieces of the federal tied house code and regulation when a manufacturer or one of its parent companies is listed on the national securities exchange.

Ohio Revised Code, Title 43 Liquor, Chapter 4301 Liquor Control Law,

§4301.24 Rules for manufacturers and wholesale distributors.

(E) This section does not prevent a manufacturer from securing and holding any financial interest, directly or indirectly, by stock ownership or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion of the business or premises of any C or D permit holder, provided that the following conditions are met:

(1) Either the manufacturer or one of its parent companies is listed on a national securities exchange.

(2) All purchases of alcoholic beverages by the C or D permit holder are made from wholesale distributors in this state or agency stores licensed by the division of liquor control.

(3) If the C or D permit holder sells brands of alcoholic beverages that are produced or distributed by the manufacturer that holds the financial interest, the C or D permit holder also sells other competing brands of alcoholic beverages produced by other manufacturers, no preference is given to the products of the manufacturer, and there is no exclusion, in whole or in part, of products sold or offered for sale by other manufacturers, suppliers, or importers of alcoholic beverages that constitutes a substantial impairment of commerce.

(4) The primary purpose of the C or D permit premises is a purpose other than to sell alcoholic beverages, and the sale of other goods and services exceeds fifty percent of the total gross receipts of the C or D permit holder at its premises.

The manufacturer's products may be sold by the C or D retail permittee (a C permit is an off-premises retail permit; a D permit is an on-premises retail permit), but exclusion and inducement are not allowed. Additionally, the primary purpose of the retail permittee may not be alcoholic beverage sales.

Delaware

The state of Delaware takes a similar approach to Ohio, but focuses on a lack of inducement and exclusion and does not have the primary purpose requirement.

Delaware Code, Title 4 Alcoholic Liquors, Chapter 5 Licenses and Taxes, Subchapter I. Manufacture and Import,

§506 Interest in establishment selling to consumer.

(b) This section shall not be construed to prohibit a manufacturer, supplier or importer doing business as a corporation, or the stockholders thereof, from having an interest in any establishment licensed to sell alcoholic liquors to the consumer thereof, where:

(1) The stock of such manufacturer, supplier or importer and such establishment is publicly traded on a national or regional exchange or over-the-counter;

(2) The manufacturer, supplier or importer does not use its ownership interest in such establishment as to induce, directly or indirectly, such establishment to purchase any products from the manufacturer, supplier or importer to the exclusion, in whole or in part, of products sold or offered for sale by other manufacturers, suppliers or importers.

➡ **Key Takeaway** The federal code and regulation require findings of inducement and exclusion elements as a second prong of the analysis rather than an industry member merely holding an interest in a retailer. The first prong of the federal prohibition, holding an interest in a retailer, is all that is required to violate Iowa's tied house law. The second prong, findings of inducement and exclusion, are not required in the state of Iowa even though the inducement and exclusion elements directly relate to interference with the three-tier system of regulating alcoholic beverages. It is highly recommended that the Iowa legislature consider incorporating elements into Iowa's tied house statute which focus on unfair competition and interference with the three-tier system.

Responses to ABD's Request for Comment

As a part of the study, ABD conducted stakeholder meetings to facilitate discussion on the topic and provide general information on the framework of the study language. The ABD also sent a Request for Comment letter to various stakeholders, including manufacturers, wholesalers, and retailers in the alcoholic beverages industry, providing them the opportunity to share their views of Iowa's tied house laws. In total, 14 comments were received. For reference and consideration, the following stakeholder comments are included in Appendix B.

Center for Alcoholic Policy
Wine Institute
Fahr Beverage
Eldorado Resorts, Inc.
Tassel Ridge Winery
7G Distributing, LLC
Toppling Goliath

Wine & Spirits Wholesalers of America, Inc.
Kum & Go, LLC
Iowa Wholesale Beer Distributors Association
Anheuser-Busch InBev
Wide River Winery
America's Beer Distributors
Backcountry Winery

Findings and Recommendations

Iowa Code 7E.1 provides a declaration of policy for the three branches of government. The separation of powers within state government among the legislative, the executive, and the judicial branches of the government is a traditional American concept. The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the executive branch carries out the programs and policies, and the judicial branch has the responsibility for adjudicating any conflicts which might arise from the interpretation of the laws.

ABD, as an agency of the executive branch, carries out the programs and policies of alcoholic beverage control as set forth in Iowa Code chapter 123. As a review of programs previously authorized, the legislature has requested a study concerning the manner of properly balancing appropriate regulation of the manufacturing, distribution, and sale of alcoholic liquor, wine, and beer in the state with emerging market trends in the industry. While conducting the study, ABD was to consider any other relevant issues it identified for study, issues relating to the three-tier system and section 123.45, as it impacts the ability of manufacturers, wholesalers, and retailers to meet changing marketplace conditions and business opportunities.

ABD's objective is to educate the legislature about the history of the three-tier system of alcohol regulation, tied house prohibitions, exceptions to tied house prohibitions, prior and existing tied house conflicts in Iowa, judicial review of tied house law in Iowa, federal code and regulation, and other states' tied house laws. Ultimately, as the Iowa Supreme Court stated in *Auen*, it is best left up to the legislature to determine if tied house policy in Iowa is outdated, not ABD.

The findings of this study indicate that:

- 1) After the repeal of Prohibition by the Twenty-First Amendment, states were given the authority to regulate alcohol within their borders. Iowa chose to become a control state, assuming direct control over the wholesale and retail sale of all alcohol except beer. This meant that at the very beginning of alcohol regulation in the state, Iowa did not maintain a pure three-tier system with strict separation of the tiers.
- 2) Over the years, the legislature and various Governors have shown their approval of a blended three-tier system by enacting laws allowing for cross-tier privileges.
- 3) Although Iowa's alcohol laws have remained mostly static, it is crucial to remember that alcohol regulation in the state has been largely successful under those laws. Any attempts to make changes to Iowa tied house law must ensure the health, safety and welfare of Iowans is maintained.
- 4) The tied house code directly addresses what a manufacturer and wholesaler shall not do in relation to a retail licensee or permittee but does not directly address what a retail licensee or permittee shall not do in relation to a manufacturer or wholesaler.
- 5) The tied house code does not consolidate all exceptions to tied house prohibitions in the tied house code section.

- 6) The tied house code does not allow exceptions granted to a manufacturer to apply when a manufacturer enters into manufacturing another type of alcoholic beverage.
- 7) The tied house code has remained relatively unchanged since 1934, but has adapted as possibilities of tied house conflicts presented themselves.
- 8) The tied house code has been interpreted by the Iowa Supreme Court in *Auen*, as to the language “directly and indirectly interested in the ownership,” that the legislature meant to prohibit any ownership interest, no matter how remote or *de minimis*.
- 9) The tied house code has been interpreted by the Iowa Court of Appeals in *Valero* that an ownership interest in both an out-of-state winery and in-state retail stores holding retail beer permits is prohibited.
- 10) The tied house code does not specifically define key terms.
- 11) The tied house code applies to retirement and institutional investments.
- 12) The tied house code limits employment opportunities.
- 13) The tied house code is more restrictive than the federal tied house code by not requiring findings of inducement and exclusion.

The recommendations of this study are:

- ◆ That the legislature evaluate whether Iowa’s current tied house code serves the public policy purpose of protecting the welfare, health, peace, morals, and safety of the people of the state;
- ◆ That the legislature determine whether the tied house code is clear and concise, and whether exceptions granted to tied house can easily be determined and adhered to by those subject to regulation; and
- ◆ That the legislature determine the reach and depth with which tied house prohibitions are intended to extend.

It is important to note that Iowa Code section 123.45 casts a wide net and as the dissent reasoned in the Texas *Cadena* case, ***including all invariably excludes all***. The alcoholic beverage control study language and the administrator’s election to defer on final determinations of licensing eligibility regarding tied house conflicts concerning subsection 1, paragraphs (c) and (d) is repealed July 1, 2019. At that time, the administrator, as the head of ABD, an agency of the executive branch, shall carry out the programs and policies set forth by the legislature, including those set forth in Iowa Code section 123.45. On July 1, 2019, identified ownership interests in conflict with Iowa Code section 123.45 will be subject to regulatory enforcement and compliance action by ABD.

Acknowledgements

ABD would like to thank those individuals and business entities who provided input to this study for their time and consideration of this subject matter.

The following individuals conducted this study:

Stephen Larson – Author

Stephen Larson was first appointed administrator of ABD in 2010 by Governor Chet Culver and has twice since been reappointed in 2014 and 2018 by Governor Terry Branstad and Governor Kim Reynolds, respectively. He has been in public service to his home state of Iowa since 1984. During his time in government he has served on state and national boards, most recently as the Chairman of the National Alcohol Beverage Control Association in 2015-2016. He, along with Iowa Economic Development Authority Director Debi Durham, performed a comprehensive review of Iowa's alcohol laws in the fall of 2016 and authored a report of recommendations that were submitted to the governor and lieutenant governor. His prior employment includes various roles and serving on boards and commissions for the State, including auditing for unclaimed property and coordinating debt financing for the State. He graduated with honors from William Penn University in Oskaloosa with a bachelor's degree in business administration.

Lolani Lekkas – Author

Lolani Lekkas is an attorney and mediator licensed to practice law in the state of Iowa. She has been a compliance officer with ABD since 2016. During that time, she has been heavily involved with tied house compliance-related issues, legal interpretation of Iowa Code chapter 123 and 185 Iowa Administrative Code, as well as federal code and regulation analysis. She contributed to the comprehensive review of Iowa's alcohol laws in the fall of 2016. Her prior employment includes various roles in Illinois state government, including analyst positions with the governor's office. She graduated from Illinois State University with a bachelor's degree in business administration and a Juris Doctorate from St. Louis University School of Law.

Tyler Ackerson – Contributor

Tyler Ackerson serves as an education and outreach program planner at ABD, where he works directly with internal and external stakeholders to help them better understand Iowa's alcohol laws. He has been with ABD since 2015. During that time, he has contributed to various official publications, including the final report of recommendations from a study of Iowa's alcohol laws submitted to the governor and lieutenant governor. He holds bachelor's degrees in journalism and political science from the University of Iowa.

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Iowa Code and Rule

Iowa Code §123.3, page 31

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Iowa Code §123.56, pages 12, 40

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Iowa Code §123.178B, pages 13-14

Iowa Code §123.187, page 14

Iowa Admin. Code § 16, page 18

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Other States' Code

Ariz. Rev. Stat. §4-243.04, page 54

Colo. Rev. Stat. §12-46-104, pages 19, 35

Del. Code tit. 6, §506, page 56

Me. Stat. tit. 28-A, §707, pages 34-35, 42

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N.Y. U.C.C. Law §8-101, page 17

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Ohio Rev. Code §4301.24, page 55

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Or. Rev. Stat. §471.396, pages 15, 41-43, 48

6 R.I. Gen. Laws §3-7-22, page 18

S.D. Codified Laws §35-2-6.4, pages 33-34

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Vt. Stat. Ann. Tit. 7, §9-203, pages 40, 53-54

Wash. Rev. Code §66.28.010, pages 49-50

Wash. Rev. Code §66.28.285, pages 50-51

Wash. Rev. Code §66.28.290, pages 48-49

Wash. Rev. Code §66.28.295, pages 15-17

Wash. Rev. Code §66.28.300, pages 51-52

Wis. Stat. §125.69, page 34

Federal Code and Regulation

27 U.S.C. §205, pages 46-47

27 C.F.R. §6, pages 47-48

Select Case Law

Auen V. Alcoholic Beverages Div., Iowa Dep't of Commerce, 679 N.W. 2d.586 (Iowa 2004) pages 4, 20, 23, 30, 41, 44, 57-58

In Re Chapman, 890 N.W.2d 857 (Iowa 2017), page 23

New Midwest Rentals, LLC d/b/a Valero #204 v. Iowa Dep't of Commerce, Alcoholic Beverages Div., 910 N.W. 2d. 643 (Iowa 2018), pages 36-39, 58

Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm'n, 449 S.W. 3d 154 (Tex. App. 2014), pages 43-44, 58

Granholm v. Heald, 544 U.S. 460 (2005), pages 45-46

Other Resources

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Strategic Economics Group (2015). "The Economic Impact of the Craft Beer Industry in Iowa". URL https://www.traveliowa.com/UserDocs/2014_Iowa_Craft_Beer_Economic_Impact_Report.pdf, accessed May 8, 2018, page 32

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**ALCOHOLIC
BEVERAGES
DIVISION**
State of Iowa

ALCOHOLIC BEVERAGE CONTROL STUDY

Appendix A



TERRY E. BRANSTAD
GOVERNOR

OFFICE OF THE GOVERNOR

KIM REYNOLDS
LT. GOVERNOR

May 12, 2017

The Honorable Paul Pate
Secretary of State of Iowa
State Capitol Building
LOCAL

Dear Mr. Secretary:

I hereby transmit:

Senate File 516, an Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, concerning taxation, and providing for other properly related matters, and including effective date and retroactive applicability provisions.

The above Senate File is hereby approved this date.

Sincerely,

A handwritten signature in black ink, reading "Terry E. Branstad".

Terry E. Branstad
Governor

cc: Secretary of the Senate
Clerk of the House



Senate File 516

AN ACT

RELATING TO STATE AND LOCAL FINANCES BY MAKING APPROPRIATIONS,
PROVIDING FOR LEGAL AND REGULATORY RESPONSIBILITIES,
CONCERNING TAXATION, AND PROVIDING FOR OTHER PROPERLY
RELATED MATTERS, AND INCLUDING EFFECTIVE DATE AND
RETROACTIVE APPLICABILITY PROVISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

DIVISION I

STANDING APPROPRIATIONS AND RELATED MATTERS

Section 1. BUDGET PROCESS FOR FISCAL YEAR 2018-2019.

1. For the budget process applicable to the fiscal year beginning July 1, 2018, on or before October 1, 2017, in lieu of the information specified in section 8.23, subsection 1, unnumbered paragraph 1, and section 8.23, subsection 1, paragraph "a", all departments and establishments of the government shall transmit to the director of the department of management, on blanks to be furnished by the director, estimates of their expenditure requirements, including every proposed expenditure, for the ensuing fiscal year, together with supporting data and explanations as called for by the director of the department of management after consultation with the legislative services agency.

2. The estimates of expenditure requirements shall be in a form specified by the director of the department of management, and the expenditure requirements shall include all

sight saving school at Vinton entered into between the state of Iowa and the city of Vinton.

Sec. 25. Section 321N.4, subsection 6, Code 2017, is amended to read as follows:

6. Insurance maintained under this chapter shall be provided by an insurer governed by chapter 515 ~~or 518~~, or by a surplus lines insurer governed by chapter 515I. ~~A surplus lines insurer that issues a policy pursuant to this section shall be considered an insurance carrier duly authorized to transact business in this state for the purposes of chapter 321A.~~

Sec. 26. EFFECTIVENESS AND IMPLEMENTATION. The general assembly declares that the appropriation from the general fund of the state to the secretary of state, serving as the state commissioner of elections, made pursuant to 2017 Iowa Acts, House File 640, section 21, subsection 1, is sufficient for the implementation of section 48A.10A contained in 2017 Iowa Acts, House File 516.

Sec. 27. ALCOHOLIC BEVERAGE CONTROL — STUDY.

1. It is the intent of the general assembly that the three-tiered system of regulating the alcohol beverage industry is critical to maintaining a fair and competitive marketplace. The study required by this section does not preclude the alcoholic beverages division from applying regulatory discretion that aligns with the performance of the powers and duties granted to the administrator in chapter 123.

2. The alcoholic beverages division of the department of commerce, in conjunction with other stakeholders the division deems necessary, shall conduct a study concerning enforcement issues related to alcoholic beverage control, including consideration of the manner of properly balancing appropriate regulation of the manufacturing, distribution, and sale of alcoholic liquor, wine, and beer in this state with emerging trends in the industry.

3. In conducting the study, the division shall consider any other relevant issues the division identifies for study, issues relating to the three-tiered system and section 123.45, as it impacts the ability of manufacturers, wholesalers, and retailers to meet changing marketplace conditions and business opportunities.

4. By July 1, 2018, the division shall submit a final report to the general assembly. The report shall provide the results of the study including any findings and recommendations.

5. During the time period of the study and consideration of the issue by the general assembly during the 2019 legislative session, if an applicant has a conflict with section 123.45, subsection 1, paragraphs "c" or "d", the administrator may elect to defer on a final determination regarding the eligibility and issue a temporary license or permit with conditions, if applicable. In making a determination of whether to defer on a final determination, the administrator shall balance regulatory principles and practices that ensure a fair and competitive marketplace with the protections of the public interests as provided in chapter 123.

6. This section is repealed July 1, 2019.

Sec. 28. SEXUAL ABUSE EVIDENCE COLLECTION KITS. Any sexual abuse evidence collection kit identified by a jurisdictional law enforcement agency through the inventory required pursuant to 2016 Iowa Acts, chapter 1042, shall be maintained by the law enforcement agency indefinitely. A law enforcement agency in possession of any sexual abuse evidence kit identified through the inventory shall submit for analysis any kit at the request of the department of justice.

Sec. 29. REPEAL. Chapter 304A, Code 2017, is repealed.

