

# Regulating Alcohol Delivery by Third-Party Providers in Iowa

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*ABSTRACT: Since the repeal of Prohibition in 1933, most states have relied on some form of a three-tier system to regulate the manufacture, distribution, and sale of alcohol. With the rapid changes in technology, e-commerce, and consumer habits today, the use of unlicensed third-party providers (“TPPs”) to solicit and deliver alcohol orders on behalf of licensed retailers threatens to upend alcohol regulation and the three-tier system. This would be undesirable because it might frustrate several goals of alcohol regulation such as protecting public health and safety, ensuring a fair and orderly alcohol market, and holding entities involved in the alcohol industry accountable to the public. Examining Iowa Code section 123.46A, Iowa’s third-party alcohol delivery law that was enacted in July 2021, this Note argues that more effective regulation of TPP activity can be achieved by: (1) issuing TPP licenses, (2) requiring licensed retailers to exercise control over every part of the transaction facilitated by TPPs, and (3) amending Iowa’s tied-house law to prohibit manufacturers and distributors from acquiring an economic interest in TPPs.*

INTRODUCTION .....	446
I. HISTORICAL DEVELOPMENT OF ALCOHOL REGULATION AND TPP DELIVERY LAWS .....	448
A. HISTORY OF ALCOHOL REGULATION IN THE UNITED STATES.....	449
1. Pre-Prohibition and the Temperance Movement.....	449
2. The Eighteenth Amendment and Prohibition .....	450
3. The Twenty-First Amendment .....	451
4. The Three-Tier System .....	454
B. COVID-19 AND STATE ALCOHOL TO-GO AND DELIVERY LAWS.....	455

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II. COMPARING IOWA’S TPP REGULATIONS WITH OTHER STATES’ LAWS .....	457
A. IOWA’S THREE-TIER SYSTEM.....	457
B. IOWA CODE § 123.46A AND THIRD-PARTY DELIVERY .....	460
C. OTHER STATES’ APPROACHES TO THE TPP PROBLEM .....	461
1. California .....	461
2. New York.....	461
3. Texas .....	462
4. D.C.....	463
D. PROBLEMS WITH IOWA’S CURRENT FRAMEWORK.....	464
1. No TPP License Requirement.....	464
2. No Tied-House Restrictions for TPPs.....	465
3. Current Law Grants Manufacturers Extra Retail Option .....	465
III. PROPOSED IMPROVEMENTS TO IOWA’S TPP DELIVERY LAWS.....	466
A. TPP LICENSES.....	466
B. GRANTING RETAILERS MORE CONTROL OVER ORDERS.....	466
C. APPLYING TIED-HOUSE RESTRICTION TO TPPS.....	467
CONCLUSION .....	467

## INTRODUCTION

On May 10, 2021, Iowa Governor Kim Reynolds signed into law House File 766, which makes it legal for licensed alcohol vendors in Iowa to deliver alcohol to consumers’ homes via third-party providers (“TPPs”).<sup>1</sup> The law, which took effect July 1, 2021,<sup>2</sup> marks a recent trend among several states toward relaxing alcohol regulation laws in an effort to stimulate economic activity during the COVID-19 pandemic.<sup>3</sup>

There has been “a[n] [incredible] proliferation of startup” third-party delivery apps in the past decade ranging from grocery and food deliveries to

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1. Elijah Decious, *New Iowa Law Allows Cocktails to Be Brought to Your Door*, GAZETTE (July 1, 2021, 10:12 AM), <https://www.thegazette.com/news/new-iowa-law-allows-cocktails-to-be-brought-to-your-door> [<https://perma.cc/ND43-7YQE>]; Becky Phelps, *New Iowa Law Allows for Expanded Home Delivery of Alcohol*, KCRG (July 3, 2021, 12:12 AM), <https://www.kcrg.com/2021/07/03/new-iowa-law-allows-expanded-home-delivery-alcohol> [<https://perma.cc/96CU-8ZBP>]; *Reynolds Signs Law Allowing Third-Party Services to Deliver Alcohol in Iowa*, KCCI (May 10, 2021, 10:28 PM), <https://www.kcci.com/article/reynolds-signs-bill-allowing-alcohol-delivery-in-iowa/36380885> [<https://perma.cc/Q7NQ-4UJX>].

2. Decious, *supra* note 1; Phelps, *supra* note 1.

3. See Ron Ruggless, *Pandemic Fuels Widespread Changes in Alcohol Laws*, NATION’S REST. NEWS (June 24, 2020), <https://www.nrn.com/restaurants-ready/pandemic-fuels-widespread-changes-alcohol-laws> [<https://perma.cc/CZN7-57ZP>].

household tasks.<sup>4</sup> During the COVID-19 pandemic, revenue generated from food delivery apps, like DoorDash and UberEats, more than doubled in 2020 compared to the previous year.<sup>5</sup> Today, with just about every commodity imaginable becoming available via e-commerce, adding alcohol to the list makes sense. Indeed, specialized alcohol delivery apps like Drizly have already been around for several years,<sup>6</sup> and food delivery apps like DoorDash have expanded their services to include alcohol deliveries in states that allow it.<sup>7</sup> These delivery apps, also known as TPPs,<sup>8</sup> normally take customer orders from a mobile app, transmit the order to the retailer, pick up the order from the retailer, and deliver it to the customer's home.<sup>9</sup> However, because these TPPs are essentially operating without licenses in a highly regulated industry, states that have implemented third-party alcohol delivery laws raise questions regarding the permissible scope of TPP activities and how they fit into the three-tier system of alcohol regulation.<sup>10</sup>

Iowa, like most states, uses a three-tiered system to regulate the alcohol industry.<sup>11</sup> The first tier consists of manufacturers, like breweries and wineries, that create alcoholic beverages.<sup>12</sup> Manufacturers then sell their products

4. Alexa Bordner, Note, *How New York Drinks: If and How Third-Party Providers Can Integrate with the Three-Tier System*, 83 BROOK. L. REV. 251, 263 (2017).

5. Levi Sumagaysay, *The Pandemic Has More than Doubled Food-Delivery Apps' Business. Now What?*, MARKET WATCH (Nov. 27, 2020, 7:00 AM), <https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169> [<https://perma.cc/5SCS-KX9R>] (reporting that DoorDash, UberEats, GrubHub, and Postmates "raked in roughly \$5.5 billion in combined revenue from April through September [2020], more than twice as much as their combined \$2.5 billion in revenue during the same period last year").

6. *About Us*, DRIZLY, <https://drizly.com/about-us/e-594c4a6ff3342911> [<https://perma.cc/P79L-WC3R>].

7. Victoria Campisi, *Delivery Landscape Changing as DoorDash, Rivals Go All in on Alcohol*, FOOD INSTITUTE (Sept. 24, 2021), <https://foodinstitute.com/focus/delivery-landscape-changing-as-doordash-rivals-go-all-in-on-alcohol> [<https://perma.cc/Z27B-3MF9>] ("DoorDash plans to deliver alcohol to all 50 states and already has licenses to deliver it in 20 states and D.C.").

8. Bordner, *supra* note 4, at 251.

9. See Evan W. Saunders, Note, *It's 1919 Somewhere: What Tennessee Wine & Spirits Retailers Association v. Thomas Means for the National Hangover of the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Legalization of Intoxicating Substances*, 86 BROOK. L. REV. 261, 282–83 (2020).

10. See Bordner, *supra* note 4, at 253–54 ("TPPs purposely refrain from identifying as 'disruptor[s]' in order to avoid the inference that their businesses overstep the privileges of licensees, but they are arguably engaging in activities that are an integral part of the three-tier system." (alteration in original) (citation omitted)); Alana Lenore Joyce, Note, *Wine Online: Fermenting the Role of Third Party Providers from California to New York*, 48 U.C. DAVIS L. REV. 2035, 2037 (2015) ("Currently, TPPs need not obtain a license to maintain websites or provide compliance services. Yet TPPs arguably engage in activities for which a license is mandated: the sale and direct shipment of wine." (footnotes omitted)).