DIVISION IV

CORRECTIVE PROVISIONS

Sec. 30. Section 22.13A, subsection 5, paragraph b, as enacted by 2017 Iowa Acts, House File 291, section 51, is amended to read as follows:

b. If paragraph "a", subparagraph (1) or (2) is not consistent with the provision of a collective bargaining agreement, a state agency shall provide the individuals referenced in this subsection, as applicable, with regular reports regarding any personnel settlement agreements entered into with state employees by the state agency.

Sec. 31. Section 27.1, as enacted by 2017 Iowa Acts, Senate File 499, section 1, is amended to read as follows:

27.1 Definitions.

~~1.~~ For purposes of this ~~section~~ chapter:



**ALCOHOLIC
BEVERAGES
DIVISION**
State of Iowa

ALCOHOLIC BEVERAGE CONTROL STUDY

Appendix B



January 11, 2018

Lolani Lekkas
Compliance Officer
Alcohol Beverage Division
State of Iowa
1918 SE Hulsizer Rd.
Ankeny, IA 50021

Dear Ms. Lekkas,

Thank you for reaching out to the Center for Alcohol Policy (the Center) and asking for our views on Iowa Code Chapter 123.45 (1) c & d, Iowa's tied-house restrictions and related regulation. We are happy to offer our insight.

Let me first share a few words about the Center and its involvement with state alcohol regulation. The Center is a 501(c)(3) education foundation whose mission is to educate policymakers, regulators and the public about alcohol, its uniqueness and its proper regulation. Some of our programs and activities include: conducting sound research on best practices in alcohol regulation; sponsoring conferences and educational programs on responsible alcohol regulation; facilitating networking between policymakers, industry members, public health groups, law enforcement and other interested parties on matters related to alcohol abuse and regulation; and, conducting public opinion research on attitudes about alcohol regulation. The Center strongly supports and promotes state-based alcohol regulation and an important component of all state's regulations, the licensed three-tier system.

I will address each of your areas of focus in the order presented.

Whether Iowa Code Chapter 123.45 (1) c & d are clear and subject to efficient, predictable and sustainable regulation?

It is the opinion of the Center that this section of Iowa's code is clear and unambiguous. It tracks with tied-house prohibitions in the vast majority of state alcohol laws which make it very clear that there can be no cross-ownership between tiers of the industry and an entity licensed in the manufacturing or wholesaling tier cannot hold a retail license. Taken as a whole, subsection (1) makes very clear the state's intention to keep the tiers separate and not allow any form of commercial bribery or undue influence to disrupt the orderly and well regulated market in alcohol commerce. The use of the terms "direct or indirect interest" leave no doubt that the state's goal is to prevent any interest whatsoever which could influence a retail licensee's decisions and practices. The clarity of the language in the code enhances the sustainability of the statute as has been proven in court cases both in Iowa and other states.

Please comment on Iowa's three tier system with particular focus on direct or indirect ownership related issues and tied house concerns.

The Center's comments regarding Iowa's three-tier system and related tied-house regulations would be the same for all states – we strongly support these concepts and believe they are critical components of responsible alcohol regulation. Iowa's three-tier system and prohibition of direct or indirect interests between licensees is critical to orderly markets and protecting public health and safety. As a 501(c)(3) organization, the Center does not have a "role" in the three-tier system in Iowa but we conduct research and educational programming on the merits of the system. We defer to the courts with regard to the interpretations of direct and indirect ownership and persons engaged in the business in a particular state. In general, anyone who is licensed in the manufacturing tier should not be availed the opportunity to influence the sale of their products at a retail establishment to the exclusion or detriment of products from other manufacturers. Direct and indirect ownership of a retail license would most certainly create that opportunity.

These principles were an integral part of recommendations advocated in the seminal work on alcohol regulation, *Toward Liquor Control*. The Center obtained the rights to this out of print book and republished it for the benefit of today's alcohol regulators. The book is the result of a study commissioned by John D. Rockefeller to analyze the problems with alcohol abuse which led to Prohibition and to recommend the most appropriate regulations upon Prohibition's repeal.

Creating a barrier between the profit motive and sale of alcohol is the most important principle behind the recommendations of the book. Preventing a return of the "tied-house evils" was the number one goal. The "control state" model, which Iowa has in place for spirits, is one avenue to accomplish this goal. A licensing system with clear and unambiguous tied-house restrictions is a second approach. Iowa successfully regulates beer and wine under this model. We enclose a copy of *Toward Liquor Control* and believe the recommendations are as important today as when published post-Prohibition.

As marketplace conditions and business opportunities change, how have tied house regulations and the three tier system impacted your business?

The Center is not in the business of alcohol commerce but we are happy to offer insight into how these regulations have impacted business across the country. The "orderly markets" and "even playing field" created by the three-tier system and tied-house prohibitions help foster the proper balance between economic success and public health and safety. One need only look at the dramatic growth of small beer, wine and spirit manufacturers in virtually all states to see the positive impact they have. Today, consumers are fortunate to have an unprecedented variety of products from literally thousands of manufacturers. These regulations discourage corporations in the manufacturing, distribution or retail tier from using loopholes to stifle competition.

One change in "business opportunities" has been the growth of counterfeit or fake alcohol as well as illegal bootlegging. The problem has exploded worldwide, but has been kept in check in the US primarily due to our transparent and accountable three-tier system where the regulators know who is engaged in the business and their interests. Coupled with strong tied-house

restrictions, these regulations protect revenues, legitimate businesses and public health. A copy of the Center funded report "The Fake Alcohol Situation in the United States: The Impact of Culture, Market Economics and the Current Regulatory Systems" by Robert Tobiasen, former Chief Counsel of the TTB is included for your review.

Explain your view of tied house regulation and the three tier system as it exists today.

The Center views the three-tier system and tied-house prohibitions as absolutely essential to responsible alcohol regulation in today's highly competitive alcohol beverage industry. The profit motive and other forces which led to significant problems of alcohol abuse and related societal woes which led to Prohibition are alive and well in today's economy. The three-tier system and related tied-house prohibitions are essential to keeping these potentially negative forces in check.

However, there are increasing challenges to these regulations given the fast pace of change and disruptions to many different industries. In response, under a grant from the Center, Jessica Starns, former executive council to the Louisiana Office of Alcohol and Tobacco Control, authored a report entitled "The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions." This important work is designed to help policy makers and the legal community better understand the history and modern day benefits of these regulations. We include a copy of this report as further input to the Iowa Alcohol Beverage Control Study.

If you had the opportunity to change tied house regulation and the three tier system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law?

The Center does not advocate for or against specific changes to alcohol laws. We do caution state regulatory agencies that creating exemptions or carve-outs to three-tier system and tied-house related laws can jeopardize the integrity of the statutes and invite legal challenges.

What concerns with any changes to tied house regulation and the three tier system would you want our division to be aware of as we conduct the study?

Please see the answer to the previous question. In addition, the Center cautions against changing a time-tested and successful regulatory system to address the changing whims of various entrepreneurs. Too often in recent years, legislation has been proposed to change regulations in order to adjust to the marketing plans of one or a few constituents. This is backwards. The Center contends that prospective licensees should adjust their marketing plans to conform to existing regulations that benefit public health and welfare.

We believe it is also important to note the strong public support for the existing system of alcohol regulation and the belief that public health and safety are the highest priorities for policymakers when considering changes to alcohol regulation. In July 2017, the Center commissioned a national public opinion survey on alcohol regulations which officials with the Iowa ABD have reviewed. Another copy of the results is enclosed.

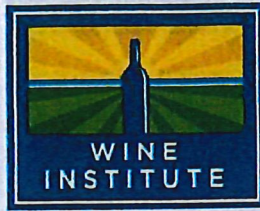
We thank you for the opportunity for input on these critical questions. Feel free to contact me if you have any questions or desire additional information.

Sincerely,

A handwritten signature in cursive script, reading "Michael Lashbrook". The signature is written in dark ink and is positioned below the word "Sincerely,".

Michael Lashbrook
Executive Director

cc: Stephen Larson, Administrator
Stephanie Strauss, Executive Officer II



January 12, 2018

Lolani Lekkas
Compliance Officer
Iowa Alcoholic Beverages Division
1918 Hulsizer Road
Ankeny, IA 50021

Dear Ms. Lekkas,

Thank you for your letter dated October 6, 2017, and for the opportunity to be included in your Alcoholic Beverage Control Study. Wine Institute supports states' periodic reviews of their alcohol laws and regulations to adapt to the ever-changing alcoholic beverage industry and to find efficiencies within laws and regulations. On behalf of Wine Institute, I will address each requested comment in your letter.

1. Whether Iowa Code Chapter 123.45 subsection 1 paragraphs c and d are clear and subject to efficient, predictable, and sustainable regulation.

As understood by all in the alcoholic beverage industry, the end of Prohibition led to a legal and complete separation of the manufacturing, wholesale/distributing, and retail industries because of the vertical monopolies that occurred prior to (and during) Prohibition. Chapter 123.45 is, as we believe, Iowa's method for creating this separation, i.e. prohibiting "tied houses" between the three tiers of the sale of alcoholic beverages. However, the language in this 123.45(c) is not necessarily clear in our view.

We are unclear as to how an entity could "indirectly be interested in the ownership, conduct, or operation of the [retail] business...." We assume this could mean a family member or employee of a manufacturer licensee owning or working for a retail establishment, but this prohibition, or other similar "indirect interests," are not specifically identified. Also, the statute does not seem to prevent a manufacturer from owning a business in the middle tier, i.e. wholesaling and/or distributing. If the Iowa legislature desires a strict delineation between the manufacturing, distributing, and retail tiers, they should craft more specific language on exactly how (and how far apart) they wish to separate the tiers.

2. Please comment on Iowa's three-tiered system with particular focus on direct and indirect ownership issues and tied house concerns.

While Wine Institute has not run into any issues or had any specific concerns with Iowa's tied house rules, we are attentive to the concerns surfacing around the country. In many states, legislators, regulators, and judges are discussing and/or arguing about what it means to "own" or "control" a

business, particularly in the alcohol beverage industry. For example, Texas has had lawsuits and legislation to determine to what extent an entity is owned or controlled by another. It's "one share rule" has come under scrutiny because an investor in a retail store also invests in a distributor. Should owning one share in a retailer while also owning one share in a distributor or a manufacturer be strictly prohibited? Does owning a share or two or 100 give someone control over that company? The answer seems to depend on the surrounding information, for example how many shares there are in those companies and could one owner exert complete control over the whole company. Iowa's legislature should contemplate instances where fractional ownership through broad-based investment portfolios could potentially shut suppliers or retailers out of the market. Wine Institute does not encourage or discourage revisions to allow or disallow fractional ownership, but merely asks for clarity within the law to advance our members' businesses legally.

3. As marketplace conditions and business opportunities change, how have tied house regulation and the three-tiered system impacted your business?

Wine Institute, with almost 1000 wineries as members, has a wide range of companies, from small family-owned boutique wineries to the largest winery in the world. Each member, whether large or small, has its operational and sustainability challenges. Growth and acquisition, especially for smaller wineries, now often depends more upon access to non-traditional capital sources. Over the years, private equity and hedge fund companies have offered financial assistance to wineries. To what extent these companies control a winery depends on the agreements between the parties. It is possible that one day a company could have an interest in one of our wineries while also having an investment in a large retail outlet. But that company's control over each of those entities could vary greatly. Nevertheless, a winery would be very reticent to align with another company if doing so would prevent the winery's products from being distributed in every state and to as wide a market as possible. Iowa's laws and regulations should be designed so that both licensees and potential investors can clearly see the potential impacts of a sale or investment should the lender or purchaser hold even a minimal investment in licensed premises anywhere in the world.

4. Explain your view of tied house regulation and the three-tier system as it exists today.

Wine Institute believes the three-tier system and corresponding tied house laws have benefited the public since their inception. It has helped protect against vertical monopolies of the industry and has engendered more consumer choice. That said, the industry has changed in the last couple of decades, particularly because of innovation, the internet, and the ease and affordability of travel.

In the wine industry, many innovations in agriculture and production have led to efficiencies and thus more and better produced products. Additionally, the number of wineries have increased not only in California, but around the United States. With these changes, getting wine to consumers has become more and more competitive. The internet has offered a method to not only advertise products, but also for consumers to gain knowledge about products. Also, in states with direct shipping laws, the internet has fostered commerce between wineries and consumers without visitation to the winery or a store. Additionally, as travel became more accessible over the last few decades, tourism to wine regions has increased, which in turn has increased consumers' knowledge of, and desire for, wine products. Finally, transportation, innovation, and the internet combined

continue – and should continue – to ease the ability for consumers to obtain wine and other alcoholic beverages. It has been Wine Institute's contention that changes such as direct-to-consumer shipping, when carefully crafted to provide for the payment of taxes and the licensing of the participants, have been positive augmentations to the traditional three-tier system.

With the changes that have occurred, Wine Institute believes that legislators and regulators should continue to keep consumer choice and public safety as their biggest concerns. As Raymond Fosdick and Albert Scott wrote many, many years ago in their book *Toward Liquor Control*, "Only the public welfare needs to be considered....For a state, confronted with this opportunity, deliberately to tie its own hands by establishing an entrenched business that will seek in its own protection to thwart every limitation and block every change, would seem to be the height of folly."

5. If you had the opportunity to change tied house regulation and the three-tiered system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law?

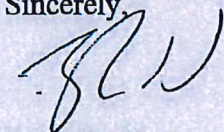
Wine Institute does not have any specific changes relating to Iowa's laws on the three-tiered system or cross tier ownership. However, we do request the legislature and regulators take into account fairness, reasonableness, and efficiency when drafting laws and regulations relating to the alcohol beverage industry.

6. What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study?

None specifically.

Thank you again for the opportunity to share our thoughts on Iowa's tied house laws and three tier system. We view these studies very helpful for the industry, particularly in modernizing laws and regulations as the industry changes and adapts to the times. We feel confident the Iowa Legislature and Iowa ABD will produce the necessary amendments to its alcohol laws that best reflect the views, concerns, and safety of Iowans.

Sincerely,



Tyler Rudd
Central States Counsel



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January 8, 2018

Lolani Lekkas
Compliance Officer,
Iowa Alcoholic Beverages Division
1918 Hulsizer Road, Ankeny, Iowa 50021

EMAIL: lekkas@iowaABD.com

Re: Response to Request for Comments

Ms. Lekkas:

In your letter of October 2, 2017 you asked us to comment on the questions presented regarding the Alcoholic Beverage Control Study ("Study") that was mandated by the Iowa Legislature (SF 516) to be conducted by the Iowa Alcoholic Beverages Division.

This letter will serve as our response to the request for comment.

To give some clarity to my comments, it is essential for you to understand some facts about our Company.

Fahr Beverage Inc. was founded in 1958 by my parents. They purchased the Beer Division of Capital Tobacco Company that represented Anheuser-Busch and the Goetz Brewing Company. The Company employed six people and operated three sales routes. They sold a little over 56,000 C/E in our six county territory.

Today, the Company has grown to employing seventy two and services 536 retail accounts in the Counties of Black Hawk, Bremer, Butler, Buchanan, and parts of Grundy and Fayette out of a warehouse located in Waterloo. From our beginning when we represented the two breweries previously mentioned to today we have grown to represent 55 suppliers, have approximately 350 brands and over 1500 packages that are delivered on thirteen routes. We sell over 1,500,000 C/E in the same six county territory.

As part of our responsibility of being a wholesaler for these 55 suppliers, we provide services to our customers of sales, delivery, promotion, brand building, merchandising, and product rotation. Additional services that we provide as allowed by the Code of Iowa are maintenance and cleaning of taps; TIPS training for the retailer where their employees are properly trained in the serving of alcohol. We also further compliance with Code by verifying that our accounts have the proper license for the business and types of alcohol they serve; as well as collect State Excise tax on the sale of our products.

Proudly Distributing the Quality Beers
of

Since our Company was founded, we have operated and built our business based on the three tier system and the regulatory system that is based on that. We made our investment based upon the current regulatory system and with the full knowledge that we were prohibited from owning an interest in a retailer. We have had numerous opportunities presented to us to participate in other tiers of the industry but have refrained from those opportunities due to the express prohibition from our involvement in them.

Since our founding, Fahr Beverage has been located in Waterloo at three different locations. We built our current location in 1981 and have had three additions to it since the original construction. We currently have 70,000 square feet of office, warehouse, fleet maintenance, and recycling under roof at our 10.2 acre campus in Waterloo. Current replacement cost is \$11 million dollars. Our annual property tax is \$84,464.00 dollars a year.

Our annual payroll and benefits are approximately \$4, 535,915.

We pay annually approximately \$684,000 in Iowa State Excise Tax. Our annual Federal Excise tax paid is over \$3,911,000.

We spend annually \$320,000 in advertising and promotion with an additional \$58,000 spent for sponsorships.

We spend \$25,000.00 annually for Alcohol Awareness and Education.

The above numbers do not include the charitable contributions or organizations that our Officers and employees support and participate in.

In your original letter we were asked to provide input to some questions. We would like to provide our answers to those questions.

1. **Whether the Iowa Code Chapter 123.45, subsections 1 (c) and (d) are clear and subject to efficient, predictable, and sustainable regulation.**
 - The language of subsections (c) and (d) cannot be clearer and the subsections are consistent with the tied-house provisions found in most of state liquor laws across the country.
 - Pursuant to subsection (c), an industry member (supplier or distributor) **cannot directly or indirectly** own an interest in a retailer nor can we be involved in the operation of the retailer's business. The purpose of the law is very clear as it

maintains the integrity of the three-tier system and insulates retailers from the control or exercise of undue influence by an industry member.