11. STATE OF IOWA: ALCOHOLIC BEVERAGES DIV., ALCOHOLIC BEVERAGE CONTROL STUDY, 5–9 (2018) [hereinafter ABD STUDY], <https://www.legis.iowa.gov/docs/publications/DF/967633.pdf>.

12. *Id.*

to entities comprising the second tier: distributors.<sup>13</sup> Distributors in turn resell these products to retailers, the third tier.<sup>14</sup> Finally, retailers sell these products to consumers.<sup>15</sup> Under a three-tier system, no member belonging to one tier may engage in activities reserved for another tier or express any ownership interest in an organization belonging to a different tier.<sup>16</sup> With a few exceptions, like on-premises consumption for small breweries, only retailers are allowed to sell directly to consumers.<sup>17</sup>

Effective alcohol regulation should be able to strike a balance between the state's interests in securing public health and safety while collecting revenues and the private economic interests of alcohol manufacturers, distributors, and retailers. However, allowing TPPs to participate in the alcohol industry in an unregulated fashion threatens to undermine many of these interests.<sup>18</sup> This Note will first argue that to more effectively regulate TPPs in the context of alcohol deliveries in Iowa, state officials should create and require TPP licenses. These licenses are necessary to ensure TPP compliance with mandated alcohol delivery regulations, accountability in the event of a violation, the facilitation of revenue generation through licensing fees, and the contribution to a stable and orderly alcohol market. Second, this Note will suggest amending Iowa Code section 123.46A to require licensed retailers to exercise greater control over alcohol orders facilitated by TPPs.<sup>19</sup> Finally, this Note will argue that Iowa's tied-house law, which prohibits alcohol manufacturers and distributors from holding any ownership or business interest in alcohol retailers,<sup>20</sup> should extend to TPPs in order to better fit TPPs within the three-tier framework.

Part II of this Note will examine the history of alcohol regulation in the United States from the pre-Prohibition era to today. Part III will examine Iowa's three-tier system and compare its third-party alcohol delivery statute with other states' advisory rulings on TPPs and identify problems with Iowa's TPP statute. Part IV will propose two solutions to these problems which include issuing TPP licenses and applying tied-house restrictions to TPPs.

## I. HISTORICAL DEVELOPMENT OF ALCOHOL REGULATION AND TPP DELIVERY LAWS

Laws governing the distribution and sale of alcohol consist of both state and federal regulations.<sup>21</sup> First, this Part will describe the historical development of alcohol laws in the United States. The first historical phase that involved

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 9.

17. *Id.* at 10.

18. *See id.* at 5–10.

19. *See* IOWA CODE § 123.46A (2022).

20. *Id.* § 123.45.

21. *See infra* Section II.A.

efforts to regulate alcohol began in the mid-nineteenth century with local sales bans brought about by the Temperance Movement.<sup>22</sup> The second phase was marked by continued attempts to limit alcohol consumption culminating in the ratification of the Eighteenth Amendment in 1919, which marked the beginning of the third phase, the Prohibition era.<sup>23</sup> The last historical development consists of the end of Prohibition with the ratification of the Twenty-First Amendment and the adoption of the three-tier system by most states.<sup>24</sup> Next, this Section will examine the Supreme Court's Twenty-First Amendment jurisprudence, and recent developments in the alcohol industry that challenge the three-tier system, notably direct shipping and third-party provider delivery laws.<sup>25</sup>

#### A. HISTORY OF ALCOHOL REGULATION IN THE UNITED STATES

Alcohol regulation in the United States can generally be separated into three periods: the pre-Prohibition era, the Prohibition era, and the post-Prohibition era. The following Sections will examine the legal developments in alcohol regulation during each of these periods. This Section will also examine how the Supreme Court's interpretation of the Twenty-First Amendment changed from granting states broad authority to pass alcohol regulations to one narrowed by the Commerce Clause's prohibition of states to impede interstate commerce.

##### 1. Pre-Prohibition and the Temperance Movement

Since colonial times, Americans have had a reputation for being heavy drinkers.<sup>26</sup> Data suggests that throughout the nineteenth century, Americans on average drank twice as much as they do today.<sup>27</sup> Alcohol consumption was blamed for a range of societal ills, from theft and domestic violence to "diverted incomes meant for subsistence."<sup>28</sup> By the beginning of the twentieth century, alcohol was also already known to cause diseases such as "cirrhosis of the liver and chronic alcoholism [at very] high levels."<sup>29</sup>

Overconsumption of alcohol during the pre-Prohibition era is largely thought to have been encouraged by the popular "tied-house" saloons of the

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22. See *infra* Section II.A.1.

23. See *infra* Section II.A.2.

24. See *infra* Sections II.A.3, II.A.4.

25. See *infra* Section II.B.

26. W. J. RORABAUGH, PROHIBITION: A CONCISE HISTORY 6 (2018) ("The earliest European immigrants to the thirteen colonies that became the United States were hearty drinkers. That fact is not surprising, since Europe, more than any other continent, embraced heavy alcohol consumption."); Saunders, *supra* note 9, at 261.

27. Richard Francis Hamm, *Origins of the Eighteenth Amendment: The Prohibition Movement in the Federal System, 1880–1920*, at 2 (1987) (Ph.D. dissertation, University of Virginia).

28. *Id.* at 3.

29. Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 214 (2015).

nineteenth century.<sup>30</sup> These were retail establishments often owned by breweries.<sup>31</sup> Without the substantive alcohol regulations we now have, alcohol manufacturers of the late nineteenth century wielded considerable influence over the retail sale of their products.<sup>32</sup> These manufacturers often owned saloons that exclusively sold the beverages made by the manufacturers.<sup>33</sup> Tied-house saloons also promoted overconsumption by offering a free meal with the purchase of beer and further established poor reputations for violating restrictions, like selling alcohol to minors.<sup>34</sup>

The problems associated with the largely unregulated alcohol industry led several religious, social, and political groups to advocate for Prohibition throughout the nineteenth century, or what is now referred to as the Temperance Movement.<sup>35</sup> Resistance to alcohol consumption began in the United States as early as the 1820s from Protestant religious groups seeking to convince Americans to voluntarily abstain from drinking.<sup>36</sup> Later, groups such as the Woman's Christian Temperance Movement and the Anti-Saloon League advocated for legislation banning alcohol at the local, state, and federal levels of government.<sup>37</sup> These later efforts led to the successful passage of local option bans and larger statewide restrictions on the manufacture and sale of alcohol.<sup>38</sup> However, these largely piecemeal and localized bans on the manufacture and sale of alcohol were mostly ineffective in deterring overconsumption of alcohol, as nothing prevented liquor from being brought into dry states from the wet states.<sup>39</sup>

## 2. The Eighteenth Amendment and Prohibition

Aware of the impracticability of locally enforcing alcohol prohibitions, Congress passed the Webb-Kenyon Act in 1913 to address this issue.<sup>40</sup> This Act prohibited the importation of intoxicating liquors from one state to another if doing so would be in violation of the laws of the receiving state.<sup>41</sup> Courts

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30. ABD STUDY, *supra* note 11, at 5; RORABAUGH, *supra* note 26, at 36.

31. RORABAUGH, *supra* note 26, at 36.

32. *See id.* at 36–37.

33. *Id.* at 2, 36–37.

34. *Id.* at 37; Hamm, *supra* note 27, at 2–3.