- Similarly, pursuant to subsection (d), an industry member is prohibited from holding a retailer license.
- There is no vagueness in the language of either section. **The prohibition is absolute.**

2. Please comment on Iowa's three-tiered system with particular focus on direct and indirect ownership related issues and tied house concerns.

- The language of subsections (c) and (d) are clear and supported by strong, historically validated public policy.
- The prohibition on an industry member owning an interest in a retailer means that an industry member cannot own that interest indirectly through a corporate subsidiary, an affiliated corporation, an employee, a family member, an agent or anyone else under the control or influence of the industry member.
- Any other interpretation just opens the door for industry members to accomplish indirectly what the statute clearly prohibits them from doing directly. **The prohibition is absolute and should remain so.**
- To interpret that statute in any other manner, is unfair to all of the industry members who have invested in the current system; it destroys the underlying public policy of protecting the public health, safety, and welfare, and threatens to unravel the entire regulatory fabric.

3. As marketplace conditions and business opportunities change, how have tied house regulation and the three-tiered system impacted your business?

- The number of craft brewers, craft distillers, and native wineries doing business in Iowa have exploded over the last few years. Iowa consumers enjoy unprecedented choice and variety in the alcohol market. That growth would not have occurred, and that choice and variety would not exist if the alcohol market was deregulated; if tied-house laws did not exist, and if distributors did not invest in the creation and growth of the market for those products.
- In a deregulated environment, a small supplier's only access to market would be through retail outlets that it owns. If we return to the pre-prohibition days of the tied-house, craft brewers would lack the capital to acquire not only a brewery and hire brewery employees but also build refrigerated warehouses and buy trucks to deliver product to retail; hire a distribution sales force; hire a

distribution delivery force; along with having retail outlets and retail employees. International Mega-brewers, like Anheuser-Busch InBev, MillerCoors, Constellation Brands, and Heineken along with Mega-retailers like Amazon, Walmart, and Costco, clearly have such resources that a small supplier does not and could use them to put the small supplier out of business.

- Many of these small suppliers are continually seeking and, in many cases succeeding in securing exemptions from three-tier and tied-house laws that could allow the mega brewers and retailers an avenue to destroy those same suppliers requesting the exemptions.
- For very small suppliers, these exemptions may be reasonable to nurture new, truly small business and to guaranty an access to market. But beyond the start-up phase, these exemptions not only threaten to start deregulation but also are unfair to distributors and nonsupplier-owned retailers who invested in their business' under current regulatory system and are restricted to exclusively operating in the distribution and retail tier respectively. It is not the role of the legislature or regulators to choose winners and losers in the industry. It is the responsibility of the legislature and regulators to effectively regulate a potentially dangerous product.

4. Explain your view of tied-house regulation and the three-tier system as it exists today.

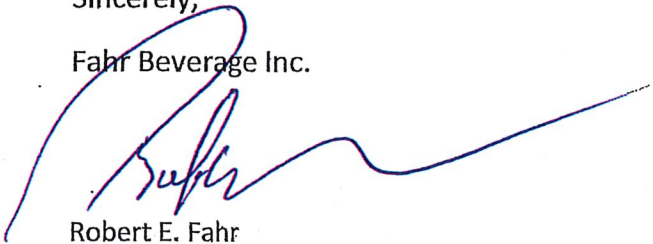
- Iowa's regulatory system is operating extremely well. It has carefully balanced competition and availability, with effective control. No changes are needed.
- Iowa's current system has nurtured small, family-owned businesses like ours throughout the state at the supplier, distributor and retail tier. The alcohol industry is one of family-owned businesses. This is because the three-tier system prohibits vertical integration of the industry and prevents global giants from dominating the market. The system has provided Iowans with unprecedented choice and variety. Look at your local grocery store. Out of the twenty five feet of shelf space devoted to soft drinks, ten feet will likely be occupied by Coke products and twelve feet will likely be occupied by Pepsi products. All of this space has been "purchased" by Coke and Pepsi. "Craft" sodas will be likely have three feet or less of shelf space. Contrast that within the same grocery store where there are literally hundreds of different beers, wines and spirits. That is due to our current regulatory system and the independence of the wholesale tier.

- The system works. It is not broken. Why allow a business to operate in all three tiers of a highly regulated system?
- 5. What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study?**
- A brewer, wholesaler, or retailer should be restricted to stay in their tier. In our opinion that means the three tier system is effective and works. The current prohibition prohibiting one tier from owning an interest, directly or indirectly, in another tier should continue to be prohibited. The prohibition of a manufacturer from owning a wholesaler from owning a retailer should continue to stand.

If you have any questions with regard to the above, or if I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Fahr Beverage Inc.



Robert E. Fahr
President and CEO

REF/kmn



Brown, Winick, Graves, Gross,
Baskerville and Schoenebaum, P.L.C.

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January 12, 2018

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Via Electronic Mail and Hand Delivery

Lolani Lekkas, Compliance Officer
Iowa Alcoholic Beverages Division
1918 Hulsizer Road, Ankeny, IA 50021
lekkas@iowaabd.com

Re: Eldorado Resorts, Inc. Comments Pursuant to Senate File 516

Dear Ms. Lekkas:

My firm serves as local regulatory counsel to Eldorado Resorts, Inc. ("ERI"). ERI is the corporate parent of the Isle of Capri Bettendorf, L.C. and IOC Black Hawk County, Inc.-- operators of Isle of Capri Casinos in Bettendorf and Waterloo, respectively. Enclosed please find for your review and consideration, ERI's response to the ABD's request for public comment pursuant to Senate File 516.

Yours truly,

Michael E. Jenkins

MEJ/hs
Enclosure

Eldorado Resorts, Inc.

**Corporate Parent of Isle of Capri Bettendorf, L.C. (Operator of the Isle of Capri Casino, Bettendorf) and
IOC Black Hawk County, Inc. (Operator of the Isle of Capri Casino, Waterloo)**

COMMENTS REQUESTED SENATE FILE 516- DUE JANUARY 12, 2018

1. Whether Iowa Code Chapter 123.45 subsection 1 paragraphs c and d are clear and subject to efficient, predictable, and sustainable regulation. If the language is clear, please provide your interpretation. If it is ambiguous, please identify the areas that are ambiguous and provide clarity to those areas.

The ambiguous language describing ownership limits under Iowa's three-tier system from Iowa Code § 123.45 required interpretation by the Iowa Supreme Court in *Auen v. Alcoholic Beverages Div., Iowa Dep't of Commerce*, 679 N.W.2d 586 (Iowa 2004). In *Auen*, the court specifically considered rules promulgated by the ABD that sought to interpret what it means for "a person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer" from being "directly or indirectly" interested in a retail licensee. The Court's interpretation in *Auen* went so far as to hold that, "A remote or de minimis ownership interest is an indirect ownership interest, which is prohibited by the statute." *Id.* at 592. A formal application of the Court's holding in *Auen* makes a scofflaw out of nearly every Iowa licensee with a retirement account (holding an S&P 500 index fund in a retirement account would cause a licensee to violate the Court's interpretation in *Auen* because Molson Coors Brewing Company is a component of the S&P 500). Clearly the law has not kept pace with the times.

Iowa's three-tier system harkens back to social ills that gave rise to the temperance movement in the pre-Prohibition era. Gone are the days of the "free lunch" where tied-house taverns provided free food to workers on their lunch breaks as an inducement to purchase alcohol manufactured by the corporate owner of the tavern. While the legislature may continue to intend to prevent an improperly close relationship between a retailer and a manufacturer that causes the retailer to promote its "house brands" over other brands, the current law is overly broad for this purpose. Instead, current law requires regulators to turn a blind eye toward most market participants and make arbitrary decisions as to when to enforce laws that cripple business development while providing no benefit to public interest.

The decision from *Auen* presents Iowa state government with a stark choice, continue under an antiquated regulatory framework that stifles innovation and makes a mockery of enforcement, or modify the law to align with contemporary business practices. Eldorado Resorts, Inc. ("Eldorado") strongly encourages the State to move forward with changes to the law that promote business development and innovation while upholding the greatest fidelity to the stated public policy of Iowa Code § 123.1 to protect "the welfare, health, peace, morals, and safety of the people of the state."

2. Please comment on Iowa's three-tiered system with particular focus on direct and indirect ownership related issues and tied house concerns. What is your interpretation of direct and indirect

ownership? Should they be treated differently when tied house concerns are being regulated? What is your interpretation of "a person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages"? Are there varying degrees of "engaged in" and if so, should they be regulated differently from one another? Please make sure to explain your role in the three-tier system.

As Eldorado has previously disclosed to the ABD, the Carano Family holds an approximately 15% ownership interest in Eldorado through Recreational Enterprise, Inc. ("REI"). REI also holds a controlling interest in Ferrari Carano Vineyard & Winery, LLC which produces critically-acclaimed wines in Northern California. Eldorado-owned casinos in Bettendorf and Waterloo hold retail licenses for on-premises consumption at their hospitality facilities.

Based upon the holding in *Auen*, there appears to be very little room for the ABD to interpret Iowa Code § 123.45 in a way that is consistent with contemporary commerce and finance. Eldorado believes that the Legislature should consider amending the code to provide for indirect ownership of a retail licensee by a party with an ownership interest in a manufacturer when the that indirect ownership does not involve control of both the manufacturer and retailer by the same person or controlled persons. Alternatively, Eldorado believes that the Legislature should allow ownership in the manufacturing and retail tiers when the retailer does not sell products made by the manufacturer.

3. As marketplace conditions and business opportunities change, how have tied house regulation and the three-tiered system impacted your business? Have you had to forgo an opportunity to expand your business because of tied house regulation and the three-tiered system? Please explain how Iowa's three-tiered system positively and negatively affects the ability of your current business to grow and your ability to invest in other business entities related to alcoholic beverages.

Eldorado entered the Iowa marketplace with its 2017 acquisition of the Isle Bettendorf and Isle Waterloo. Eldorado was only able to close on the acquisition of the Isle Bettendorf and the Isle Waterloo because of the provisions from SF516 which granted the ABD discretion to defer on a final determination of eligibility of an applicant under Iowa Code § 123.45. If the Iowa Legislature fails to act based upon the findings of the Alcoholic Beverage Control – Study, then Eldorado will be faced with decisions on costly and inefficient divestitures that may be necessary to comply with the current antiquated law. These issues could also present obstacles to any future expansion of our business interest in the state.

4. Explain your view of tied house regulation and the three-tier system as it exists today. Do you believe tied house regulation and the three-tier system serves the purpose it was intended to serve when it was first created? Explain the value you see in tied house regulation and the three-tier system as it pertains to alcoholic beverages control and the public policy purpose of protecting the welfare, health, peace, morals, and safety of the people of Iowa.

In our view, the current three-tier system and tied-house laws, specifically as interpreted in *Auen*, are overly broad for their intended purpose. Certain activities that do not represent a threat to the public

interest are prohibited by the overly formal rule from *Auen*. For example, prohibiting remote or de minimis ownership of a retail licensee by all persons engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer regardless of issues such as the control of the retail licensee, the control of the manufacturer, or the issue of whether the retailer sells products manufactured by the manufacturer does not serve the public policy purpose of Chapter 123. Instead, the necessarily arbitrary enforcement of the provision creates regulatory uncertainty while also eroding trust in the enforcement framework. While the foundation of the three-tier system protects the public interest by discouraging promotion of irresponsible consumption of alcohol, its application pursuant to *Auen* serves to discourage business and innovation without protecting the public interest.

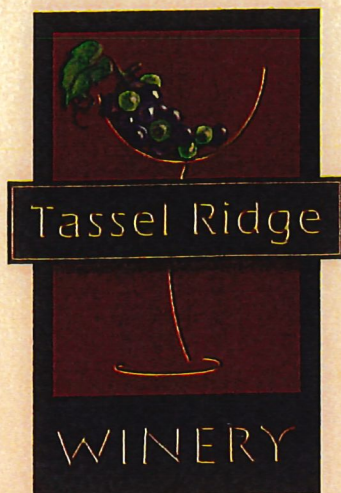
5. If you had the opportunity to change tied house regulation and the three-tiered system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law? Please try to be specific and explain how you came to your conclusions.

Eldorado would support a change to tied-house regulations in either of the following two ways:

- Allowing indirect ownership of a retail licensee by the owner of a manufacturer when there is not control of both the retail licensee and the manufacturer by the same person or persons controlled by the same person.
- Allowing ownership in a manufacturer and a retail licensee when the retail licensee does not sell products made by the manufacturer.

6. What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study? Please include specific concerns that may affect the industry the consumer, the marketplace, the ability to regulate and enforce the change, public safety and health, etc.

Eldorado supports changes to the law and regulations that bring the law and regulations in line with contemporary commercial and financial practices. Eldorado specifically seeks changes that will allow our ownership structure to continue without change while also allowing the ABD to approve the license renewal requests of our Iowa businesses.



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December 22, 2017

Lolani Lekkas
Compliance Officer
Alcoholic Beverages Division
1918 Hulsizer Road
Ankeny, IA 50021

Dear Ms. Lekkas:

Re: Alcoholic Beverage Control Study

Following are my comments and suggestions related to the questions for the Alcoholic Beverage Control Study outlined in your letter dated October 9, 2017. I hope they prove useful.

1. **Iowa Code Chapter 123.45 subsection 1 paragraphs C and D** – No comment.
2. **Three-tiered system with focus on direct and indirect ownership related issues and tied house concerns** – As a Native Iowa Winery, Tassel Ridge Winery is allowed to operate in all three tiers of the three-tier system under current law. Detailed, precise enforcement of employment regulations related to people who work for more than one license holder need attention and revision. Specifically, part-time employees who work for a Native Iowa winery and also for a Hy-Vee (or other license holder) in another part-time position, don't present a realistic conflict with the objectives of tied house rules. It is one thing for owner or senior leadership; it is quite another for part-timers in low level positions.
3. **Changes in market conditions impact on winery business opportunity** – Hiring of employees AT ALL LEVELS is very challenging in Iowa right now. Eliminating candidates for low level part-time positions just because they also work for another license holder, frequently in roles that don't involve any contact or relationship to alcoholic beverages, reduces our hiring pool with no impact on the health and safety of Iowa's residents.
4. **Tied house regulation and the three-tier system today** – The three-tier system was set up to prevent (large alcoholic beverage) manufacturers from dominating and controlling small on-premise alcoholic beverage retailers (formerly known as saloons). The distributor is a creation of the state that was intended to prevent direct

December 22, 2017

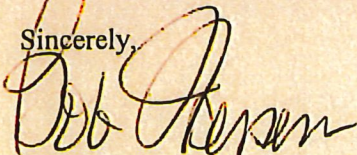
Lolani Lekkas

Page -2-

contact between the manufacturer and retailer. Today, the world is turned upside down! Some manufacturers ARE really large (Gallo has revenues exceeding \$1,000,000,000). Most wineries have sales of less than 5,000 cases (~\$100,000-\$5,000,000 depending on sales price of wine). Distribution is dominated by VERY large distributors (Southern Glazers is the largest with ~\$12,000,000,000 in revenue). And, retailers now mean food and discount stores like Wal-Mart, Costco, Target, and soon Amazon. In an environment like this, big numbers speak and smaller players, including manufacturers, wholesalers, retailers, and consumers are not being well served. IT IS TIME TO ELIMINATE GOVERNMENT MANDATED USE OF DISTRIBUTORS. Let distributors survive on the basis of good service and not on a mandate. Arguments that wholesalers protect the welfare of people in the State of Iowa are totally bogus.

5. **Suggested changes to tied house regulation and the three-tier system in Iowa with regard to direct and indirect ownership and cross tier related issues** – From my perspective, as a Native Winery owner that can participate in all three tiers of the three tier system, I don't see any changes necessary in the law that directly impact me. BUT, a strict reading of the law might interpret me to be in violation of the law if a fund I hold in my 401(k) retirement account holds an interest in Constellation Group, for example. Such an interpretation is, of course, ridiculous. I think we need to help regulators make meaningful interpretations of the law with the public welfare as the litmus test for relevance. So, if a major owner of an Iowa retailer just happens to also own a winery in a foreign country, hopefully the regulator can look at the potential impact on the welfare of the people of Iowa. If this requires legislation and a change in the law, let's make it happen by defining just how close the connection between entities must be to violate the tied house regulations.
6. **Concerns about tied house regulation and the three-tiered system** – The wine consumer in Iowa is NOT well-served by regulations prohibiting direct sales by out-of-state retailers to Iowa citizens for personal consumption. Iowa is a relatively small state with low per capita wine consumption. Iowa's wine distributors will only bring in wine that they can sell at least 60 cases of, limiting the selection of wine that is sold Iowa. Again, big numbers talk. My suggestion is legislation that would require out-of-state retailers to hold a Direct Shippers License like wine manufacturers do now and pay any applicable fees and excise taxes to the state. Also, it is now illegal for a consumer to personally carry wine into the State of Iowa from outside the state. We need legislation to establish some de minimis level of direct wine imports for PERSONAL CONSUMPTION that would be legal. I propose five cases as the de minimis level.

Sincerely,



Bob Wersen

Owner

bwersen@interpower.com

January 10, 2018

Lolani Lekkas,
Compliance Officer,
Iowa Alcoholic Beverages Division,
1918 Hulsizer Road, Ankeny, Iowa 50021
lekkas@iowaABD.com

Re: Response to Request for Comments

Dear Ms. Lekkas:

We are pleased to comment on the questions from your letter dated October 2, 2017 regarding the Alcoholic Beverage Control Study ("Study") to be conducted by the Iowa Alcoholic Beverages Division ("Division") and we thank you for the opportunity. Our response is set forth below.

Before we share our responses, we'd like to tell you a little about 7G Distributing, LLC.

- 7G Distributing, LLC is a family owned, Iowa business and our history extends back to the early 1900's.
- We employ over 200 people, sell nearly 2,000 SKUs from more than 40 different suppliers (14 of which are Iowa based brewers), and service more than 2,000 retail customers across 14 counties in Iowa.
- We have a fleet of over 200 tractors, trailers, and vehicles, and we operate out of three distribution centers. One is located in Cedar Rapids, one is located in Dubuque, and one is located in Davenport. We are currently building a new 110,000 square foot distribution warehouse in Davenport that will cost over \$14 million and will be completed in the spring of 2018.
- We provide sales, delivery, and warehousing services and we play an important role in ensuring that our suppliers and retailers are duly licensed in Iowa. We also monitor code dates and ensure product freshness, and we spend over \$50 thousand per year on alcohol education and awareness training.

- Each year, our business contributes over \$2.2 million in state excise taxes, over \$800 thousand in payroll taxes, \$75 thousand in vehicle registration fees, and \$350 thousand in property taxes.

Whether the Iowa Code Chapter 123.45, subsections 1 (c) and (d) are clear and subject to efficient, predictable, and sustainable regulation.

We believe the language in subsections (c) and (d) is clear and consistent with the tied-house provisions of most states liquor laws. Subsection (c) prohibits industry members from directly or indirectly, owning an interest in a retailer and from being involved in the operation of the retailer. The purpose of this law is to maintain the integrity of the three-tier system and to protect retailers from excessive influence from an industry member. Likewise, pursuant to subsection (d), an industry member is prohibited from holding a retailer license.

Please comment on Iowa's three-tiered system with particular focus on direct and indirect ownership related issues and tied house concerns.

The language of subsections (c) and (d) is clear and the prohibition of an industry member from owning an interest in a retailer has played an important role in protecting the health, safety, and welfare of Iowa citizens. Any action or interpretation that goes against this principal threatens to undermine the entire system and could lead to an unraveling of the system that has served Iowa so well.

As marketplace conditions and business opportunities change, how have tied house regulation and the three-tiered system impacted your business?

In recent years, the number of craft brewers, craft distillers, and wineries has increased significantly and Iowa consumers enjoy extraordinary choice and variety in the alcohol market. However, this growth would not have occurred, and that choice would not exist, if the alcohol market was deregulated, if three-tier, tied-house laws did not exist, and if distributors did not invest in the creation and growth of the platform through which these products gains access to the market.

In a deregulated environment, large brewers like Anheuser-Busch InBev and MillerCoors, and huge retailers like Amazon, Walmart, and Costco could make it extremely difficult for certain products to enter the market and the craft producers may find that their only access to the market would be through the retail outlets that they own. This would severely limit their growth potential. This lack of growth opportunity would make it extremely difficult for craft producers to raise the capital necessary to buy brewery equipment, hire employees to make, market, and sell the product, acquire refrigerated storage, or to purchase the vehicles and material handling equipment necessary to operate the business. Thus, three-tier system, with its prohibition against tied houses, not only ensure that Iowans have choice and variety, it also provides a system in which craft producers are able to get their start and to thrive.

Ironically, however, these small producers are continually seeking and, in many cases succeeding in securing, exemptions from three-tier and tied-house laws. Perhaps, for very small suppliers, these exemptions may be reasonable to nurture new, truly small business and to guaranty an access to market. However, after the start-up phase, these exemptions not only push us down the slippery slope of deregulation, they are unfair to distributors and nonsupplier-owned retailers who invested in the current regulatory system and are restricted to exclusively operating in the distribution and retail tier respectively.

Explain your view of tied-house regulation and the three-tier system as it exists today.

Iowa's regulatory system has operated extremely well and it has done a good job of balancing competition, choice and variety, and the health, safety, and welfare of Iowa citizens. Additionally, it has nurtured small, family-owned businesses throughout the state at the supplier, distributor and retail tier. The alcohol industry remains one of the last strongholds of family-owned businesses. This is because the three-tier system prohibits vertical integration of the industry and prevents global giants from dominating the market.

The system has provided Iowans with unprecedented choice and variety. If you visit the soda aisle of your local grocery store, you're likely to see 18 out of 20 feet of shelf space devoted to Coke or Pepsi products and less than two feet available for other choices. In contrast, your local liquor store has hundreds of different beers, wines and spirits. That is due to our current regulatory system. Again, not only does the current system provide Iowans with choice, it also provides a system in which small producers can start, develop, grow, and this is what's happening in Iowa today. Tinkering with the system that has served us so well threatens to destroy the benefits we experience today.

What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study?

As discussed above, there have recently been attempts, including successful attempts, to secure exemptions from three-tier and tied-house laws and it seems likely that there will be additional attempts in the future. We want the division to be aware of the slippery slope that is created by allowing such carve-outs and we urge the legislature and the Division to prevent these carve-outs and exemptions from occurring. The three-tier system has provided Iowans with unprecedented choice, allowed craft producers to thrive, and protected the health, safety, and welfare of Iowa citizens. The three-tier system needs to be protected.

Thank you for the opportunity to share our views. If you have any questions, or if I can be of further assistance; please don't hesitate to reach out.

Thanks,

7G Distributing, LLC

Tod Wolter - GM



Lekkas, Lolani <lekkas@iowaabd.com>

Iowa Alcoholic Beverages Control Study - Stakeholder Comments and Meetings9 messages

Curt Wymer <curt@tgbrews.com>

Fri, May 18, 2018 at 11:08 PM

To: "Lekkas, Lolani" <lekkas@iowaabd.com>, "Schaffer, Heather" <schaffer@iowaabd.com>, "Ackerson, Tyler" <ackerson@iowaabd.com>, Josh Happe <happe@iowaabd.com>, "John Lundquist" <john.lundquist@iowa.gov>
Cc: Steve Larson <larson@iowaabd.com>, Clark Lewey <clark@tgbrews.com>, Barbara Lewey <barb@tgbrews.com>, Nichole Hageman <nichole@tgbrews.com>

Iowa ABD Team,

On behalf of our owners and the Toppling Goliath team, thank you for allowing us to be active participants in the Stakeholder meetings. We are hopeful our feedback will assist in encouraging positive and fair adjustments as part of the Iowa Alcoholic Beverages Control Study.

In response to your request for additional feedback, we are submitting the attached matrix. This matrix provides a high level analysis for 6 states, focusing on key categories within their respective framework.

As we discussed in the stakeholder meeting, identifying a starting point in comparing Iowa Law to other states can be a daunting task. Moreover, it is challenging to glean the favorable aspects of other state law, and successfully craft into our language, while maintaining a level playing field.

With this in mind, we chose these 6 states based off simple criteria:

1. States providing latitude for growth within their state, while maintaining a level playing field within the 3-tier system.
2. States that have encouraged larger craft breweries to expand brewery operations and taprooms to their state.

We understand aspects of this analysis may fall outside the purview of the control study. With this in mind, we would be happy to review what pieces make sense to include as part of the study submission to the legislature.

Thank you for all you do, and we wish you a great weekend!



Curt Wymer

General Manager/CFO

SUMMARY OF STATE ALCOHOL PROVISIONS

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
California	<p>There are restrictions in the code prohibiting certain relationships between the tiers (manufacturer, wholesaler, retailer). However, there is nothing that specifically prohibits multiple licenses within one tier. Beer manufacturers are specifically permitted to handle other alcoholic beverages under certain circumstances, including the following:</p> <p>Beer manufacturers that produce more than 60,000 barrels of beer a year may manufacture cider or perry at the licensed premises of production. They may also sell the cider and perry to any licensee authorized to sell wine.</p> <p><u>Cal. Bus. & Prof. Code § 23357</u></p> <p>Beer manufacturers with duplicate licenses for branch offices can have up to two (2) offices with bona fide eating establishments, which also allow for the sale of wine and other beer.</p> <p><u>Cal. Bus. & Prof. Code § 23389</u></p> <p>A California beer manufacturer with a license in good standing in this state may ship into this state beer which was manufactured at plants</p>	<p>Type 01 License – Beer Manufacturer</p> <ul style="list-style-type: none"> • Over 60,000 barrels per year • Authorizes sale of beer to any person holding a license authorizing the sale of beer, and to consumers for consumption on or off premises. • May sell beer and wine, regardless of source, to consumers for consumption at a bona fide eating place on or contiguous to the licensed premises. <p>Type 23 License – Small Beer Manufacturer</p> <ul style="list-style-type: none"> • Less than 60,000 barrels per year • Privileges and limitations are the same as for the Type 01 beer manufacturer, but the license fees are different. <p><u>Cal. Bus. & Prof. Code § 23320</u></p> <p>Beer manufacturers may obtain up to six (6) duplicate licenses for branch offices, which give each location certain retail privileges. These</p>	<p>Licensed beer manufacturers may sell beer to any person holding a license authorizing the sale of beer.</p> <p><u>Cal. Bus. & Prof. Code § 23357</u></p> <p>Brewpubs cannot self-distribute; only authorized to sell beer to a licensed beer and wine wholesaler, subject to the requirements of Chapter 12(commencing with Section 25000).</p> <p><u>Cal. Bus. & Prof. Code § 23396.3</u></p>	<p>Licensed beer manufacturers (both Type 01 and Type 23) may sell beer that is produced and bottled by, or produced and packaged for, that manufacturer to consumers for off-premises consumption.</p> <p><u>Cal. Bus. & Prof. Code § 23357</u></p> <p>A “package” is defined as any container or receptacle used for holding alcoholic beverages which is corked or sealed with a stub, stopper, cap, or in any other manner.</p> <p><u>Cal. Bus. & Prof. Code § 23028</u></p> <p>A beer manufacturer that refills any container supplied by a consumer must take steps to fully remove previous markings and affix the appropriate label to the container.</p> <p><u>Cal. Bus. & Prof. Code § 25201</u></p> <p>Brewpubs cannot sell products to consumers for off-sale consumption.</p> <p><u>Cal. Bus. & Prof. Code § 23396.3</u></p>

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p>out of this state without holding an out-of-state beer manufacturer's certificate.</p> <p>Cal. Bus. & Prof. Code § 23357.1</p> <p>Brewpubs are authorized to purchase beer, wine, and distilled spirits from a licensed wholesaler or winegrower and offer it for sale and on-premises consumption.</p> <p>Cal. Bus. & Prof. Code § 23396.3</p>	<p>privileges are the same as those that exist under their original Type 01 or Type 23 license, including consumer tastings and sales for on- or off-premises consumption to consumers of beer that is produced and bottled by, or produced and packaged for, the beer manufacturer.</p> <p>Up to two (2) of the six (6) are allowed to have bona fide eating establishments, which also allows for the sale of wine and other beer.</p> <p>Cal. Bus. & Prof. Code § 23389</p> <p>Brewpub</p> <ul style="list-style-type: none"> • An on-sale retail license (Type 75) may be issued to a bona fide public eating place. • Licensed location must have a minimum seven-barrel brewing capacity, and produce between 100 and 5,000 barrels of beer annually on the premises. • License authorizes the purchase of beer, wine, and distilled spirits from a licensed wholesaler or winegrower for sale and on-premises consumption. 		

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ATTORNEY WORK PRODUCT

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
		<ul style="list-style-type: none"> License also allows beer produced on the premises to be sold: 1) to consumers for on-site consumption, and 2) to licensed wholesalers for distribution. The statute does not comment on a limit to the number of licenses. <p>Cal. Bus. & Prof. Code § 23396.3</p> <p>Licensed beer manufacturers and holders of out-of-state beer manufacturer's certificates may obtain retail package off-sale beer and wine licenses. The statute does not comment on a limit to the number of licenses.</p> <p>Cal. Bus. & Prof. Code § 23357</p>		
Oregon	<p>Among other things, a brewery license authorizes the licensee to:</p> <p>(a) Sell wine, malt beverage or cider on the licensed premises at retail for consumption on or off the licensed premises.</p> <p>(b) Sell, in securely covered containers supplied by the consumer and having a capacity of not more than two gallons each, wine,</p>	<p>A brewery is limited to selling malt beverages at retail at three locations in the state, regardless of the number and type of licenses held under common ownership.</p> <p>ORS 471.221</p>	<p>A brewery license does not allow for self-distribution. However, a brewery licensee may apply for a wholesale malt beverage and wine license, which would allow it to act as distributor.</p> <p>ORS 471.221</p> <p>Brewery-public houses can sell and distribute directly to licensees in Oregon up to 7,500 barrels of malt beverages produced by the licensee.</p>	<p>Breweries may sell growlers with a capacity of 2 gallons or less or kegs to consumers for off-premises consumption.</p> <p>ORS 471.221</p> <p>Brewery-public houses can sell growlers (no size limit) or kegs to consumers for off-premises consumption.</p> <p>ORS 471.200</p>

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p>malt beverages or cider for off-premises consumption.</p> <p>(c) Obtain a special events brewery license.</p> <p>(d) Notwithstanding ORS 471.392 to 471.400, subject to ORS 471.175, hold a full on-premises sales license.</p> <p>(e) Conduct permitted activities up to two (2) additional locations approved by the commission.</p> <p>Brewery may hold a wholesale malt beverage and wine license.</p> <p>A brewery licensee and a winery licensee may not be under common control unless the winery licensee uses its premises to produce wine or cider and holds a valid producer and blender basic permit issued by the Alcohol and Tobacco Tax and Trade Bureau.</p> <p>A brewery licensee is limited to selling malt beverages at retail at three locations in the state, regardless of the number and type of licenses held under common ownership.</p>		ORS 471.200	Oregon Liquor Control Commission Resource

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p><u>ORS 471.221</u></p> <p>Among other things, a brewery-public house license allows the licensee:</p> <ul style="list-style-type: none"> (a) To sell wine and cider at retail for consumption on or off the premises; (b) To sell for consumption off the premises wines and cider in securely covered containers supplied by the consumer and having capacities of not more than two gallons each; (c) To conduct permitted activities, except manufacturing, two (2) locations other than the premises where the manufacturing occurs; (d) To obtain a special events brewery-public house license; (e) To distribute malt beverages manufactured at the licensed premises to any other premises licensed to the same licensee, whether a manufacturer, 			

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ATTORNEY WORK PRODUCT

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p>wholesaler or retail premises; and</p> <p>(f) To distribute for export, in any amount, malt beverages manufactured at the licensed premises.</p> <p>A brewery-public house licensee must follow certain tied-house restrictions for retailers and manufacturers. However, they are permitted to hold:</p> <ul style="list-style-type: none"> • A winery license (under ORS 471.223) • A warehouse license (under ORS 471.242) • Limited on-premises sales licenses • Temporary sales licenses • Full on-premises sales licenses • Distillery license <p>ORS 471.200</p>			
Washington	<p>The statutes are silent as to whether a brewery licensee may also hold other manufacturer licenses, but it</p>	<p>The state may issue up to two (2) retail licenses allowing a domestic brewery or microbrewery to operate an on- or off-premises tavern, beer and/or wine</p>	<p>Domestic breweries (except for brand owners under RCW 66.04.010(7)) may act as a</p>	<p>Domestic breweries or microbreweries that hold a spirits, beer, and wine restaurant license may sell their own beer for off-premises</p>

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p>does specifically permit the following:</p> <p>A domestic brewery or microbrewery may hold a spirits, beer, and wine restaurant license.</p> <p>A domestic brewery or microbrewery may sell (for on- or off-premises consumption) beer produced by another microbrewery or domestic brewery as long as the other brands do not exceed 25% of the tap offerings.</p> <p>Microbreweries may also sell cider produced by a domestic winery</p> <p>RCW 66.24.240</p> <p>RCW 66.24.244</p>	<p>restaurant, or spirits, beer, and wine restaurant.</p> <p>RCW 66.24.240</p> <p>RCW 66.24.244</p>	<p>distributor and/or retailer for beer of its own production.</p> <p>Domestic breweries qualified for a reduced rate of taxation pursuant to RCW 66.24.290(3)(b) may apply for an endorsement to sell bottled beer at qualifying farmers markets.</p> <p>RCW 66.24.240</p> <p>Microbreweries may also act as a distributor and/or retailer for beer and strong beer of its own production.</p> <p>Microbreweries may apply for an endorsement to sell bottled beer at qualifying farmers markets.</p> <p>RCW 66.24.244</p> <p>The Wholesale Distributor/Supplier Equity Agreement Act does not apply to any brewer or manufacturer of malt liquor producing less than two hundred thousand barrels of malt liquor annually and holding a certificate of approval issued under RCW 66.24.270.</p> <p>RCW 19.126.020</p>	<p>consumption from their restaurant premises in kegs or growlers.</p> <p>RCW 66.24.240</p> <p>RCW 66.24.244</p>