35. Jessica R. Reese, Note, *A Post-Granholm Analysis of Iowa's Regulatory Framework for Wine Distribution*, 94 IOWA L. REV. 665, 671–73 (2009).

36. RORABAUGH, *supra* note 26, at 2.

37. *Id.* at 3.

38. *Id.*

39. *See* Elias, *supra* note 29, at 214.

40. Reese, *supra* note 35, at 672–73; Saunders, *supra* note 9, at 269.

41. Reese, *supra* note 35, at 672–73; Saunders, *supra* note 9, at 269; Elias, *supra* note 29, at 214–15.

interpreted the Webb-Kenyon Act as excluding interstate transportation of alcohol from protections ordinarily granted by the Commerce Clause.<sup>42</sup>

The efforts of the organizations involved in the Temperance Movement eventually led to Congress passing the Eighteenth Amendment of the U.S. Constitution in 1917, which prohibited “the manufacture, sale, or transportation of intoxicating liquors” in the United States and the importation and exportation of alcoholic beverages in and out of the country.<sup>43</sup> The Eighteenth Amendment was finally ratified by all states in 1919, and Prohibition went into effect a year later.<sup>44</sup>

Although alcohol consumption significantly decreased during Prohibition, new problems came with it.<sup>45</sup> Compliance with Prohibition was not uniform, especially in large urban areas, and enforcement proved to be untenable.<sup>46</sup> Prohibition led to a rise in liquor prices and a drop in the quality of alcoholic beverages.<sup>47</sup> Public support for Prohibition also quickly waned because many people blamed it for the rise in organized crime, as gangs had assumed control of the illicit alcohol market.<sup>48</sup> Even government officials, badly in need of revenue after the Great Depression, began to doubt the wisdom of Prohibition, since it barred their ability to tax a potentially lucrative commodity.<sup>49</sup>

### 3. The Twenty-First Amendment

Due to Prohibition’s growing unpopularity, Congress repealed the Eighteenth Amendment in 1933 with the ratification of the Twenty-First Amendment.<sup>50</sup> Section One of the Twenty-First Amendment repealed the Eighteenth Amendment, and Section Two reads: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>51</sup> Early Twenty-First Amendment jurisprudence interpreted Section Two to grant states broad discretion to regulate alcohol within their borders.<sup>52</sup> In *Board of Equalization v. Young’s Market Company*, decided in 1936, the Supreme Court upheld a California statute that required payment of licensing fees to import beer into the state.<sup>53</sup> The Court acknowledged

42. Reese, *supra* note 35, at 673 (citing *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (1917)); Saunders, *supra* note 9, at 269.

43. U.S. CONST. amend. XVIII; Saunders, *supra* note 9, at 262.

44. RORABAUGH, *supra* note 26, at 54–57.

45. Elias, *supra* note 29, at 215–18; Bordner, *supra* note 4, at 255–57.

46. See Elias, *supra* note 29, at 215; RORABAUGH, *supra* note 26, at 88–89.

47. RORABAUGH, *supra* note 26, at 60–61.

48. Elias, *supra* note 29, at 215.

49. RORABAUGH, *supra* note 26, at 96–98.

50. Elias, *supra* note 29, at 217.

51. *Id.*; U.S. CONST. amend. XXI, §§ 1–2.

52. See Reese, *supra* note 35, at 670–71; Saunders, *supra* note 9, at 271.

53. *Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59, 61–62 (1936).

that “[p]rior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege . . . because the fee would be a direct burden on interstate commerce.”<sup>54</sup> And in *Indianapolis Brewing Company v. Liquor Control Commission*, a 1939 case, the Court upheld a Michigan statute expressly prohibiting the sale of “beer manufactured in a state which by its laws discriminates against Michigan beer.”<sup>55</sup> Despite finding Michigan’s statute retaliatory and discriminatory, since it targeted ten states that restricted the sale of Michigan beer,<sup>56</sup> the Court nevertheless emphasized “the right of a state to prohibit or regulate the importation of intoxicating liquor [a]s not limited by the [C]ommer[ce] Clause.”<sup>57</sup> The effect of these early cases was to grant broad authority to states to fashion their own alcohol laws, even when such regulations discriminated against out-of-state alcohol manufacturers.<sup>58</sup>

However, the decades following these early Twenty-First Amendment cases saw a significant change in the Court’s Commerce Clause jurisprudence granting Congress increasingly expansive regulatory powers.<sup>59</sup> Subsequent Supreme Court decisions retreated from such a broad interpretation of Section Two and eventually held that a state’s power to regulate the transportation and sale of alcohol must be restrained, to some extent, by the Dormant Commerce Clause.<sup>60</sup> The Dormant Commerce Clause is a legal doctrine implied from the Commerce Clause that prevents states from passing “protectionist” legislation that affects interstate commerce, even “when Congress has not acted.”<sup>61</sup> The clash between the Twenty-First Amendment and the Dormant Commerce Clause came to a head in *Bacchus Imports, Ltd. v. Dias*, decided in 1984, where the Court invalidated a Hawaii statute that applied a tax exemption on a local brandy, but not on out-of-state liquor, as violating the Dormant Commerce Clause.<sup>62</sup> The Court rejected the state’s argument “that even if the tax exemption violates ordinary Commerce Clause principles, it is saved by [a broad interpretation of] the Twenty-[F]irst Amendment.”<sup>63</sup> The Court proposed a balancing test to resolve any potential conflicts between the Twenty-First Amendment and the Dormant Commerce Clause by asking “whether the principles underlying the Twenty-[F]irst Amendment are sufficiently implicated by the [statute] to outweigh the Commerce Clause principles that would

54. *Id.* at 62.

55. *Indianapolis Brewing Co. v. Liquor Control Comm’n*, 305 U.S. 391, 392 (1939).

56. *Id.* at 392–93 n.2 (finding that the statute expressly prohibited the sale of beer manufactured in “Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, [and] Washington.”).

57. *Id.* at 394; U.S. CONST. art. I, § 18, cl. 3.

58. *See supra* note 52 and accompanying text.

59. Saunders, *supra* note 9, at 271–72; *see* U.S. CONST. art. I, § 18, cl. 3.

60. Saunders, *supra* note 9, at 272; Reese, *supra* note 35, at 674.

61. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 227–28 (19th ed. 2016).

62. Saunders, *supra* note 9, at 272.

63. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 274 (1984).



otherwise be offended.”<sup>64</sup> Here, the Court found Hawaii’s statute essentially served a protectionist purpose and was not sufficiently related to any recognized purpose of the Twenty-First Amendment, such as promoting temperance.<sup>65</sup>

The Supreme Court once again examined the scope of the Twenty-First Amendment in 2005 as it applied to a new development in the alcoholic beverage industry: direct shipment laws.<sup>66</sup> Direct shipment laws allow manufacturers, mostly wineries, to ship bottles to in-state and out-of-state consumers.<sup>67</sup> In its 2005 decision in *Granholm v. Heald*, the Supreme Court addressed how the Commerce Clause limits states’ rights to regulate alcohol under the Twenty-First Amendment.<sup>68</sup> In *Granholm*, the Supreme Court struck down Michigan and New York laws that allowed direct shipment of in-state wines but prohibited direct shipment of out-of-state wines.<sup>69</sup> Citing *Bacchus* for the principle that state regulatory powers under the Twenty-First Amendment are limited by the Commerce Clause’s nondiscriminatory principle, the Court found that the Michigan and New York direct shipment laws unconstitutionally discriminated against out-of-state wineries.<sup>70</sup> The key takeaway from these cases is that any proposed legislation involving alcohol regulation must not discriminate between in-state and out-of-state entities.