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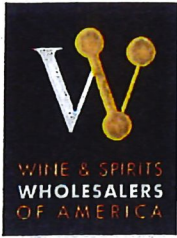
State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
North Carolina	There is no statutory prohibition against a company holding a distiller's, wine maker's or other alcoholic beverage production license in addition to beer manufacturer's, although this matter requires further research to confirm that the North Carolina Alcoholic Beverage Control Commission permits manufacturers to hold both license types.	<p>A North Carolina brewery may operate a tap room at any licensed brewery location.</p> <p><u>N.C. Gen. Stat. § 18B-1104(7)</u></p> <p>A "small brewer" (producing less than 25,000 barrels annually) may operate three additional retail locations in North Carolina and obtain retail licenses for sale of beer produced by the brewer and by other brewers. If the retail locations operate under a different trade name, such locations must offer a "reasonable selection" of competitive beer.</p> <p><u>N.C. Gen. Stat. § 18B-1104(8)</u></p>	<p>A "small brewer" whose production does not exceed 25,000 barrels annually may self-distribute its products.</p> <p><u>N.C. Gen. Stat. § 18B-1104</u></p>	<p>A North Carolina brewery is authorized to sell, at any licensed facility, beer produced by the brewery for consumption on the premises or off-premises.</p> <p><u>N.C. Gen. Stat. § 18B-1001(1); § 18B-1104(7), (8)</u></p>
Virginia	There is no statutory prohibition against a company holding a distiller's, wine maker's or other alcoholic beverage production license in addition to a beer manufacturer's, although this matter requires further research to confirm that the Virginia Alcoholic Beverage Control Board permits manufacturers to hold both license types.	<p>A Virginia brewery may operate a tap room at any licensed brewery premises.</p> <p><u>Va. Code § 4.1-208</u></p> <p>A separate license must be obtained for each of a brewery's places of business.</p> <p><u>Va. Code § 4.1-208</u></p>	<p>Virginia does not permit any direct sales from breweries to retailers except for very limited circumstances:</p> <ul style="list-style-type: none"> In the event the wholesaler servicing certain retailers has been forced to suspend operations or has suffered a termination of its wholesale license, the brewery may sell to retailers for 30 days. If a brewery has provided financing to a wholesaler and forecloses on the wholesaler's assets, then 	<p>A Virginia brewery is authorized to sell, at any licensed facility, beer produced by the brewery for consumption on the premises or off-premises.</p> <p><u>Va. Code § 4.1-208</u></p> <p>The Virginia legislature has amended this section to require that at least 20% of the beer sold for on-premises consumption at a tap room must be manufactured on-site. The amendment will be effective January 1, 2019.</p>

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State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
			<p>the brewery may sell directly to retailers serviced by such wholesaler for 180 days following the foreclosure.</p> <p><u>Va. Code § 4.1-216</u></p> <p>A brewery may also apply to obtain a delivery permit to authorize direct delivery of the brewery's products to consumers within Virginia.</p> <p><u>Va. Code § 4-1.212.1</u></p> <p>Otherwise, Virginia allows "self-distribution" by allowing breweries to create their own independently-owned wholesaler, which must have separate ownership, employees, and property.</p> <p><u>Va. Code § 4.1-208</u></p>	
Delaware	<p>A "microbrewery" (not more than 2,000,000 barrels produced annually in the United States) may produce beer, mead and cider, and may also obtain the following licenses for facilities located within Delaware:</p> <ul style="list-style-type: none"> • Farm winery • Brewery-pub • Craft distillery 	<p>One or more Delaware "microbrewery" license may be issued to a brewer if the total production of beer within and outside the state by the brewer and the brewer's affiliates does not exceed 2,000,000 barrels annually. Each microbrewery may sell beer for consumption on the licensed premises (although only one microbrewery may offer products for off-sale).</p> <p><u>4 Del. Code § 512C</u></p>	<p>Delaware does not permit self-distribution for breweries.</p>	<p>Microbreweries and brew-pubs are permitted to sell any type of sealed beer product from the licensed premises, not to exceed 5 cases per day to any retail customer.</p> <p><u>4 Del. Code § 512B; 512C</u></p> <p>Off-sale is only permitted from one microbrewery and not more than a total of three brew pubs and microbreweries operated by a</p>

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

State	Multiple Manufacturer's Licenses	Quantity of Tap Rooms	Limits on Self-Distribution	Restrictions for Off-Sale Products
	<p><u>4 Del. Code § 512C</u></p>	<p>The holder of a microbrewery license may also operate up to three brew-pubs, provided each brew-pub location must obtain its own license. Brew-pubs are subject to the following limitations:</p> <ul style="list-style-type: none"> • Must operate or co-locate with a restaurant • No more than 4,000 barrels produced at each brew-pub • The brew-pub may not own or be affiliated with an importer of alcoholic liquor. <p><u>4 Del. Code § 512B</u></p>		<p>company or group of affiliated companies.</p> <p><u>4 Del. Code § 512B; 512C</u></p>



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CRAIG WOLF, PRESIDENT AND CEO

January 12, 2018

Mrs. Lolani Lekkas
Compliance Officer
Iowa Alcoholic Beverages Division
1918 Hulsizer Road
Ankeny, Iowa 50021

Re: Alcoholic Beverage Control Study – Request for Comment

Dear Mrs. Lekkas,

On behalf of the Wine & Spirits Wholesalers of America (WSWA), whose members together represent over eighty percent of all wine and spirits distributed in the United States, we write to provide comments as requested by the Division regarding Iowa's Tied-House laws. WSWA member companies are an integral part of the three-tier system in both license and control states. Our members provide marketing and logistical services that help make the U.S. the most robust and responsible beverage alcohol marketplace in the world. WSWA supports strong state-based alcohol regulations that ensure an orderly and balanced marketplace for the distribution of beverage alcohol is maintained.

Central to Iowa's laws and regulations concerning beverage alcohol are the principles of prohibiting unfair trade practices and protecting public safety and welfare. These principles arise from the special nature of beverage alcohol products. History has repeatedly proven that problems often arise when one industry member or retailer gains too much leverage over the other. For this reason, separation of the tiers, whether in a license or control jurisdiction, is key to maintaining a well-regulated system.

Over 22,000 people depend on the well-regulated manufacture, distribution and retail of alcohol for their livelihood in Iowa. Valuable revenues are collected, not just from the taxes on the product, but by the job creation a stable and well-regulated marketplace provides. Predictable state policies surrounding the industry are key for sustaining and growing the industry.

One of the most important elements of a stable marketplace is policies that prevent the corrupt influence of one industry member over another. By maintaining clear boundaries between the tiers, states prevent upper tier members from controlling which products retailers sell, and prevent retailers from controlling the supply line. This benefits consumers by preventing monopolies, encouraging competition, ensuring that small brands have an ability to enter the market and that a retailer is not incentivized to give preference to its own brand over other independent brands. This system of separation, accountability, and traceability allows the industry to counteract very real threats, saving lawmakers and taxpayers from the economic burden and cost of bad



Mrs. Lolani Lekkas

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product and tax evasion, as well as saving lives. The more de-regulated the market, the more government involvement, resources, and control is needed to preserve consumer safety, and to find and stop bad actors.

The separation and independence of the tiers has resulted in constant innovation, variety, and opportunity. In the age of big box chain stores, and loss of local community stores, separation of the tiers is more important than ever to ensure consumer choice and safety, prevent monopolies, and to promote competition. As dominant as large, interstate, chain retailers are in many product areas, the mandated separation of the beverage alcohol tiers still prevents their control over the smaller independent suppliers, and allows small retailers to maintain their independence. This means new products have a path to market, and are not shut out by larger players.

In fact, growth of small businesses on all tiers and new products are bolstered by the current system we have. Should unconstrained vertical integration be allowed, variety and innovation will not be strong. It is important to recognize that much of the innovation we see in the beverage alcohol sector is due to thoughtful regulations that allow for new business ideas while providing important safeguards around consumer safety and choice.

The way product has been sold over the years has changed, but the need for an orderly, well-regulated marketplace, efficient tax collection and social responsibility has not. The basic need to regulate the alcohol market has not disappeared, nor does it need to disappear in order to continue serving consumer choice and preferences. Overbroad relaxation of policies that support this stable structure would give an advantage to bad actors, and create an incentive for unscrupulous individuals to ignore laws and cheat the state and local communities.

Instead of dismantling a system that works, regulators and lawmakers should look to bolster sound policies and adapt to new changes in the market by focusing on enforcement of current laws, and adoption of laws that strengthen the system, save taxpayer money, recoup lost costs, and benefit law abiding state businesses.

WSWA appreciates the opportunity to comment on this important matter and would be happy to meet with the Division to discuss any of these ideas in greater detail.

Warm regards,

Craig Wolf
WSWA President and CEO



January 12, 2018

Lolani Lekkas
Compliance Officer
Iowa Alcoholic Beverages Division
1918 SE Hulsizer Road
Ankeny, IA 50021

Re: Kum & Go, L.C. Comments on Alcoholic Beverage Control Study

Dear Ms. Lekkas:

Kum & Go, L.C. (hereinafter "Kum & Go") sincerely appreciates the invitation and opportunity to provide this input in response to the Alcoholic Beverage Division's ("ABD") study and request for comment. As an initial matter and consistent with the language within Section 27 of Senate File 516, Kum & Go would like to begin its comments by acknowledging that the three-tiered system of regulation is an important component to the alcohol beverage industry in Iowa and across the Country. The comments below are provided in response to the ABD's specific inquiry, dated October 6, 2017, and are provided for purposes of demonstrating certain concerns with Iowa Code Chapter 123 such that those concerns may be addressed and remedied by the ABD and/or the Iowa General Assembly as appropriate at a future date - an outcome that Kum & Go strongly believes is not and should not be grounded in dismantling or otherwise weakening the three-tier system; but rather, strengthening the three-tier system such that it reflects the realities of modern business relationships and may be efficiently, predictably, fairly, practically, and *legally* enforced throughout the State and well into the future.

1. Whether Iowa Code Chapter 123.45 subsection 1 paragraphs c and d are clear and subject to efficient, predictable, and sustainable regulation. If the language is clear, please provide your interpretation. If it is ambiguous, please identify the areas that are ambiguous and provide clarity to those areas.

Iowa Code Chapter 123.45 subsection 1, paragraphs "c" and "d" are vague and contain numerous ambiguities such that they are not efficiently, predictably, fairly and practically enforced. Some of these ambiguities are outlined in the following paragraphs.

First, paragraph 1 purports to impose restrictions upon on manufacturers, bottlers, and wholesalers. Subparts "a," "b," "c," and "d" describe what manufacturers, bottlers, and wholesalers are prohibited from doing in the marketplace. Notably, neither paragraph 1 nor any of its subparts impose restrictions upon retailers. While the legislature clearly did not include "retailers" in paragraph 1, the State of Iowa is ignoring this black letter law and applying new and non-existent language into paragraph 1; namely, inserting the term "retailer." Such an erroneous interpretation is the only manner by which the regulations in subparts "a," "b," "c," and "d" would arguably apply to a retailer. If the State is going to interpret and apply this section in a manner that differs from the law, the provisions must be amended.

Second, regulations within paragraph 1 are expressly limited and apply only to "[a] person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer..." Importantly, similar to the phrase "interested in," as more fully described below, the phrase "engaged in the business of" is not defined and is inherently vague. As such, the marketplace is largely left to guess as to its meaning and differ as to its application. The following examples illustrate just a few uncertainties and inequities in application that arise regarding a "person engaged in the business of," as that vague phrase pertains to business:

1. Does this phrase apply only to a formal business entity, such as a legal corporation, that is licensed to and/or employs individuals to actually manufacture, bottle, or wholesale product?

2. Does this phrase only apply to those specific employees of a corporation identified in paragraph 1 that are directly involved in manufacturing, bottling, or wholesaling?

3. Does this phrase apply to all employees of a corporation identified in paragraph 1, regardless of whether the employees' roles and responsibilities specifically involve manufacturing, bottling, or wholesaling (e.g. a human resources director whose duties do not in any way involve actively manufacturing, bottling or wholesaling)?

4. Does this phrase apply to all directors of a corporation identified in paragraph 1?

5. Does this phrase apply to all officers of a corporation identified in paragraph 1?

6. Does this phrase apply to all owners of a corporation identified in paragraph 1, including non-voting shareholders, minority shareholders who lack

control, mutual funds, corporations, companies, partnerships, blind trusts, and all others manners by which shares in a corporation may be held?

7. Does this phrase only apply to majority and controlling shareholders of a corporation identified in paragraph 1?

8. Does this phrase apply to holding companies, subsidiaries, wholly-owned subsidiaries, and sister entities of a corporation identified in paragraph 1? If so, is it at all relevant or a consideration as to whether those related entities are licensed and/or employ individuals to manufacture, bottle, or wholesale product? Similarly, is it at all relevant or a consideration as to whether those related entities share common management (i.e. directors and officers)?

9. Does this phrase apply to a business in the "supply chain?" For example, does the phrase capture vendors doing business with any one of the applicable parties identified in paragraphs 1-8 above. Put differently, is a glass manufacturing company - that has an exclusive relationship to supply glass beer bottles to a licensed beer manufacturer - a "person engaged in the business of manufacturing, bottling, or wholesaling...")?

10. Does this phrase apply to a business that simply owns a trademark or a "brand" that licenses that trademark to another business for a fee and manufactures alcoholic beverages, wine or beer? This is an example of a modern business reality that likely was not considered in the wake of Prohibition when most of these regulations were promulgated?

Third, paragraph "c" uses the phrase "interested in the ownership, conduct, or operation..." to describe the prohibited relationship that applies to a person engaged in the business of manufacturing, bottling, and wholesaling. Notably, the term "interested in" is also not defined and is astonishingly vague such that the provision cannot efficiently, predictably, fairly and practically be enforced. For instance, it is unclear whether "interested in the ... conduct, or operation" means a legal interest, personal interest, business interest, financial interest, political interest, charitable interest, property interest, or any other interest one can imagine. The following hypothetical examples underscore the ambiguities and unequal enforcement stemming from the phrase:

(1) Example 1, Inherent Interests between Wholesalers and Retailers: Corporation "A" contracts with and distributes beer to a licensed retailer (hereinafter "corporation "B""). At the very least, corporation "A" has: (1) a business interest in the operations of corporation "B" continuing to operate in the territory and increasing sales of product it distributes; (2) a legal / contractual interest in the operations pursuant to the contract between the businesses and any rights and obligations specified therein; and (3) a financial interest in the conduct

or operation of corporation "B" such that corporation "B" is able to and does pay for services rendered.¹ Despite this very clear and obvious interest between a wholesaler and retailer, the State of Iowa allows such relationships to exist regardless of the prohibitions within 123.45.

(2) Example 2, Private Label Sales: Corporation "A" is a licensed retailer that sells beer, wine, and alcoholic beverages. Corporation "A" contracts with another entity (hereinafter "corporation "B") to manufacture private label beer, wine, and alcoholic liquors to sell exclusively at corporation "A's" retail locations. At the very least, corporation "B" has: (1) a business interest in the operations of corporation "A" continuing to operate and increasing sales of product it manufactures; (2) legal / contractual interests in the operations and conduct of corporation "A" pursuant to the contract between the businesses and any rights and obligations specified therein; and (3) financial interest in the conduct or operation of corporation "A" such that corporation "A" continues to operate and sell product it manufactures.² Despite this very clear interest, the State of Iowa allows such relationships to exist between retailers and manufactures regardless of the provisions within 123.45.

(3) Example 3, Trademark and Legal Interests in Common Products: Corporation "A" is a licensed retailer that sells beer, wine, and alcoholic liquors. Corporation "A" is also the registered owner of a trademark that is affixed to beer, wine, and alcoholic liquors it sells and which are manufactured by corporation "B." Corporations "A" and "B" have, at the very least: (1) business interests in the operations and conduct of each other such that the product and sales of such product meet minimum manufacturing, brand, and sale standards; (2) legal / contractual interests pursuant to each other's' operations, often memorialized through a license agreement; (3) financial interests in each other's' operations, again often memorialized in a license agreement; and (4) intellectual property interests in the conduct and operations as reflected by the trademark itself and protecting the same.³

Fourth, paragraph "c" specifically uses the term "another licensee" to describe a prohibited relationship. The State of Iowa has suggested, without explanation, that the legislature's decision to include the term "another," before the term "licensee," is

¹ See *Auen v. Alcoholic Beverages Div., Iowa Dep't of Commerce*, 679 N.W.2d 586, 592 (Iowa 2004) (explaining that no matter how minor an interest, even a "de minimis" interest, is improper under Iowa Code Chapter 123.45).

² See *Texas Alcoholic Beverage Comm'n v. Mark Anthony Brewing, Inc.*, No. 03-16-00039-CV, 2017 WL 4582848, at *1 (Tex. App. Oct. 13, 2017) (addressing how private label relationships give rise to impermissible "interests" in a three-tier system of regulation).