The *Granholm* Court next examined whether the laws “advance[d] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>71</sup> Michigan and New York argued their direct shipment laws advanced two legitimate local purposes: to prevent underage drinking and to collect liquor taxes.<sup>72</sup> The Court rejected both arguments.<sup>73</sup> First, the Court claimed the states did not present enough evidence to establish that allowing direct shipment of out-of-state wines made it easier for minors to obtain alcohol.<sup>74</sup> Second, the Court held there were nondiscriminatory alternative measures the states could have enacted to facilitate tax collection.<sup>75</sup> The *Granholm* Court also affirmed in dicta the constitutionality of the three-tier system in its ruling, describing it as “unquestionably

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64. *Id.* at 275.

65. *Id.* at 276 (observing “the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-[F]irst Amendment, but instead acknowledges that the purpose was ‘to promote a local industry’”).

66. *See* *Granholm v. Heald*, 544 U.S. 460, 493 (2005).

67. *See* Reese, *supra* note 35, at 669; Joyce, *supra* note 10, at 2037.

68. Saunders, *supra* note 9, at 274; Reese, *supra* note 35, at 669.

69. *Granholm*, 544 U.S. at 493; Saunders, *supra* note 9, at 274; Reese, *supra* note 35, at 669.

70. *Granholm*, 544 U.S. at 493; *see* Joyce, *supra* note 10, at 2041–42.

71. *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

72. *Id.*

73. *Id.* at 489–93.

74. *Id.* at 490–91.

75. *Id.* at 491.

legitimate.”<sup>76</sup> *Granholm* stands for the proposition that the Twenty-First Amendment does not allow a state “to discriminate in favor of local producers” and that such discrimination may violate the Commerce Clause.<sup>77</sup> Questions remain as to the applicability and scope of *Granholm*’s decision, which involved direct shipment of wine from a manufacturer to a consumer, to direct shipments involving out-of-state retailers to consumers.<sup>78</sup>

#### 4. The Three-Tier System

Acknowledging the failure of a complete ban on alcohol, policymakers still agreed that some kind of regulation must be implemented following the repeal of Prohibition to prevent the problems of overconsumption associated with the pre-Prohibition era.<sup>79</sup> Still keenly aware of the societal harms attributed to the manufacturer-owned saloons of the nineteenth century, most states adopted a three-tier system shortly after the end of Prohibition to regulate the alcohol industry by preventing vertical integration and the creation of monopolies, thereby encouraging consumption at home.<sup>80</sup> A typical three-tier system consists of manufacturers, distributors, and retailers.<sup>81</sup> The first tier consists of manufacturers like breweries, wineries, and distilleries, who produce alcoholic beverages.<sup>82</sup> The second tier consists of distributors, who purchase alcohol from manufacturers and resell them to the third tier, retailers.<sup>83</sup> Retailers, like bars, restaurants, and liquor stores, then sell alcoholic beverages to consumers.<sup>84</sup>

Under a three-tier system, restrictions are placed on members of each tier to prevent vertical integration, or the “tied-house” saloons of the pre-Prohibition era.<sup>85</sup> These tied-house laws typically restrict a tier member’s activities to those reserved for their tier and prohibit members of one tier to possess an ownership interest in an entity belonging to a different tier.<sup>86</sup> Thus,

76. *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

77. *Id.* at 489; Joyce, *supra* note 10, at 2044.

78. Joyce, *supra* note 10, at 2044 (“Some courts have held that *Granholm*’s holding should be limited to the first tier only . . . because *Granholm* explicitly considered direct shipment from wineries in its analysis and holding. However, other courts have found that *Granholm*’s logic should apply to every tier of distribution . . . because . . . the Twenty-[F]irst Amendment seem[s] to support a broader interpretation.” (footnotes omitted)).

79. See Elias, *supra* note 29, at 215–16; Bordner, *supra* note 4, at 256.

80. Elias, *supra* note 29, at 215–16; see ABD STUDY, *supra* note 11, at 5.

81. Saunders, *supra* note 9, at 282; see, e.g., ABD STUDY, *supra* note 11, at 5.

82. See ABD STUDY, *supra* note 11, at 5–10.

83. See *id.*

84. See *id.*

85. Bordner, *supra* note 4, at 258; Reese, *supra* note 35, at 668; ABD STUDY, *supra* note 11, at 5 (“The aggressive retail sales focus of the manufacturer-owned saloon, which arguably brought about Prohibition, promoted [overconsumption] to the detriment of the consumer in specific and society in general.”).

86. See ABD STUDY, *supra* note 11, at 5.

in a pure three-tier system, the product must pass from the manufacturer to the distributor, from the distributor to the retailer, and finally from the retailer to the consumer.

Following the end of Prohibition, states were also free to choose between becoming license states or control states.<sup>87</sup> Under what is known as a license state scheme, the distribution and retail sale of alcohol was privatized and regulated by the states through the issuing of licenses.<sup>88</sup> Under what is known as a control state scheme, on the other hand, states could establish a monopoly of the distribution tier, retail tier, or both (by operating state-owned liquor stores, for example).<sup>89</sup>

States originally adopted the three-tier system to promote temperance and facilitate tax collection.<sup>90</sup> Those policymakers who support the three-tier system also attribute certain economic benefits to it, such as its promotion “of an orderly marketplace, a level playing field, product availability, safer products, and reliable and efficient tax collection.”<sup>91</sup> In *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, Roni A. Elias argues a three-tier system also provides several regulatory advantages.<sup>92</sup> These advantages include the ability of state liquor commissions to tailor regulations to changing local conditions, effectively enforce these regulations through local and regional offices, and hold manufacturers, distributors, and retailers accountable to local communities.<sup>93</sup>

Opponents of the three-tier system argue that it has failed to adapt to recent changes in the alcohol industry—namely the proliferation of small breweries and wineries across the country and the rising prevalence of direct shipping and e-commerce—and claim it limits consumer choice of alcoholic products.<sup>94</sup>

#### B. COVID-19 AND STATE ALCOHOL TO-GO AND DELIVERY LAWS

The COVID-19 pandemic has led to, perhaps, the greatest change in state alcohol regulation laws since the end of Prohibition.<sup>95</sup> The implementation

87. *Id.* (“A ‘control’ state is one in which the state itself holds the position as retailer and/or wholesaler in the three-tier system.”).

88. *Id.*; see Bordner, *supra* note 4, at 257.

89. ABD STUDY, *supra* note 11, at 5.

90. Elias, *supra* note 29, at 216 (observing the three-tier system was intended to promote temperance by “discourag[ing] drinking in bars and saloons and encourag[ing] it in restaurants and above all, at home”); Joyce, *supra* note 10, at 2040 (“[S]tate laws attempted to control consumption, collect tax revenue, and eliminate alcohol-related crime. To accomplish this, most states adopted a three-tier distribution system.” (footnotes omitted)).

91. ABD STUDY, *supra* note 11, at 5; see Elias, *supra* note 29, at 220.

92. Elias, *supra* note 29, at 218–20.

93. *Id.*

94. Bordner, *supra* note 4, at 259.

95. Ruggless, *supra* note 3.

of social distancing measures, lockdown orders, limited indoor capacity requirements, and the closure of bars and restaurants in response to the ongoing pandemic had a profound, negative impact on the hospitality business across the country.<sup>96</sup> In an attempt to soften the major financial hit to bars and restaurants during the pandemic, over thirty states passed laws allowing to-go and delivery sales of cocktails and spirits.<sup>97</sup> Most of these regulations require the licensed seller to complete deliveries, but some states allow retailers to use third parties to deliver alcoholic drinks to consumers.<sup>98</sup> Although many of these laws are only temporary, some states decided to make these changes permanent.<sup>99</sup> “In June 2020, Iowa became the first state” to do so, and several others have since followed suit.<sup>100</sup> In response to these more relaxed alcohol regulations, several of the larger food delivery apps, like DoorDash, undertook expansion of their services to include alcohol deliveries in states that had recently begun to permit it.<sup>101</sup>

The benefit to the consumer is mainly one of convenience.<sup>102</sup> Allowing retailers to deliver alcohol via TPPs also benefits retailers, in theory, by providing an alternative avenue to carry out sales.<sup>103</sup> Considering that drinks make up a substantial percentage of restaurants’ revenues, and that delivery and carry-out orders significantly increased during the pandemic, allowing customers to purchase alcoholic beverages with their food orders can help make online orders more profitable for restaurants.<sup>104</sup>

There are some obstacles, however, to successfully implementing online alcohol deliveries. Many restaurants and bars hesitate to fully embrace third-

96. Sumagaysay, *supra* note 5 (observing that “[i]n the short term, many restaurants have little choice but to sign on with the [food delivery] apps”); Ron Ruggless, *One Year In, COVID-19 Pandemic Continues to Impact Independent Restaurants*, REST. HOSP. (Mar. 15, 2021), <https://www.restaurant-hospitality.com/operations/one-year-covid-19-pandemic-continues-impact-independent-restaurants> [<https://perma.cc/gVPG-WUAL>] (“As many as 110,000 restaurants have closed since the pandemic was declared, according to the National Restaurant Association, and foodservice sales have fallen \$255 billion in the year since. . . . [T]he pandemic-induced economic crisis had reduced restaurant staffing by 2 million jobs, a decline of 16%, from pre-COVID-19 levels.”).

97. Ruggless, *supra* note 3.

98. *Id.*; Gail Cole, *States Revisiting Covid-Inspired Cocktail-to-Go Laws and Taxes*, CPA ADVISOR (Aug. 10, 2021), <https://www.cpapracticeadvisor.com/sales-tax-compliance/news/21232612/states-revisiting-covid-inspired-cocktail-to-go-laws-and-taxes> [<https://perma.cc/8F8H-TX2P>].

99. Cole, *supra* note 98.

100. *Id.*

101. Joanna Fantozzi, *DoorDash Is Expanding Its Alcohol Delivery Program*, NATION’S RESTAURANT NEWS (Sept. 20, 2021), <https://www.nrn.com/beverage-trends/door-dash-expanding-its-alcohol-delivery-program> [<https://perma.cc/FJ6G-WEDV>].

102. See Decious, *supra* note 1; Phelps, *supra* note 1.

103. *Why Alcohol Delivery Will Still Be a Big Opportunity Post-Pandemic*, REST. DIVE (Sept. 27, 2021), <https://www.restaurantdive.com/spons/why-alcohol-delivery-will-still-be-a-big-opportunity-post-pandemic/607124> [<https://perma.cc/N5X7-F2W2>].

104. *Id.* (“For restaurants, which on average see 20 to 25% or more of their revenue come from alcohol sales, including alcohol in their delivery offerings can have a major impact on the bottom line as consumers add drinks on to their orders.”).

party alcohol deliveries, largely due to the already fraught relations between restaurants and third-party delivery platforms concerning food delivery.<sup>105</sup> One common complaint from restaurants about third-party delivery apps is that they often add restaurants to their platforms without the restaurant's knowledge or consent.<sup>106</sup> Another grievance between restaurants and TPPs is that the latter often take a significant percentage from each order completed through the TPP's app, sometimes as high as thirty percent, rendering online delivery sales profitless for the restaurant.<sup>107</sup> The pandemic has only exacerbated these problems as the number of online delivery orders reached an all-time high—several lawsuits have made their way into courts across the country.<sup>108</sup>

Adding alcohol delivery also creates logistical challenges for TPPs that have previously focused on food. TPPs will need to implement ID verification methods, train drivers on how to legally comply with alcohol delivery regulations, and in some states require their drivers to be at least twenty-one years old.<sup>109</sup>

## II. COMPARING IOWA'S TPP REGULATIONS WITH OTHER STATES' LAWS

This Part will first analyze Iowa's current three-tier system for regulating the alcohol industry. It will then proceed to examine Iowa's new TPP delivery statute and compare it to similar statutes in other states. Finally, this Part will argue that Iowa's current law governing the use of TPPs to deliver alcohol raises issues regarding TPP accountability and should be improved by implementing TPP licenses and tied-house restrictions on TPPs.

### A. IOWA'S THREE-TIER SYSTEM

The Alcoholic Beverages Division ("ABD") is responsible for enforcing Iowa's alcohol regulations.<sup>110</sup> Shortly after the repeal of Prohibition, Iowa

105. See Patrick L. Robson, *Regulating Third-Party Food Delivery Services During COVID-19*, NAT'L L. REV. (Feb. 5, 2021), <https://www.natlawreview.com/article/regulating-third-party-food-delivery-services-during-covid-19> [https://perma.cc/D9SR-PUQ6].

106. *Id.* (reporting that the use of TPPs "has created problems for restaurants, which often have no knowledge that they are listed on the apps and are unable to control the content that these platforms provide to their users. Some platforms have posted outdated menus with incorrect pricing. Others have indicated erroneously that a restaurant was closed or that online ordering was unavailable even when the restaurant was open and accepting orders. This incorrect information often frustrates consumers, who tend to blame the restaurant for any misrepresentations").

107. Michelle Cheng, *The Food Delivery Industry Is Learning It Needs to Keep Restaurants Happy*, QUARTZ (Oct. 14, 2021), <https://qz.com/2072962/delivery-apps-are-learning-it-needs-to-keep-restaurants-happy> [https://perma.cc/8TND-72SE].

108. Robson, *supra* note 105.

109. Eleanor Hildebrandt, *Businesses See Delayed Start to Home Alcohol Delivery*, TIMES-REPUBLICAN (July 24, 2021), <https://www.timesrepublican.com/news/todays-news/2021/07/businesses-see-delayed-start-to-home-alcohol-delivery> [https://perma.cc/YB9V-Y6J4].

110. *Iowa Alcoholic Beverages Division*, ALCOHOLIC BEVERAGES DIV., <https://abd.iowa.gov/iowa-abd> [https://perma.cc/HW9Y-AJDU].

became a control state with a three-tier system.<sup>111</sup> Unlike a traditional three-tier system where each of the tiers are owned and operated by private licensed entities, a control state maintains a state monopoly of the distribution or retail tiers.<sup>112</sup> In practice, private manufacturers must first sell their products to a state-owned distributor, and these products are then sold to consumers in state-owned liquor stores.<sup>113</sup> Iowa was the state's sole distributor and retailer for liquor and wine until the 1980s, when it privatized the entire retailer tier.<sup>114</sup> Today, ABD continues to be the sole distributor of hard liquor in the state, while the distribution of beer and wine is privatized.<sup>115</sup>

Iowa now operates under a "blended-tier" system.<sup>116</sup> Unlike a strict three-tier system, Iowa breweries and wineries can either choose to sell their products to distributors or distribute it themselves.<sup>117</sup> However, brewpubs and distilleries still need to sell their products to a distributor before they can be sold to consumers.<sup>118</sup> A brewpub differs from a brewery in that it is usually a restaurant that holds both a retail license and a limited manufacturing license.<sup>119</sup> In Iowa, brewpubs are required to sell at least twenty-five percent of their product on-premises, and all beer sold for off-premises consumption must first be sold to a distributor.<sup>120</sup> Other exceptions to Iowa's three-tier system include the ability of breweries and wineries to apply for permits that allow them to engage in retail sale of their products for on- and off-premises consumption.<sup>121</sup> This effectively allows them to operate in all three tiers.<sup>122</sup>

Despite that Iowa's blended tier system allows some manufacturers to also engage in wholesale and retail sales, Iowa's tied-house law—embodied in Iowa Code section 123.45—strictly prohibits manufacturers and distributors from acquiring any economic interest in licensed retailers or obtaining retail

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111. ABD STUDY, *supra* note 11, at 5.