³ See *Id.*

meaningless.⁴ Again, if the State is going to interpret and apply this section in a manner that differs from the law, the provisions must be amended. A reasonable and plain reading of the phrase "another licensee" might suggest that Iowa Code Chapter 123.45 only applies to businesses that desire to hold multiple licenses issued by the ABD and that so long as a business is only licensed within the State of Iowa to conduct activity in Iowa in only one of the three tiers of alcoholic beverage, any conduct outside of the State of Iowa is permitted. Fifth, setting aside the numerous ambiguities above, the State of Iowa is simply not in a position to efficiently, predictably, fairly and practically enforce such vague regulations in today's marketplace. For illustration purposes only, consider the explosion in craft beer, wine, and alcoholic beverage manufacturers (more fully described below) in Iowa as well as the publicly traded beer, wine, and liquor manufactures (e.g. Constellation Brands, Inc., Anheuser-Busch InBev SA/NV, and Molson Coors Brewing, Craft Brew Alliance, Inc.). Consider also how ownership is held in retailers throughout the state of Iowa and across the Country. In short, the State of Iowa is not able to catalogue all persons "engaged in" the business of manufacturing and cross-reference those persons with all persons "directly or indirectly" "interested in" a retailer. Put differently, the ABD is not able to ensure all shareholders in entities "engaged in the business of manufacturing, bottling, and wholesaling" are not also shareholders - or otherwise interested in, directly or indirectly, including through a 401k, of licensed retailers (i.e. also owners in Amazon, Inc., Casey's General Stores, Inc., Hy-Vee, Inc., Fareway Stores, Inc., Target, Inc., Trader Joe's, Inc., Walmart, Inc., Whole Foods, Inc. among countless others) in violation of 123.45⁵.

Finally, considering the stated public policy of Iowa Code Chapter 123,⁶ it is unclear how the State of Iowa can legally and legitimately be interested in regulating activities of a retailer in the State of Iowa - even if that retailer has an indirect interest in a person engaged in manufacturing outside the State of Iowa - if those manufacturing activities do not in any way impact any retail operations in the State of Iowa (e.g. despite

⁴ Compare *Auen* (finding words cannot be ignored and must be "given their ordinary and common meaning by considering the context within which they are used.").

⁵ Pursuant to *Auen*, the ownership of just a single share in such a retailer would violate Iowa Code Chapter 123.45. Pursuant to *Auen*, a consistent application of Iowa Code Chapter 123.45 would have the unbelievable result of prohibiting a person or mutual fund from simultaneously holding stock - and thus having ownership interests in - Anheuser-Busch InBev and Casey's General Stores, Inc. Upon information and belief, the ABD is not actively monitoring 401k retirement accounts owned by Iowans to ensure those plans do not hold ownership interests, no matter how *de minimis*, in violation of Iowa Code 123.45.

⁶ Iowa Code Chapter 123.1 specifies the public policy of chapter 123:

This chapter shall be cited as the "Iowa Alcoholic Beverage Control Act", and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose. It is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in this chapter.

the indirect "relationship," the retailer does not wholesale, resell, distribute, control, touch or have any impact whatsoever on the manufactured product).

2. Please comment on Iowa's three-tiered system with particular focus on direct and indirect ownership related issues and tied house concerns. What is your interpretation of direct and indirect ownership? Should they be treated differently when tied house concerns are being regulated? What is your interpretation of "a person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages"? Are there varying degrees of "engaged in" and if so, should they be regulated differently from one another? Please make sure to explain your role in the three-tier system.

Kum & Go's role in the three-tier system is exclusively as a retailer holding a class "E" license. Kum & Go is not a manufacturer of any wine, beer, or alcoholic beverages.

As explained above in response to question 1, as written within Iowa Code Chapter 123, the phrase "engaged in" is ambiguous and vague. Indeed, the phrase is susceptible and open to numerous interpretations, which at the very least invite inconsistent interpretations and applications. Complicating matters is the further ambiguity provided by the undefined and open ended terms "direct and indirect ownership." For purposes of this inquiry only, it is Kum & Go's belief and understanding that the phrase "a person engaged in the business of manufacturing..." should be defined clearly and applied uniformly to mean a specific legal entity actively engaged in an activity specified in Iowa Code Chapter 123.3(27).

Further, it is commonly known and understood that the three-tier system was originally created to ensure that manufacturers do not unduly influence wholesalers and retailers, a circumstance which led to conditions that gave rise to the system. Considering this important background, along with the stated legislative purpose and intent of Chapter 123, the statute and regulations should address and be interpreted to protect against these legitimate interests and concerns – and not so broadly construed and interpreted, however, to prohibit modern day business practices that do not offend the stated intent and public policy goals of Chapter 123.

3. As marketplace conditions and business opportunities change, how have tied house regulation and the three-tiered system impacted your business? Have you had to forgo an opportunity to expend your business because of tied house regulation and the three-tiered system? Please explain how Iowa's three-tiered system positively and negatively affects the ability of your current business to grow and your ability to invest in other business entities related to alcoholic beverages.

Laws arising out of Prohibition, by their nature as being nearly 90 years old, are certain to create issues with modern business relationships not contemplated when they were enacted and therefore, should be updated accordingly.

4. Explain your view of tied house regulation and the three-tier system as it exists today.

Do you believe tied house regulation and the three-tier system serves the purpose it was intended to serve when it was first created? Explain the value you see in tied house regulation and the three-tier system as it pertains to alcoholic beverages control and the public policy purpose of protecting the welfare, health, peace, morals, and safety of the people of Iowa.

As stated above, the three-tier system⁷ is an important component to regulation. The system, however, cannot exist in a vacuum and regulations must reflect and be applied in a manner consistent with the modern-day marketplace and in furtherance of the stated policy goals of Iowa Code Chapter 123.

As demonstrated throughout the ABD's ongoing study, the alcohol industry, corporate legal structures, securities regulations, and the retail industry as a whole have dramatically transformed since the inception of the three-tier system in the early 1930s (nearly 90 years ago). Not only have dramatic changes occurred over the last century, but the pace of change is increasingly accelerating. Indeed, as the ABD explained during its December 2017 meeting, in 1934 there were just 71 different liquor brands available for sale in the State of Iowa. Comparatively, in 2017 there were over 2,100 different liquor brands available for sale in the State of Iowa (and over 5,000 available nationally). Moreover, one can simply look to the sheer explosion of licensees in the State of Iowa over roughly the past decade: In 2005, 540 class "E" licenses existed; in 2017, that number nearly tripled to 1455. The pace of change is only escalating and in order for Iowa businesses to compete in an ever-changing and dynamic marketplace, which includes the ability to not only compete with bricks and mortar facilities, but also with online retailers (an exploding retail category that did not exist just a few years ago), our laws and regulations need to adapt accordingly - all while continuing to ensure public health and safety are maintained.

Similar to the revolutionary changes occurring in the consumer marketplace, equally dramatic changes have occurred with respect to the types of business entities - and how those entities are structured, organized, managed, and owned - in the State of Iowa. For instance, the limited liability company ("LLC") is a relatively new legal entity in Iowa. In fact, Iowa's first LLC statutes were not adopted until 1992 (Iowa Code Chapter 490A) and were entirely replaced less than a decade ago, in 2008 (Iowa Code Chapter 489). Similarly, during the 2004 legislative session, the State of Iowa adopted the Iowa Uniform Securities Act, which updated regulations regarding the issue and sale of securities in Iowa. These and numerous other changes to Iowa's corporate laws have fundamentally changed how Iowa businesses are created, owned, structured, taxed, and managed. Such sweeping

⁷ It has been stated by many throughout the ABD's meetings during the Fall and Winter of 2017, Iowa's regulations are more of a hybrid than a true "three-tier system." Specifically, the code permits relationships between manufacturers and wholesalers. Further, as a control state, the State of Iowa may also be considered yet another tier.

legal changes in corporate law, especially when coupled with wholesale changes in the consumer marketplace, further underscore why provisions within Iowa Code Chapter 123 must be clarified, updated, and modernized as the legislature contemplated within SF516.⁸

5. If you had the opportunity to change tied house regulation and the three-tiered system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law? Please try to be specific and explain how you came to your conclusions.

Regulations must be narrowly tailored to address and achieve legitimate state interests and in a manner that the state can properly enforce. As such, if the interest is to protect the welfare, health, peace, morals, and safety of Iowans, our regulations should be tailored and written in a manner to address those policy goals. As written and considering the changes that have occurred over the last ninety years, Iowa Code Chapter 123 fails this basic test. For instance, the law prohibits all Iowans from simultaneously owning, in 401k funds or otherwise, shares in Target and Anheuser-Busch InBev SA/NV - this prohibition applies regardless of whether the Iowan simply owns a single share. Such a provision is arbitrary, unreasonable, and not capable of proper enforcement.

In furtherance of the stated policy, the law can be amended in ways to accomplish the stated objectives, ensure proper enforcement, while also preserving and strengthening the three-tiered system:

(1) If the objective is to prohibit vertical integration and so called tied-houses, then the law can be amended to provide that manufacturers who have an interest in a retailer shall distribute manufactured product through an independent, third-party (either private distribution or through the State);

(2) If the objective is to prohibit manufacturers from selling owned brands at their own retail locations at prices that unfairly entice the public to purchase the manufactured

⁸ SF516 provides in part:

“[t]he alcoholic beverages division of the department of commerce, in conjunction with other stakeholders the division deems necessary, shall conduct a study concerning enforcement issues related to alcoholic beverage control, including consideration of the manner of *properly balancing appropriate regulation of the manufacturing, distribution, and sale of alcoholic liquor, wine, and beer in this state with emerging trends in the industry* ...

In conducting the study, the division shall consider any other relevant issues the division identifies for study, issues relating to the three-tiered system and section 123.45, as it impacts the ability of manufacturers, wholesalers, and retailers *to meet changing marketplace conditions and business opportunities*.

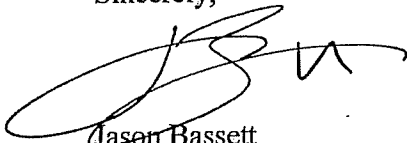
product, then the law can simply be amended to require the retailer: (a) sell its owned brand at the same price as it is sold at all other retailers in the State and report such sales information to the ABD for appropriate oversight and validation; (b) to limit sales of its owned brand to a percentage of sales in the category and report such sales information to the ABD for appropriate oversight and validation; (d) only sell its owned brand if the brand is obtained from another class "E" licensee; (e) prohibit the retailer from purchasing any product from a distributor that distributes the owned brand.

6. What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study? Please include specific concerns that may affect the industry the consumer, the marketplace, the ability to regulate and enforce the change, public safety and health, etc.

As outlined above, Iowa's current laws on the issue are inherently vague. As such, the marketplace is largely left to guess as to meaning, differ as to application and interpretation, and in the limited instances in which the State is able to enforce, enforcement lacks equality and is inconsistent with the express language of Iowa Code Chapter 123. The provisions should be updated and narrowly tailored to reflect changes in corporate law, securities law, industry practices, and marketplace demands, all while maintaining a three-tier system the satisfies the policy goals of Iowa Code Chapter 123.

Thank you for the opportunity to share the input above. The comments above are not exhaustive and do not encompass all concerns, issues, and potential solutions. Kum & Go looks forward to further discussing these and other important issues related to the ABD's ongoing study.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Bassett", with a stylized flourish at the end.

Jason Bassett
Director of Government Affairs

January 12, 2018

Ms. Lolani Lekkas
Compliance Officer
Alcohol Beverage Division
State of Iowa
1918 SE Hulsizer Road
Ankeny, IA 50021

Following the direction of the Iowa Legislature with the passage and enactment of Senate File 516, the Iowa Alcoholic Beverages Division has asked the Iowa Wholesale Beer Distributors Association (IWBDAs) to respond to a set of questions related to a study of Iowa Code Chapter 123.45, subsection 1, paragraphs c and d.

The Association is pleased to provide an overview and analysis of the issue in question. The Association believes that the Iowa Alcoholic Beverages Division and members of the Iowa Legislature will find the code section in question, also referred to as Iowa's tied house protection, is clear, unambiguous and necessary to the competitive and open nature of the alcohol beverage industry in this state.

About IWBDAs

Established in 1945, the Iowa Wholesale Beer Distributors Association is comprised of 26 wholesalers holding federal basic permits and an Iowa "Class A" wholesaler permit. Any person meeting those requirements, that is not controlled by a manufacturer or supplier of malt beverages, is eligible for membership in the organization.

The IWBDAs's members range from small businesses with less than 10 employees to operations with more than 300 employees. With such a diverse range, for the purposes of this report we find it pertinent to give a view of what the IWBDAs's media beer distributor looks like:

- Began operating in 1963 with six brands and a truck. Today, that distributor sells brands for seven Iowa brewers and 332 total brands
- Is a third-generation small family business
- Is located in a regional center in greater Iowa with one warehouse
- Provides 28 full-time and two-part time jobs with a \$1.55 million payroll
- Distributes 1.7 million gallons of beer to 337 retail establishment in six counties using eight trucks
- Recycles about 661,000 cases of beverage containers and cardboard
- Spends \$125,000 on local marketing and advertising in newspapers, radio and billboards
- Expands the local economy by purchasing services from Iowa banks, lawyers, accountants and insurance agents within their territory
- Donates \$60,000 to charities and local member organizations each year and contributes \$15,000 to responsible consumption initiatives

No Iowa wholesaler has more than three warehouses located within the state. As a contrast to many industries which have consolidated into dominant, statewide chains, no such arrangement is present in the distribution of beer.

Context

Chapter 123 of the Iowa Code provides that "traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in this chapter."

The IWBDA believes that chapter 123's strongly worded purpose statement, and reasonable regulations provided within the chapter, are absolutely necessary. The alcohol industry has historically used its position to increase sales rather than to position itself as a champion of control and restraint of an intoxicating product, and therefore strong regulation within the three tier system must be preserved.

As evidence of this assertion, look to Iowa's past relationship with alcohol. "In four different periods in her history Iowa had some form of state-wide prohibition, alternating with license systems of one type or another." [City Fosdick & Scott, p. 1]

Policy makers should be suspicious of industry claims that disregard decades of success, stability and growth within an industry that has indisputable potential to harm people in a way few other industries can. While the public's attitude toward alcohol has progressed substantially in favor of access, alcohol remains as intoxicating today as it was in 1919. It is clear that residents of Iowa are generally satisfied with today's balance between access and control.

While the public's interest in controlling an orderly marketplace should be the primary concern, policy makers should also consider the benefits of creating policy that encourages investment in local economies. Beer distributors believe the current code accomplishes that goal in a way that minimizes risks associated with alcohol consumption.

Despite the alcohol manufacturing industry abandoning the state of Iowa for decades, the independent wholesale and retail industries continued to thrive and grew within the confines of Iowa's three-tier system.

Wholesalers encourage a general examination of preferences: would Iowans prefer that the manufacture, wholesale, and retail of alcoholic beverages was controlled by multiple foreign entities? Or would they prefer the current system where independent operators choose how to market and sell an intoxicating product? Would Iowans prefer an untested system that shifts the economic benefits outside the state's borders? OR would they prefer a system that has provided unwavering stability and accountability for decades?

It is impossible for a multi-national corporation to be accountable to its community in the same way locally based, independent wholesalers and retailers are. The Association strongly believes it's no coincidence that Iowa has consistently adopted laws to support this independence.

Prohibited Interest

The Code of Iowa in 1935 adopted a version of a tied house law that prohibited a person from owning multiple classes of permits. The Legislature has occasionally modified and updated this language, but from the repeal of Prohibition, a firewall between the manufacturer and retailer has been a clear requirement for engaging in the business of alcohol.

The Association supports Iowa's legal and regulatory framework supporting the manufacture, distribution and retail sale of all forms of beverage alcohol.

Is Iowa code Chapter 123.45 subsection 1 paragraphs c and d are clear and subject to efficient, predictable, and sustainable regulation?

The Iowa Wholesale Beer Distributors association strongly agree that 123.45, subsection 1, paragraphs c and d are clear and subject to efficient, predictable and sustainable regulation.

The language in question states *"a person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee or agent of such a person, shall not do any of the following:*

c. Directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.

d. Hold a retail liquor control license or retail wine or beer permit."

The succinct and clear answer to the question posed by Ms. Lekkas, is yes, this code section is clear and subject to efficient, predictable, and sustainable regulation.

In 2004, the Iowa Supreme Court issued a decision addressing this question in *Auen v. Alcoholic Beverages Division* in which ABD issued a rule narrowing the definition of direct or indirect ownership. The Court concluded in part:

"At the time the ban on tied-house arrangements was enacted, the legislature drew a bright-line rule defining the allowable relationship between a manufacturer, wholesaler or other entity in the chain of alcohol beverage distribution and the retailer of these beverages. By choosing the language "directly or indirectly be interested in the ownership," the legislature meant to prohibit any ownership interest, no matter how remote or de minimis, by a manufacturer, wholesaler or other entity in the chain of the alcohol beverage distribution and the retailer of these beverages....

In 1981, the legislature enacted a limited exception to the ban against tied-house arrangements as it applied to manufacturers of beer. If the legislature wanted to exclude remote connections between industry members, their subsidiaries or affiliates, and retailers of these beverages, it would have done so by amendment...."

In concluding, the Supreme Court further ruled: *"A remote or de minimis ownership interest is an indirect ownership interest, which is prohibited by the statute."*

[Auen v. ABD, 2004]

After the Court's ruling in *Auen*, the Legislature chose to leave intact the language prohibiting tied-house arrangements. Subsequent rulings by ABD and Iowa District Court further affirm widespread understanding of the strict interpretation of 123.45.

After the Court issued its decision, the Legislature has not amended the code section in question in a way that would change the logical interpretation of the statute.

It is the position of the Iowa Wholesale Beer Distributors, and the Iowa Supreme Court, that 123.45, subsection 1, paragraphs c and d, are clear and subject to efficient, predictable and sustainable regulation.

Further, Iowa Alcoholic Beverages Division Administrator Larson has recently determined, in rejecting an appeal by a manufacturer of wine who wished to sell beer at retail, that any ambiguity in 123.45 was resolved by the legislature. The following is the Division's interpretation of the law based on the legislative intent of the Iowa Code Section 123.45.

"The Division interprets the legislative intent of Iowa Code Chapter 123, as set forth in Iowa Code 123.1, to require strict separation between the manufacture, wholesale and retail levels. With this in mind, the Division must liberally construe Iowa Code 123.45 (2015) to achieve the legislative mandate. The language of Iowa Code 123.45 (2015) not only prohibits the actual control over a retailer by an industry member, but relationships between industry members and retailers that create the potential for influence or arrangement of business interests....

...allowing a person engaged in the business of manufacturing to simultaneously hold a retail permit of another alcoholic beverage creates the potential for influence or an arrangement of business interests, which is certainly what the legislature intended to prohibit....

...The code is clear that persons who manufacture liquor, wine or beer, and their employees or agents, shall not do certain things, including having a direct or indirect interest "in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail." Any ambiguity identified by the district court was resolved by the legislature, continuing the clear delineation of independence among the three tiers." [New Midwest Rentals]

The Legislature, the Iowa Alcoholic Beverages Division and the Iowa Supreme Court have all affirmed Section 123.45's clarity, efficiency and unambiguity. The Iowa Wholesale Beer Distributors Association agrees.

Any amendment to the clear and unambiguous construction of 123.45 introduces unnecessary uncertainty and risk into what is today an orderly alcohol marketplace, risking decades of business investment and infrastructure.

Please comment on Iowa's three-tiered system with focus on direct and indirect ownership related issues and tied-house concerns.

Both the federal government and the state of Iowa have recognized the danger of tied-house arrangements. A tied house is an unfair trade practice under the Federal Alcohol Administration Act, found at Title 27, United States Code, Section 205.

The Iowa Legislature has adopted the substance of the federal ban on tied house arrangements in 123.186 and provided additional scrutiny to the members of Iowa's alcoholic beverages industry.

27 CFR 6.26 defines an indirect interest as *"Industry member interest in retail licenses includes any interest acquired by corporate officials, partners, employees or other representatives of the industry"*

member. Any interest in a retail license acquired by a separate corporation in which the industry member or its officials, hold ownership or are otherwise affiliated, is an interest in a retail license.

A direct interest in a retail establishment is clearly outright ownership of a retail establishment. Iowa Code 123.45 provides that both "direct," or proprietary, and "indirect" ownership interests are prohibited.

The following tied house arrangements are prohibited under the federal tied house provisions:

1. Any partial interest in a license with respect to the premises of a retailer
2. Any interest in real or personal property owned, occupied or used by the retailer in the conduct of its business
3. Furnishing, giving, renting, lending or selling to the retailer any equipment, fixtures, signs, supplies, money, services or other things of value (see exceptions)
4. Paying or crediting the retailer for any advertising, display or distribution service
5. Extending credit
6. Requiring the retailer to take and dispose of a certain quota of products

["Understanding Trade Practice Laws Under the Federal Alcohol Administration Act, A Brief Guide and Overview to the Statutory and Regulatory Provisions"]

Other examples of indirect interest would include free warehousing, assistance in acquiring a license, inducements through third parties, guaranteeing loans, and the sale of equipment at a special price.

By adopting 27 CFR 6, and strengthening tied house protections beyond 27 CFR 6, the Iowa legislature has repeatedly adopted policy that restricts tied house arrangements within the state. Clear definitions of direct and indirect ownership are provided in 27 CFR 6.26 and adopted by Iowa Code Section 123.186.

The text of 123.45(1)(c) & (d) is critically important to preventing unfair trade practices and is a necessary component of retailer independence. Any amendment weakening restrictions on direct or indirect interests in Iowa would provide a legal loophole for industry members to gain control of retailers and competitors through inducements, exclusions or providing other coercive things of value.

Therefore, any reasonable person would conclude that both proprietary ownership, and any of the specifically aforementioned provisions or other indirect interests in a retailer by a manufacturer, are prohibited by 123.45(1)(c)&(d).

This Association's interest in the three-tier system lies within the wholesale tier, and we strongly align our interpretation of direct and indirect ownership with that of the federal government as clearly adopted by the state of Iowa.

As marketplace conditions and business opportunities change, how have tied house regulation and three-tiered system impacted your business?

Tied house protections have fostered rapid diversification of wholesalers' portfolios during the past decade. These protections have also promoted home-grown Iowa business in the manufacturing tier.

Iowa wholesalers have embraced this diversity of product and increased resources dedicated to representing an increased number of local breweries.

Competition within Iowa's beer marketplace has evolved and grown tremendously during the past generation. As evidence of increased competition delivered by the three-tier system, consider that in 2000 the Iowa Wholesale Beer Distributors Association reported, based on data obtained from the Iowa Alcoholic Beverages Division, that there were four breweries and nine brewpubs operating within the state of Iowa.

In 2016, the last year for which a full dataset is available, the same report revealed 44 breweries and 26 brewpubs operating within the state. Many of these breweries utilize the efficiencies and protections of independent distributors and independent retailers to gain equal access to warehousing, logistical services, retail tap handles, shelf sets and sales support.

Absent the tied house protections of 123.45, Iowa breweries would find high barriers to access the retail marketplace at both the wholesale and retail tiers. New breweries would have entered the industry to find anti-competitive arrangements common in the non-alcoholic beverage industry, such as exclusive agreements, slotting fees and brewery-backed volume incentives.

The Iowa Wholesale Beer Distributors Association opposes these anti-competitive arrangements and fully supports language in 123.45 that prohibits influence that would jeopardize independence of the wholesale or retail tier. Any weakening of Iowa's tied-house protection would have the effect of permitting manufacturer influence of the other tiers, which would naturally restrict robust competition and wide market access.

Explain your view of tied house regulation and the three-tier system as it exists today

First and foremost, Iowa's tied house law promotes access to market and consumer choice. Second, these laws check the power of the alcohol industry to prevent societal damage by making each tier accountable and independent to the people of Iowa.

While consumers of telecommunication, publishing, insurance, finance and many other industries have lamented industry consolidation and a reduction in choice, the independent three-tier system of alcohol distribution has provided a tremendous surge in the number of breweries, wineries and distilleries that are able to access the retail marketplace. In turn, Iowa has seen a dramatic increase in the number of breweries and brands available on retail shelves and taps.

Ponder for a minute the prospect of major alcohol manufacturers, almost all of which are located outside Iowa's borders, controlling the retail market by providing things of value to retailers or by simply buying shelf space, tap lines or demanding exclusive agreements. Much like the soft drink industry, two or three dominant players would demand exclusive agreements, slotting fees and incentives for increased alcohol sales.

The foreign manufacturing industry would grow more profitable and more powerful while local manufacturers and retailers would be pressured on each transaction by those same foreign

manufacturers. Suddenly, the Iowa manufacturing industry would find competition with the major manufacturers nearly impossible outside a few key retailers and taprooms.

In Iowa, five foreign-based breweries control 89.9% of the state's beer shipments. Contrast that number with the members of the retail and wholesale tiers who traditionally have held their corporate headquarters within the state. Tied house regulation prevents dominant breweries from controlling the wholesale and retail sale of the product into the marketplace

Even a small exception to Iowa Code 123.45 for a foreign alcohol manufacturer to control a retail establishment would provide an opportunity for all foreign manufacturers to dictate terms to Iowa retailers and destroy wholesalers' ability to provide reasonable efforts in representing all breweries within their portfolio.

If provided an exception to control an establishment in the retail tier, alcohol manufacturers would likely begin to assume direct and indirect interests in retail establishments and dictate that only certain products – primarily those produced by the controlling manufacturer – be sold within these retail establishments. Eventually, the largest alcohol manufacturers would diminish retail opportunities for their smaller competitors.

Iowa's beer wholesalers strongly prefer the current policy which shifts decisions regarding the marketing and retail sale of alcohol products to local purveyors.

The three-tier system was designed to prevent abuse by industry. To that end, Iowa's tied house law has accomplished its goal to protect the welfare, health, peace, morals and safety of the people of Iowa. A weakening of a law so effective for so many decades risks the unintended consequences of reduced control of an intoxicating and dangerous substance.

A vocal minority of the alcohol industry mistakenly complain that tied house protections erect a barrier to commerce and somehow prevent economic expansion. The Legislature has gradually loosened alcohol beverage control laws and today, all manufacturers of alcoholic beverages may serve and sell their products at the manufacturing location.

Iowa's tied house protections also create an economic opportunity or a second or third independent business to grow and contribute to the state's economic vitality and provide reliable verification for the payment of excise taxes, sales taxes and safe, non-counterfeit products. Iowa's tied house law ensures that a successful manufacturer will create demand for additional business owners and jobs within the wholesale and retail tier. Although this was not a primary goal of tied house protections, the Iowa Wholesale Beer Distributors Association supports 123.45 and a as a business-creating and job-creating policy.

If you had the opportunity to change tied house regulation and the three-tiered system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law?

The Iowa Wholesale Beer Distributors would not advocate for weakening 123.45, tied house protections or the three-tier system. IWBDAs would, however, consider advocating for ways to strengthen the integrity of Iowa's alcoholic beverage distribution system.

What concerns with any changes to tied house regulation and the three-tiered system would you want our Division to be aware of as we conduct the study?

If clarity is necessary on the state's ban of manufacturers owning retail establishments, the Iowa Legislature should reaffirm its prohibition on manufacturers owning retail establishments. Any rollback of the protections outlined in 123.45 would be a dramatic and unprecedented retreat from the stated public policy goals of 123.1 and a shift away from state control of Iowa's alcohol market.

The private sector operates most efficiently when government provides clear and equally applicable law and rules to the private sector and within the alcohol industry. Generations of businesses and business owners have built their pursuit of happiness on clear and consistent application of tied house protections provided in 123.45. Regrettably, the association believes certain language provided in SF 516 introduced considerable doubt in the state's desire or ability to apply the law equally to all people who have been issued privileges to sell alcohol.

While providing direction to the Iowa Alcoholic Beverages Division was a step worth considering, SF 516 section 27, subsection 5 added an unnecessary caveat to the enforcement of the law.

It reads in part: "During the time period of the study and consideration of the issue by the general assembly during the 2019 legislative session, if an applicant has a conflict with section 123.45, subsection 1, paragraphs "c" or "d", the administrator may elect to defer on a final determination regarding the eligibility and issue a temporary license or permit, with conditions, if applicable."

Such broad authority to issue or deny any application with a real or imagined conflict with 123.45 is a significant attack on the industry's independence and also shifts tremendous authority to an unelected administrator who may make determinations that unjustly advantage a party in clear violation of the statute to the disadvantage of law-abiding retailers, wholesalers and manufacturers.

The Iowa Wholesale Beer Distributors Association would like to thank Iowa ABD for engaging members of the wholesale distribution industry as it reviews the importance of 123.45 and tied house protections. It is the sincere belief of the wholesaler community that the alcoholic beverages industry, consumers and the state of Iowa are greatly improved by adopting and supporting strong and clear tied house protections, including those in 123.45.

Thank you for your time and consideration of these comments.

Sincerely,

The Iowa Wholesale Beer Distributors Association

cc: Stephen Larson, Administrator
Stephanie Strauss, Executive Officer II

ANHEUSER-BUSCH



*One Busch Place
St. Louis, Missouri 63118-1852 U.S.A.
314-577-2000*

January 10, 2018

Lolani Lekkas
Compliance Officer,
Iowa Alcoholic Beverages Division
1918 Hulsizer Rd.
Ankeny, IA 50021

Thank you for the opportunity to submit comments on appropriate regulation of beer, wine and liquor given an ever-changing marketplace. Anheuser-Busch is supportive of the three-tier system as it has evolved in Iowa, and as a general characterization, finds the various statutes and rules clear, reasonable and accommodating of a robust and competitive marketplace.

With reference to Iowa Code Chapter 123.45, related to tied house issues, we support the language that is currently in force and find it to be clear, effective and necessary to the three-tier system. That said, we would support efforts by the ABD to work with industry participants to understand and navigate any situations that arise given the increasing complexity and incredibly dynamic state of the alcohol industry.

Sincerely yours,

Chris Williams
Vice President
Anheuser-Busch



Dorothy O'Brien <wideriverwinery@gmail.com>

Comments on Iowa Code 123.45

1 message

Dorothy O'Brien <wideriverwinery@gmail.com>
To: Lekkas@iowaabd.com

Wed, Dec 20, 2017 at 12:07 PM

Dear Mr. Larson:

Thanks for your continuing commitment and efforts to modernize our system for regulating alcohol manufacturing, distribution and sales. I am writing as a member of the "blended" 3-tier system, a native winery that manufactures, self distributes and retails its own productions.

We continue to seek a legal resolution that would allow us to sell wine by the glass at our off site tasting rooms. We have two additional locations, in LeClaire and the Village of East Davenport. These additional locations allow us to reach more people than our beautiful but remote rural winery. This is especially true in winter months. We have found that our customers at our Davenport location are more interested in wine by the glass than making the commitment to a whole bottle. They don't want to lug an unfinished bottle on their shopping trip and we certainly don't want to encourage over consumption.

We are also very interested in a level playing field with our distillery and brew pub friends who can now serve by the glass. In fact, our LeClaire neighbor Green Tree Brewery, buys our wine and sells it by the glass, while we are not able to do so even though it's our wine and we are right down the street.

We do not see anything inconsistent with our request and Iowa Code 123.45 (c) and (d). We have an ownership interest only in our own winery and not in any other entities in the 3-tier system. Our ability to sell retail does not involve other retail permits or licenses.

Finally, allowing us to sell wine by the glass at additional locations will not promote the evils of tied houses that were the targets of the original 3-tier system. The ABD and its legislative and administrative system have many safeguards in place to guard against over consumption, corruption and price fixing.

Thanks for your consideration of allowing native wineries to sell wine by the glass at additional locations where manufacturing does not occur.

Dorothy O'Brien
Wide River Winery, LLC
1776 Deer Creek Road East
Clinton, IA 52732
563 340 5678
WIDERIVERWINERY.COM



America's Beer Distributors • www.nbwa.org

January 12, 2018

Lolani Lekkas
Compliance Officer
Alcohol Beverage Division
State of Iowa
1918 SE Hulsizer Road
Ankeny, IA 50021

Dear Ms. Lekkas,

Thank you for your letter and the opportunity to comment on the laws governing the alcohol industry in Iowa. The National Beer Wholesalers Association (NBWA) represents the interests of over 3,000 beer distribution facilities across the country including 54 in Iowa. Beer distributors employ 135,000 hard-working Americans in good paying jobs that invest in communities including over 1,300 in Iowa.

Consumers Win Under the Current Alcohol Regulation System

The Nielsen Company has noted that there is more consumer choice in alcohol than any other consumer product they measure. This tremendous victory for the consumer is a result of the carefully crafted system that empowers consumer choice over the narrow interests of individual players in the alcohol industry to dominate the marketplace via exclusionary practices.

The alcohol marketplace is characterized by "consumer pull" rather than "supplier push." This happens because alcohol suppliers of all sizes from Iowa to India have access to scaled distribution. Independent retailers are not in debt to the whims of the suppliers or distributors that service them. Retailers decide on what products to sell based on what the consumers demand and working with local marketing, not some "side deal". Whether it is Iowa craft beer or Mexican imported beer or domestic premium, the Iowa retailer has access to an unprecedented variety of beers at different price points due to a system that does not encourage vertical foreclosure of rivals via state laws.

As Iowa looks at alcohol laws, it must remember the historical reality of alcohol's past and the problems for the consumer and society of allowing the tiers of the industry to blur.

History of Alcohol Regulation

The United States' desire to ultimately pass the 18th Amendment, which banned alcohol, reflected societal frustrations with a variety of issues relating to alcohol including opposition to any alcohol consumption on religious and moral grounds. Other factors including the failure of previous federal legislation to protect local regulatory rights and sensitivities as well as the growth of increased political advocacy. However, a common unifying factor of all these voices was the concern with industry practices known as the "tied-house" or saloon.

As noted in the seminal alcohol treatise *Toward Liquor Control*; "the 'tied-house' system had all of the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the

community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence.”¹

The Anti-Saloon League (ASL) was a revolutionary single subject political action organization that was able to highlight the saloon/ tied-house system as the embodiment of all that was wrong with the alcohol industry. The advocacy of the ASL and others for passage of the 18th Amendment strongly highlighted the problem of the tied-house alcohol industry. Recognizing this problem was an important subtext for the regulatory world post 21st Amendment passage. The nation in 1933 understood that alcohol prohibition was a failure, however they recognized that the country should not go back to the old ways of selling alcohol.

Upon passage of the 21st Amendment, President Franklin Delano Roosevelt issued a proclamation in which he noted, “I ask especially that no State shall by law or otherwise authorize the return of the saloon either in its old form or in some modern guise. The policy of the Government will be to see to it that the Social and political evils that have existed in the pre-prohibition era shall not be revived nor permitted again to exist.”² States and the federal government executed that charge from President Roosevelt.