112. *Id.*

113. *See id.*

114. *Id.*

115. *Id.* at 6, 27–28 (“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.”).

116. *Id.* at 9 (“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.”).

117. *Id.*

118. *Id.* at 8.

119. *See id.*; IOWA CODE § 123.124 (2022); LEGIS. SERVS. AGENCY, ISSUE REVIEW: IOWA’S CRAFT BEER INDUSTRY 15–16 (2018), <https://www.legis.iowa.gov/docs/publications/IR/696438.pdf> [<https://perma.cc/S7PY-SG5N>].

120. *See* LEGIS. SERVS. AGENCY, *supra* note 119, at 15–16.

121. ABD STUDY, *supra* note 11, at 10–11.

122. *Id.*

licenses.<sup>123</sup> Iowa Code section 123.45(1)(c) prohibits manufacturers and distributors from “[d]irectly or indirectly be[ing] interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail.”<sup>124</sup> This can be as straightforward as a prohibition on owning stock in a retail business to less intuitive examples, like sharing the same employees. Interestingly, this prohibition on acquiring economic interests in the other tiers does not apply to retailers.

The Iowa Supreme Court interpreted the language of Iowa Code section 123.45 to prohibit manufacturers and distributors from acquiring even the most “remote or de minimis ownership interest” in retailers.<sup>125</sup> *Auen v. Alcoholic Beverages Division* involved a challenge to a proposed agency rule promulgated by the ABD to define “interest in ownership” as it appears in Iowa Code section 123.45 to “exclude remote corporate connections that do not affect the retail business directly or indirectly,” such as where a manufacturer’s subsidiary has an ownership interest in a retailer.<sup>126</sup> Plaintiffs, a group of Iowa distributors, challenged the ABD’s interpretation of Iowa’s tied-house law and sought judicial review.<sup>127</sup> The dispute arose in 2000 when “the ABD filed a notice of intended action indicating its intent to amend Iowa Administrative Code rule 185-16.2 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.”<sup>128</sup> The Iowa Supreme Court held in light of the legislative intent to draw a bright-line rule of allowable relationships between manufacturers, distributors, and retailers, “ownership interest” should be interpreted broadly to include even the most remote business interests.<sup>129</sup> As a result, the Iowa Supreme Court found ABD’s interpretation of the statute “illogical” and invalidated the ABD’s proposed definition.<sup>130</sup>

*Auen* is a useful case to think about how the Iowa legislature and ABD might integrate TPPs into the state’s three-tier system. In *Auen*, the Iowa Supreme Court found it necessary to strictly prohibit manufacturers and distributors from acquiring any economic interest in retailers, no matter how remote.<sup>131</sup> And because TPPs might arguably serve retail functions when it processes orders and delivers alcohol to consumers, *Auen* might be cited in support of extending these tied-house restrictions to TPPs.

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123. IOWA CODE § 123.45.

124. *Id.* § 123.45(1)(c).

125. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 592 (Iowa 2004).

126. *Id.* at 588.

127. *Id.* at 587.

128. *Id.* at 588.

129. *Id.* at 591–92.

130. *Id.* at 592–93.

131. *See id.*

B. IOWA CODE § 123.46A AND THIRD-PARTY DELIVERY

Motivated by a desire to support struggling restaurants and bars during the COVID-19 pandemic, Iowa's Governor Reynolds considered a law allowing licensed alcohol retailers to sell beer, wine, liquor, mixed drinks, and cocktails to-go or for delivery.<sup>132</sup> About a year later, on May 10, 2021, Governor Reynolds signed into law House File 766, which amended Iowa Code section 123.46A to allow licensed alcohol retailers to contract with third-party providers to deliver alcohol to customers' homes.<sup>133</sup> The amended law went into effect July 1, 2021.<sup>134</sup> The amended statute provides that "[d]elivery of alcoholic liquor, wine, beer, or mixed drinks or cocktails shall be made by the licensee or permittee, the licensee's or permittee's employee, or a third party . . . ."<sup>135</sup> The statute requires the retailer to enter into a written contract with the third party and to report all third parties delivering alcohol on its behalf to the ABD.<sup>136</sup> The person fulfilling the delivery must be at least twenty-one years old, is required to verify the customer's age and obtain his signature upon delivery, and must cancel the delivery if the customer shows signs of intoxication.<sup>137</sup> The licensed retailer is subject to sanctions for any violation of these provisions, even if a third party caused the violation, unless the retailer can show both that the violation occurred off of the retailer's premises after alcohol was removed from the premises and that no other violation occurred in the two years preceding the incident in question.<sup>138</sup> Payment for the order must be made directly to the licensed retailer and not the third party.<sup>139</sup> The statute also limits the timeframe when deliveries can be made, from 6:00 AM through 10:00 PM Monday through Sunday.<sup>140</sup> An advisory bulletin on the amended law released by the ABD states that the law also allows local

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132. Katie Akin, *Slushies? Flasks? Bars Look to Creative Ideas After To-Go Cocktail Bill Passes*, DES MOINES REG. (June 18, 2020, 6:34 PM), <https://www.desmoinesregister.com/story/entertainment/dining/2020/06/18/to-go-alcohol-drinks-in-iowa-legislation-bellhop-hello-marjorie/3206452001> [<https://perma.cc/AAZ6-AUC6>].

133. See *supra* note 1.

134. *Id.*

135. IOWA CODE § 123.46A(3)(g) (2022); see IOWA ALCOHOLIC BEVERAGES DIV., REGUL. BULL. NO. RB-2021-01, THIRD-PARTY DELIVERY OF ALCOHOLIC BEVERAGES 1-2 (2021) [hereinafter REGULATORY BULLETIN], <https://abd.iowa.gov/sites/default/files/media/file/2021-07/regulatory-bulletin-third-party-delivery-of-alcoholic-beverages.pdf> [<https://perma.cc/P5TY-7XZ5>].

136. REGULATORY BULLETIN, *supra* note 135, at 2 (clarifying that only "[a] third party that has a written agreement with a licensee or permittee who is authorized to sell alcoholic liquor, wine, or beer in original unopened containers or wine, beer, or mixed drinks or cocktails in a container other than the original container for off premises consumption" can legally deliver alcohol, and that "[t]he licensee or permittee shall submit to the division a list of third-party entities it has authorized to act as its agent for the purpose of delivering alcoholic beverages").

137. *Id.*

138. IOWA CODE § 123.46A(4) (2022); see REGULATORY BULLETIN, *supra* note 135, at 2-3.

139. *Id.* § 123.46A(2); see REGULATORY BULLETIN, *supra* note 135, at 2.

140. *Id.* § 123.46A(3)(f); see REGULATORY BULLETIN, *supra* note 135, at 1.



breweries, distilleries, and wineries with certain permits to deliver alcohol on their own or contract with TPPs to deliver alcohol to customers.<sup>141</sup>

### C. OTHER STATES' APPROACHES TO THE TPP PROBLEM

Before examining the problems with the regulation of TPPs in Iowa, it is useful to look at how other states have treated the issue. The alcohol regulation authorities of California, New York, the District of Columbia, and Texas issued helpful advisory statements on how to regulate the TPP-retailer relationship, as the following Section explains.