The influential work of the Fosdick and Scott research in *Toward Liquor Control* greatly shaped how alcohol regulation should be set up in a post-Prohibition world. Items such as the preference for state control systems over licenses, lower taxation to drive out bootlegging, and different rules for lower strength products of alcohol were all examined. However, the lessons on the need for separating the tiers to prevent the abuses of the tied-house system remain just as relevant to debates in Iowa today and I encourage the Iowa ABD to consider the book’s timeless suggestions.

Following passage of repeal in 1933, states and the federal government utilized the guidance of *Toward Liquor Control* to set up alcohol regulatory systems that have evolved into today’s systems. Federally, the Federal Alcohol Administration Act (FAA Act)³ was passed in 1935 and this law and its regulations contains prohibitions on cross-tier ownerships and trade practice laws governing relations between the tiers.

The interface of three-tier laws and the laws on prohibited interests act to separate the tiers as independent businesses. To prevent vertical foreclosure and harm consumer choice, prohibited interest statutes are needed. All too often there are claims that a specific regulatory change will not affect the marketplace but these ideas are just a new form of the classic game Jenga. The recurring argument is that “removing this regulatory roadblock won’t hurt,” but like the Jenga game, all pieces are interdependent. The start of the block removal is the beginning of the end of the Jenga game and so it is with self-serving changes to working consumer protection/prohibited interests laws.

Right now, prohibited interest laws protect competition and the consumer by preventing a conflation of industry interests. Each tier seeks to maximize its marketplace advantage within its tier. By allowing an

¹ *Toward Liquor Control* (republished by the Center for Alcohol Policy)

² <http://www.presidency.ucsb.edu/ws/?pid=14570>

³ 27 USC 201 et.seq

entity to serve in two tiers, this is harmed. Traditional "pay-to-play" laws are not sufficient to overcome cross-ownership practices.

I additionally note that the Department of Justice (DOJ) recently identified some concerns with prohibited interest in its review of the biggest beer merger ever. The DOJ undertook an extensive review and they decided to allow the deal to proceed with several important caveats to ensure consumer protection. In approving the deal to allow the world's largest brewer (ABInBev) to buy the world's #2 brewer (SABMiller) the DOJ created conditions for the American market to prevent the vertical collapse of the industry. Specifically, the DOJ put restrictions on ABI ownership of distribution and notice provisions upon their buying of other craft breweries.⁴

Whether Iowa Code Chapter 123.45 (1) c & d are clear and subject to efficient, predictable and sustainable regulation?

Iowa Code Chapter 123.45(1) C and D state:

"a person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee or agent of such a person, shall not do any of the following:

c. Directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.

d. Hold a retail liquor control license or retail wine or beer permit."

Similarly, the related Iowa Administrative Code section 16.41 is clear.⁵ It puts more detail on the large wall between the retailer and other tiers. The intent is clear that there should be no ties and the code attempts to identify some potential "work-arounds" and cut them off such as industry loans or guarantees. It inherently recognizes that these deals are not done out of charity, but that there is an expectation of favorable treatment.

The answer to this question is "Yes." The legislation and code are clear. The section is also subject to efficient, predictable and sustainable regulation. A "bright line" test such as the Iowa legislation is much easier to enforce as an identified, objective standard than a murky, subjective standard that can frustrate the goals of the legislature and harms the consumer. It creates predictability for both industry and the regulators.

⁴ See <https://www.justice.gov/atr/file/877596/download> Defendant ABI shall not acquire any equity interests in, or any ownership or control of the assets of, a Distributor if (i) such acquisition would transform said Distributor into an ABI-Owned Distributor, and (ii) as measured on the day of entering into an agreement for such acquisition more than ten percent (10%), by volume, of Defendant ABI's Beer sold in the Territory would be sold through ABI-Owned Distributors after such acquisition

⁵ Iowa Administrative Code 185—16.41 (123) Interest in a retail establishment. 16.41(1) An industry member is prohibited, directly or indirectly, from: a. Acquiring or holding a partial or complete ownership interest in a retail establishment. b. Acquiring or holding an interest in the real or personal property owned, occupied or used by the retailer in the conduct of the retail establishment. c. Acquiring a mortgage on the real or personal property owned by the retailer. d. Guaranteeing any loan or paying a financial obligation of the retailer, including, but not limited to, personal loans, home mortgages, car loans, operating capital obligations, or utilities. e. Providing financial, legal, administrative or other assistance to a retailer to obtain a license or permit. (emphasis supplied)

The intent of the legislature and the words they chose must be given their effect. The language is unambiguous. It uses the term "shall not" which is mandatory, not permissive.

Finally, this section is sustainable. The state and federal laws seeking to know who is involved in the alcohol business are nothing new. These laws were a central focus of the original laws and they serve consumer interests by keeping tiers separate and having the proverbial "cards on the table" when it comes to market participants' entries. The fact that there are new capital investment models and some entities are doing well enough to dabble in other tiers of the alcohol businesses, is no reason to tear down the existing system.

Iowa courts have recognized this clear reading of the law. The Iowa Supreme Court decision in *Auen v. Alcoholic Beverages Division* noted that the "legislature drew a bright-line rule defining the allowable relationship between a manufacturer, wholesaler or other entity in the chain of distribution and the retailer of these beverages." The Iowa legislature has not revisited or loosened this interpretation nor should the Iowa ABD.

Chapter 123.45 and the related administrative rules make it clear that an entity that manufactures alcoholic beverages is clearly prohibited from being issued a retail permit to sell alcoholic beverages.

Please comment on Iowa's three-tier system with particular focus on direct or indirect ownership related issues and tied-house concerns.

As a national association, NBWA is familiar with the state regulations across the states. Iowa is in good company along with most of states in licensing the three tiers of the alcohol business and providing transparency and accountability for their licensing and operations.

The government interest is on two levels. First, knowing who is seeking a permit and who the operators in this regulated industry will be goals such as criminal background checks, taxation and competition. Second, laws governing the interaction between different tiers to further competition. Both prongs serve the policy objectives identified in 1933. Both prongs allow consumers a vibrant and creative marketplace of diverse goods in 2018.

Federally, the FAA Act requires anyone seeking to be a distillery, winery, importer or wholesaler to obtain a federal basic permit.⁶ 27 USC 203 notes that every industry member needs a permit "in order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages". The regulations relating to permits delve deeper into interests. The Treasury Department's Alcohol Tax and Trade Bureau (TTB) requires applicants to be free of criminal records, able to operate their business to comply with federal law and not operate in violation of state law (27 CFR 1.24). The TTB requires disclosure on who is running the businesses and if there are changes in ownership, management or control (27 CFR 1.27 and 1.42). Forms must be filed under oath (27 CFR 1.56).

The FAA Act also contains relevance as 27 USC 205 outlines the unfair competition and unlawful practices provisions. This section outlines the rules related to tied-house and related laws governing

⁶ Retailers do not have to obtain federal basic permits. Brewers were exempted from this requirement in 1933 so in a beer transaction, only a beer distributor has a federal basic permit that is subject to federal permit sanction.

transactions between the three tiers of the alcohol industry. Further there are many federal regulations (27 CFR 6.1-11.46) further specifying the laws governing differences in the tiers.

The federal law states that "it is unlawful for an industry member to induce, *directly or indirectly*, any retailer to purchase" in violation of the tied-house section⁷ (emphasis supplied). The federal regulations, like Iowa law, note that indirect interest is as problematic as direct.⁸

It is critically important for Iowa to have on the books laws related to trade practices between suppliers, wholesalers and retailers. The FAA Act only allows TTB jurisdiction over a beer sale if there is a similar state law. If Iowa has no similar state beer law, the TTB cannot be involved. For this reason, a strong Iowa regulatory scheme that has law similar to the federal law allows TTB jurisdiction. However, Iowa should not rest there. As noted earlier, only a beer distributor has "skin in the game" on a beer sale from the federal level. At the state level, Iowa should make sure brewers, their agents, and retailers also have "skin in the game" via licenses and can be sanctioned for trade practice violations. This is already the case for wine sales in Iowa.

As marketplace conditions and business opportunities change, how have tied-house regulations and the three-tier system impacted your business?

The consumers win by the enactment and enforcement of tied-house laws. As a result, consumer demand is a bottoms-up phenomena that allows retailers and distributors to partner with the wide variety of breweries to get consumers the beer they want at the price they want.

The data speaks for itself. There are over 6,000 breweries in the United States and many more globally. The growth in craft and imported beers is important for the consumer experience and the ability to grow a brand is vital to brewers and distributors and retailers.

This growth in beer producers is great, but the regulatory challenge must be coupled with an industry reality, the overall consumption of beer is going down. As a result, there are more and more industry participants fighting over a smaller piece of the proverbial pie. It is more important than ever that the clear rules of Iowa be enforced to avoid the temptation of failing business models that seek to tilt the current level playing field in their direction and collapse the system. Industry participants should win on their quality and marketing, not their clever lawyering to double dip in the three-tier pool.

The tied-house system has been critical for beer distributors and other industry partners to know the rules of the road. They can invest, innovate, and take millions in capital expense risk knowing that the regulated industry will be consistent and not changed randomly. Beer distributors are proud to be part of the \$350 billion beer industry.

Explain your view of tied-house regulation and the three-tier system as it exists today.

NBWA views the three-tier system and tied-house prohibitions as absolutely essential to responsible alcohol regulation in today's highly competitive alcohol beverage industry. The same motivations and

⁷ 27 CFR 6.21

⁸ 27 CFR 6.32

historical forces that led to the pre-18th Amendment abuses could easily return if the country, or Iowa, gets historical amnesia. Alcohol is a unique product that the Constitution notes as “intoxicating” and that government health agencies have strong concerns with its abuse.⁹

A good overview of the challenges on prohibited interest laws across the country was produced by the Center for Alcohol Policy. In a paper for the Center, Jessica Starns, former executive counsel to the Louisiana Office of Alcohol and Tobacco Control, researched and compiled a report entitled “The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions.” There are many benefits to these issues that this paper can help explain and I encourage Iowa to review this document.

The system works, the system is not inflexible. How alcohol is sold in Iowa is different in 2018 than it was in 1968 and how it will be in 2058. However, the core principles of separation of tiers remain because they are timeless and structural for the system. There were over 1,400 changes to state alcohol laws and regulations over the past 5 years. Laws that are pro consumer, pro Iowa jobs, pro public health and pro orderly marketplace should be the focus, not ones created for narrow purposes.

If you had the opportunity to change tied-house regulation and the three-tier system in Iowa with regard to direct and indirect ownership and cross tier related issues, how would you change the law?

For the most part, Iowa has the balance right for consumers, public health and the regulated industry. Clear, crisp laws and interpretation of these laws can be utilized to provide clarity for all and enforce an orderly marketplace.

The prohibited ownership applying to retail is a clear bright line rule and the same should apply to ownership of other tiers. Suppliers should not own wholesalers or retailers, directly or indirectly. And the same is true for wholesalers or retailers owning other tiers. Ten states have recently clarified the section of their alcohol code to ensure that large brewers do not own beer distributors including neighboring states of Illinois, Nebraska and Wisconsin. As mentioned before in footnote 4, the Justice Department also noted competitive concerns and their consent order with ABI curtailed their ability to own distribution. Just as a conjoined retailer interest with a supplier or distributor tilts the economic self-interest towards exclusivity and disorderly marketing, so does ownership of scaled distribution by a brewer who is only interested in providing distribution of scale to the supplier’s brands and forcing higher costs onto all other rivals.

The state has many tools to determine the right mix for its regulation. Residency clauses can be considered.¹⁰

An additional area of focus for Iowa would be the issue of trade practice laws. As noted earlier, in a federal beer transaction, the TTB only will investigate if there is a similar state law. State-level confusion about if there is a similar state law for issues on tied-house, commercial bribery, consignment

⁹ See for example, <https://www.cdc.gov/alcohol/index.htm>

¹⁰ The 8th Circuit has recently upheld a residency requirement to receive an alcohol wholesale permit in Missouri. See Southern Wine and Spirits vs. Lacy (8th Cir. 2012) However, the United States Supreme Court has made clear that laws that favor in state alcohol producers at the expense of out of state producers is a violation of the Dormant Commerce Clause. Granholm v. Heald (2015)

sales, and exclusive outlet should be eliminated for the industry. And closely related, in a federal beer transaction the TTB only has real jurisdiction over the beer wholesaler and not the brewer or retailer. Iowa law must make it clear that in a beer transaction, retailers, brewers and any other third party involved in the sale must also be licensed and can be suspended for a trade practice violation.

What concerns with any changes to tied-house regulation and the three-tier system would you want our division to be aware of as we conduct the study?

As mentioned before with the Jenga game analogy, it is tempting to seek to move one piece and convince oneself that there is no impact. That is not true, the game of Jenga is a game designed to collapse whereas the law of tied-house is to prevent the harms of collapse. The law of unintended consequences clearly applies here, especially with historical evidence of the dangers the law seeks to prevent.

Moving to allow cross-tier ownership puts economic incentives in one company to disrupt those in other tiers and gain competitive advantage. It goes directly against the warning of President Roosevelt when he celebrated the repeal of Prohibition.

Moreover, the history of states trying to protect in state producers at the expense of out-of-state suppliers is rife with constitutional challenges. The Dormant Commerce Clause limits the ability of states to favor in state producers of alcohol (although there is likely more flexibility for regulation of distributors and retailers).

Conclusion

The state of Iowa has a great system and it should be commended for its transparency and openness in this review. Likewise, those engaged in the alcohol business must be transparent and accountable to further the legislative goals.

We thank you for the opportunity for input on these critical questions. Feel free to contact me if you have any questions or desire additional information.

Sincerely,



Paul Pisano
Senior Vice President and General Counsel

cc: Stephen Larson, Administrator
Stephanie Strauss, Executive Officer

January 31st, 2018

Mr. Steve Larson
Administrator
Iowa Alcoholic Beverages Division
1918 SE Hulsizer Road
Ankeny, IA 50021

Dear Steve:

We are writing to submit comments on the specific issues currently under consideration by the Alcoholic Beverage Control Study. Our comments were submitted to the Iowa Wine Growers Association, but were omitted from their final submission and we feel it is important that our opinion as a native wine license holder also be recognized. Our comments have been more thoroughly reviewed and revised to best reflect our thoughts to be shared directly with you.

Our main concern with the issues being addressed is the need to close the Additional Location Loophole, which is currently allowing wineries to operate premises outside of their licensed location year-round, based on a privilege that from our understanding was created solely for special occasions. We feel this not only violates the intentions of the regulation, but also sells short the culture of the industry – one based in emphasizing only the best of what this state has to offer in agri-tourism.

1. We do believe the language in Chapter 123.45 subsection 1 is ambiguous. Specifically, in paragraph C, 'interested in the ownership, conduct, or operation of the business of another licensee or permittee'. Interest happens in varying degrees and seems very difficult to regulate. An employee may start as 'just an employee' and quickly find themselves passionate about the particular brand, creating bias and an un-level playing field in the second licensee's retail location. Paragraph D seems very clear. As a person engaged in the business of manufacturing, bottling, and selling native wine, I don't believe I should be able to hold a license other than the one allowed at my manufacturing location. There are a variety of other options available to us if we would choose to network with other retail establishments to sell and serve our wines.
2. Direct ownership means having a personal stake in day-to-day operations. Indirect ownership may mean a 'silent' partner or more 'behind the scenes' supervisory role. We do not believe they should be treated differently, as both have an obvious bias toward success of the business. We believe 'a person engaged in the business' must have a direct personal interest and direct involvement in any of these activities listed. We do believe there are varying degrees of 'engaged in', and that they should be regulated differently, though we see that this may be difficult because 'engaged in' happens quite loosely in varying degrees.
3. We enjoy participating in and support the 'blended three tier system' that allows us as a manufacturer to retail from our manufacturing location, as well as distribute to other license holders to retail our wines. We have built many great relationships with local grocers and gift shops who support our business by selling our wines, along with many other Iowa Wines, to customers and more convenient times and locations that we can provide at the winery. We also work with several restaurants and bars who serve our wines by the glass – another great opportunity for our loyal customers to enjoy a glass of our wines with great local food. We do

not feel at this time that our business has been limited because of tied-house regulation.

4. As a member of the wine industry, I am less familiar with the laws related to beer and spirits manufacturers, but believe the blended three-tier system that we participate in works well for our industry and that all industries should have equal rights as they relate to distribution and retailing of products.
5. No comments.
6. Our main concern is that we feel the need to preserve the culture of the Iowa Wine Industry. Iowa is a rural state by nature and the agri-tourism aspect of the business - allowing people to come out to the vineyard and see our process is part of our (and so many other wineries') draw and marketing strategy. Allowing wineries to open multiple locations degrades the experience to a level we feel is unacceptable. We also feel that the loophole allowing 365 day Additional Location Permits is also unacceptable. It abuses the privilege and completely goes against the intention of the system. We would propose limitations on the Additional Location Permit to restrict the days per week a winery could operate under this extension or to forbid the permitting at other locations also owned by the winery or related parties.
We still believe in the tied-house system, even in the 21st century, because it still prevents overly aggressive marketing practices that may allow large suppliers to sell in ways unavailable to smaller competitors. As a small-but-growing young business in this state, we're simply asking for a level playing field on which to grow our business and our customer base.

Thank you for your time and consideration of these issues. We appreciate the opportunity to submit our thoughts and opinions.

Respectfully,

Preston and Amber Gable

Backcountry Winery