#### 1. California

California's Alcoholic Beverage Control ("ABC") issued an advisory statement back in 2009 that established useful guidance on the scope of permitted TPP activities.<sup>142</sup> First, California's advisory statement emphasized the importance of retailers to maintain control of all aspects of the transaction:

all sales transactions involving Third Party Providers must ultimately be conducted by and under the control of a licensee. This includes decisions concerning the selection of alcoholic beverages to advertise or offer for sale, the pricing of those beverages, and the ultimate acceptance and fulfillment of the sales transaction.<sup>143</sup>

Second, the advisory statement states that a retailer is responsible for any actions taken by the TPP on behalf of the retailer.<sup>144</sup> Regarding the transfer of funds and payment to the TPP, the advisory statement recommends that "[t]he Third Party Provider should pass all funds collected from the consumer to the licensee conducting the sale, and that licensee should thereafter pay the Third Party Provider for services rendered,"<sup>145</sup> and "[t]hird Party Providers may receive compensation for services provided. Such compensation must be reasonable, and any compensation structure utilized may not result in any actual or de facto control over the licensed business operations, in whole or in part, by the Third Party Provider."<sup>146</sup>

#### 2. New York

New York's State Liquor Authority ("NYSLA") issued several important declaratory rulings on the permissible scope of TPP-retailer relationships.<sup>147</sup> One ruling involved ShipCompliant, a TPP determined to have violated New

141. REGULATORY BULLETIN, *supra* note 135, at 2.

142. *Third Party Providers*, CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, <https://www.abc.ca.gov/third-party-providers> [<https://perma.cc/FAS6-E794>]; Joyce, *supra* note 10, at 2050-51.

143. *Third Party Providers*, *supra* note 142.

144. *Id.*

145. *Id.*

146. *Id.*

147. Bordner, *supra* note 4, at 264-65.

York's TPP laws.<sup>148</sup> Primarily concerned with situations where retailers have little or no control over transactions and where TPPs improperly engage in retail activities that require a liquor license,

the NYSLA designated three types of impermissible TPP-licensee relationships: (1) a licensee may not take a passive role and must incur some degree of business risk through the relationship; (2) an unlicensed party may not engage in retail functions that should be controlled by the store; and (3) the third party's profit may not be "a substantial portion of the sale or sales made."<sup>149</sup>

The second New York declaratory ruling involved a review of third-party mobile alcohol delivery app Drizly.<sup>150</sup> Finding Drizly in compliance with state laws,

[t]he NYSLA split the analysis into two inquiries—first, 'whether the licensee is playing a passive role and if an unlicensed person is acting in their place,' and second, whether 'an unlicensed party ha[s] an ownership or financial interest in the licensed premises.' The passive role question takes into account the business risk incurred by the licensee, functional roles of the parties, and control over retail functions, including 'products, services, and finances.' The ownership interest questions take into account control of funds and method of compensation. Following this methodology, the NYSLA found Drizly to be an archetype for how TPPs may legally operate in conjunction with licensees.<sup>151</sup>

### 3. Texas

Texas also issued an advisory ruling on TPPs in 2013.<sup>152</sup> Like the other rulings, it emphasized the importance of the retailer maintaining control of all aspects of the transaction.<sup>153</sup>

Subject to the permit holder's control, an unlicensed third party provider may generally advertise a selection of wines of various types and prices and provide customers information related to the wines that are being offered for sale by the permit holder. Depending on the specific agreement with the permit holder, the third party may also process the wine order from a Texas consumer for a listed wine

148. Bordner, *supra* note 4, at 263–66 & n.114; see Saunders, *supra* note 9, at 283.

149. Bordner, *supra* note 4, at 267 (citation omitted).

150. Bordner, *supra* note 4, at 267; Saunders, *supra* note 9, at 283.

151. Bordner, *supra* note 4, at 268 (second alteration in original) (footnotes omitted).

152. THOMAS GRAHAM, TEX. ALCOHOLIC BEVERAGE COMM'N, MARKETING PRACTICES ADVISORY – MPA056: WINE SHIPPING AND THIRD PARTY ADVERTISERS/PAYMENT PROCESSING SERVICES 1 (2013), <https://www.tabc.texas.gov/static/sites/default/files/2020-06/mpa-056.pdf> [https://perma.cc/6W6F-Y7UF].

153. *Id.* at 2–3.

by redirecting the order to the permit holder. The permit holder will then either accept and fill the order from the permit holder's inventory or reject the order.<sup>154</sup>

In addition to the requirements of New York and California's advisory opinions, the Texas ruling also decided that a written agreement between the TPP and the retailer would be required:

In order to demonstrate that the permit holder remains in control of all activities, there should be a written agreement between the permit holder and the third party provider that authorizes and governs these arrangements. In the absence of a written agreement setting forth the services to be provided and the expectations/requirements concerning those services, it is difficult to see how the permit holder can effectively assure that it retains control over the activities of the third party provider.<sup>155</sup>

#### 4. District of Columbia

The District of Columbia's Alcoholic Beverage Control Board also issued advisory opinion in 2014.<sup>156</sup> Relying on the decisions from California, New York, and Texas, described above for guidance, D.C.'s advisory opinion held

that it is not permissible for an unlicensed online third party provider to (1) sell alcoholic beverages to customers; (2) charge or process the customer's credit cards or directly collect or receive funds from the customer; (3) store or keep alcoholic beverages for sale; or (4) package, fill, or ship the order to the consumer.<sup>157</sup>

An important difference between D.C.'s opinion and California's opinion, however, was that TPP's are strictly forbidden from collecting payment or processing customers' credit card information; payment must be made directly to the retailer.<sup>158</sup>

Iowa's TPP law resembles California's advisory opinion regarding the assignment of liability to the retailer for the actions taken by the TPP on behalf of the retailer. However, distinct from the California opinion, Iowa's statute does not provide for specific aspects of the transaction the retailer must have control over, like the product sold and price. Analogous to the Texas

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154. *Id.* at 2.

155. *Id.* at 3.

156. D.C. ALCOHOLIC BEVERAGE CONTROL BD., NO. 2014-314, ADVISORY OPINION ON ONLINE THIRD PARTY ADVERTISERS AND PAYMENT PROCESSING SERVICES 1 (2014), [https://abra.dc.gov/sites/default/files/dc/sites/abra/publication/attachments/Online\\_Providers\\_Ad\\_Opinion.pdf](https://abra.dc.gov/sites/default/files/dc/sites/abra/publication/attachments/Online_Providers_Ad_Opinion.pdf) [<https://perma.cc/9WD7-AUPR>].

157. *Id.* at 4.

158. *Id.* at 5.

advisory opinion, Iowa's TPP statute requires a written agreement between the TPP and the retailer.

D. PROBLEMS WITH IOWA'S CURRENT FRAMEWORK

Although this Section focuses on several issues with Iowa's TPP-retailer relationship, its current regulations do get a few things right. First, Iowa requires a written agreement between the retailer and the TPP before deliveries can be handled by the TPP.<sup>159</sup> This helps grant the retailer some degree of control over the partnership and prevents problems, especially concerning food delivery, of TPPs adding restaurants and bars to their websites without their knowledge. Requiring payment to be made directly to the retailer also grants the retailer additional control over transactions facilitated by TPPs and makes it harder for TPPs to improperly avail themselves of retailers' liquor licenses for profit.<sup>160</sup> Second, the several requirements described in the statute as to how delivery must be carried out, like requiring the delivery driver to confirm the customer's age and collect a signature, works to effectively further the public policy goals of promoting temperance and preventing minors from acquiring alcohol.<sup>161</sup> Iowa Code section 123.46A does, however, contain several flaws described below.

1. No TPP License Requirement

The first problem with Iowa's current statute allowing TPPs to deliver alcohol to consumers is that it does not require TPPs to hold a liquor license of any kind, while every other entity involved in the alcohol industry is required to obtain one.<sup>162</sup> The lack of a TPP license requirement is problematic when considering the potential danger of abuse of the TPP-retailer relationship. By not requiring TPPs to hold liquor licenses, Iowa's statute presents the problem of improper availment.<sup>163</sup> A retailers' license may be improperly availed by a TPP in order for the TPP to participate in retail activities that would ordinarily require a liquor license,<sup>164</sup> sometimes by individuals who are unfit or incapable of obtaining licenses on their own. Because any violations of alcohol regulations committed by the TPP will sanction the licensed retailer instead of the TPP,<sup>165</sup> there are no regulations currently in place to hold TPPs accountable for their conduct when acting on behalf of retailers. Because TPPs do not risk the same sanctions retailers do, like the revocation of their licenses, and because TPPs are free to contract

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159. IOWA CODE § 123.46A(3)(g) (2022); REGULATORY BULLETIN, *supra* note 135, at 2.

160. IOWA CODE § 123.46A(3)(g); *see* REGULATORY BULLETIN, *supra* note 135, at 2.

161. IOWA CODE §§ 123.46A(3)(h)–(j); REGULATORY BULLETIN, *supra* note 135, at 2.

162. *See* IOWA CODE § 123.46(A)(3).

163. *See* Bordner, *supra* note 4, at 273–75.

164. *Id.*

165. IOWA CODE § 123.46A; *see* REGULATORY BULLETIN, *supra* note 135, at 2.

with another retailer if such a sanction occurs, TPPs are not as motivated to comply with the alcohol delivery requirements set forth in Iowa Code section 123.46A as the retailers do,<sup>166</sup> which creates a moral hazard problem.

Of course, because Iowa Code section 123.46A requires retailers to enter into written agreements with TPPs,<sup>167</sup> retailers may recover damages in private actions like breach of contract brought against TPPs. However, some retailers might consider damages awards inadequate when compared to the loss of their licenses and inability to conduct business as they see fit. Regulation of TPPs may prove an effective substitute where damages awards prove inadequate.

## 2. No Tied-House Restrictions for TPPs

A second potential problem with Iowa's current rules involving TPPs is the apparent lack of tied-house restrictions applicable to TPPs.<sup>168</sup> Considering the very similar role to retailers that TPPs fulfill, it makes sense to apply the same restrictions imposed on manufacturers and distributors from having a direct or indirect ownership interest in retailers to TPPs. It is easy to imagine how a large brewery or winery with a significant ownership interest in a TPP may promote unfair competition and limit consumers' choice by using its influence over the TPP to exclusively promote its own brands to the exclusion of competing brands.

Indeed, the same justifications for enforcing tied-house laws between manufacturers and retailers—to avoid the dangers of unfair business practices and public health concerns raised by the brewery-owned saloons of the pre-Prohibition era<sup>169</sup>—apply equally to manufacturers and TPPs. If the goal of a tied-house law is to promote the economic independence of retailers, allowing manufacturers to have an ownership interest in TPPs would effectively undermine that independence.

## 3. Current Law Grants Manufacturers Extra Retail Option

A related problem to a no-tied-house restriction is the problem of allowing local manufacturers to contract with TPPs for the retail sale and delivery of their products. This could potentially undermine the whole purpose of a three-tier system. Iowa's TPP delivery law allows manufacturers yet another opportunity to bypass distributors and retailers and directly sell their products to consumers.<sup>170</sup> Although this option absolutely makes sense for small breweries and wineries that do not produce enough alcohol for wholesale distribution, limits should be established for larger breweries that might improperly take

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166. Decious, *supra* note 1 (“[R]estaurants were concerned about losing their liquor licenses should deliverers fail to properly verify the age of recipients. If something were to go wrong . . . the blame would fall on restaurants.”).

167. See REGULATORY BULLETIN, *supra* note 135, at 2.

168. See *id.* at 1–3.

169. See *supra* Section II.A.1.

170. See *supra* Section III.B.

advantage of such an exception to the three-tier system. By limiting the ability to contract with TPPs to local manufacturers, Iowa Code section 123.46A might also run the risk of discriminating in favor of local producers, potentially resulting in a Commerce Clause violation similar to the regulation struck down in *Granholm*.<sup>171</sup>

### III. PROPOSED IMPROVEMENTS TO IOWA'S TPP DELIVERY LAWS

Three improvements to Iowa's current TPP scheme include issuing TPP licenses, granting retailers more control over managing orders, and applying tied-house restrictions to TPPs.

#### A. TPP LICENSES

The best option for improving Iowa's ability to regulate TPPs involved in carrying out alcohol deliveries is to create a licensing requirement for TPPs. A TPP license would facilitate the state's ability to generate revenue through TPP licensing fees.<sup>172</sup> Requiring TPP liquor licenses would also allow the ABD to more effectively regulate TPP activity in Iowa, since providing TPPs with licenses would create a strong incentive for them to comply with state alcohol delivery regulations or run the risk of having their licenses revoked. The ABD would be able to enforce compliance and retailers would be more willing to enter contracts with TPPs with the knowledge that they can be held accountable for any potential violations of alcohol regulations. Moreover, TPP licenses would provide much needed stability in a new and rapidly changing industry.

#### B. GRANTING RETAILERS MORE CONTROL OVER ORDERS

Besides requiring that both parties enter into a written agreement, Iowa Code section 123.46A does not provide much guidance as to how the TPP-retailer relationship should look. Ideally, the retailer would control what products are to be sold at what price and would have the authority to accept or reject orders.<sup>173</sup> TPPs, on the other hand, should limit their activities to soliciting orders, transferring orders to the retailer, and completing deliveries.<sup>174</sup> Clarification on the respective roles of the retailer and TPP would provide useful guidance to future retailers and TPPs. Regulations surrounding the TPP-retailer relationship, such as clarification on how payments for TPP services may be collected and permissible amounts, may also prove necessary in the future. Clear definitions of the respective roles TPPs and retailers are to perform can facilitate contract formation, lead to better relationships between TPPs and retailers, and provide greater transparency to the public regarding accountability.

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171. See *supra* Section II.C.

172. See ABD STUDY, *supra* note 11, at 5.

173. See *Third Party Providers*, *supra* note 142.

174. See *supra* Section III.C.

*C. APPLYING TIED-HOUSE RESTRICTION TO TPPS*

As Iowa's law addressing TPPs and alcohol delivery currently stands, it is not at all clear how TPPs fit within the three-tier system and how they are permitted to interact with each of the three tiers. An amendment to Iowa's tied-house law preventing manufacturers and distributors from acquiring any business interests in TPPs would help situate TPPs somewhere within the three-tier regulatory framework as an agent of any retailer it contracts with. Applying the prohibition of acquiring economic interests in TPPs in a similar way to how it currently applies to retailers under Iowa Code section 123.45 would contribute to more varied consumer choice among available products, promote market competition, and prevent unfair business practices and the vertical integration of the alcohol industry here in Iowa; all goals that the three-tier system seeks to preserve. For example, applying tied-house restrictions to TPPs can promote consumer choice by ensuring TPPs remain economically independent from large breweries that might otherwise influence what products are advertised on TPP apps and websites.

## CONCLUSION

With the recent amendment to Iowa Code section 123.46A, Iowa became one of several states that now allows TPPs to deliver alcoholic beverages from licensed retailers. This new law comes at a time where states across the country have relaxed alcohol regulations in an attempt to counter the economic blow caused by the COVID-19 pandemic to bars and restaurants. The rising prevalence of TPPs in the alcohol industry also reflects innovations in e-commerce and changing consumer habits. Regardless of the reason, third-party alcohol delivery platforms are here to stay and require sensible state regulation moving forward, either in the form of TPP licenses or clear articulations of permissible TPP-retailer relationships and how they fit within the three-tier system of alcohol regulation.