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## Free Beer: How Current Relief Efforts And Proposed Legislation May Be Signs Of Loosening Restrictions In The Craft Beer Industry

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# Free Beer: How Current Relief Efforts And Proposed Legislation May Be Signs Of Loosening Restrictions In The Craft Beer Industry

Lucas B. Noble\*

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## I. INTRODUCTION

The alcohol industry is often thought to be “recession proof,” but this year will test whether or not it is “pandemic proof.” Early estimates place the decrease in economic output of the alcohol industry at just under \$70 billion in 2020 as a result of the COVID-19 Pandemic (“Pandemic”).<sup>1</sup> As it relates to beer, drops in production and sales have translated to approximately 651,000 U.S.-based beer jobs lost, with the overwhelming majority of those jobs being “retail-related.”<sup>2</sup> On-premises sales of beer, those that are purchased and consumed at the brewery, have taken the biggest hit, as stay-at-home orders closed taprooms across the

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1. Press Release, Beer Inst., 651,000 Jobs Supported by U.S. Beer Industry to be Lost Due to COVID-19 Pandemic (Sept. 22, 2020), <https://www.beerinstitute.org/press-releases/651000-jobs-supported-by-u-s-beer-industry-to-be-lost-due-to-covid-19-pandemic> (on file with the *University of the Pacific Law Review*).

2. *Id.*

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nation.<sup>3</sup> Present predictions anticipate beer production will continue to fall in 2021, placing output below 2019's numbers. And at its current trajectory, it will take until 2022 for beer to recover to its pre-Pandemic levels.<sup>4</sup> Suffice it to say, the craft brewing industry has had a rough year.

Before going any further, it warrants stating that this Article is intended to be an optimistic one. To appreciate the industry's potential and outlook in 2021 and beyond, it is important to remember that 2020 began on a high, with craft beer looking to build on the momentum from the prior year's sales and production data.<sup>5</sup> Craft beer had experienced a growth of 3%–4% in the years leading up to 2020, reaching nearly 14% of the total United States beer market by volume by the end of 2019.<sup>6</sup> So, how does the craft beer industry get back on track?

The governing bodies that oversee the alcohol industry, specifically the California Alcohol Beverage Control (“ABC”), will have to emphatically embrace the trend toward modernization not only in technology, but also in purchase and consumption habits. The pace at which new brands, beers, and products enter the market will require continued flexibility at the licensing and enforcement levels, which will prompt lawmakers to reevaluate old and implement new regulatory measures.

As we approach the unofficial first anniversary of the Pandemic, the craft beer industry's economic prospects hang in the balance. The instability caused by a year of Band-Aid-like policies have rendered craft breweries incapable of planning ahead with any degree of certainty. This Article will examine the most relevant challenges to the craft beer industry today, the emergency relief measures meant to provide aid during the Pandemic, and the recent proposed legislation, Senate Bill 314, which could significantly help with craft beer's recovery efforts. While recovery may be slow, it is well within the reach of the craft beer industry.

### II. THE UNITED STATES BEER INDUSTRY AND HOW IT'S REGULATED

When the Twenty-first Amendment brought an end to prohibition in 1933, it vested the regulation of alcohol largely in the states.<sup>7</sup> Since then, the majority of states, including California, have enacted their own alcoholic beverage control

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3. Bart Watson, *2020 Points and 2021 Predictions*, BREWERS ASS'N (Dec. 16, 2020), <https://www.brewersassociation.org/insights/2020-points-and-2021-predictions/> (on file with the *University of the Pacific Law Review*).

4. *Id.*

5. See *National Beer Sales & Production Data*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics-and-data/national-beer-stats/> (last visited Feb. 21, 2021) [hereinafter *Sales and Production Data*] (on file with the *University of the Pacific Law Review*).

6. *Id.*

7. U.S. CONST. amend. XXI, § 2; Daniel Croxall, *Helping Craft Beer Maintain and Grow Market Shares with Private Enforcement of Tied-House and False Advertising Law*, 55 GONZ. L. REV. 167, 171 (2020).

laws, albeit with much variety between them.<sup>8</sup> These beverage control laws, as the California Supreme Court once put it, “sought to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to prohibition.”<sup>9</sup> The preferred regulatory structure among the states was a “triple-tiered distribution and licensing scheme,” known in the alcohol industry as the three-tier system.<sup>10</sup>

To put it simply, the three-tier system divides the industry into three distinct but related tiers—manufacturers, distributors, and retailers—and regulates how those tiers may interact with one another.<sup>11</sup> Think of this as a chain reaction: manufacturers (e.g., craft breweries) make a product and sell it to distributors who, in turn, take that product and sell it to retailers (e.g., liquor stores). Retailers are the only tier originally permitted to sell product directly to consumers.<sup>12</sup> As a rule of thumb, neither manufacturers nor distributors may have an ownership interest in a retailer.<sup>13</sup> Over time, the three-tier system evolved with many states carving out exceptions for each of the three tiers. In California, for example, craft breweries are able to operate taprooms and sell draught beer to consumers for consumption on-premises, sell packaged beer to customers for enjoyment off the premises, and distribute the brewery’s own beer to retailers without having to use a distributor.<sup>14</sup> These exceptions are some of the primary reasons the craft beer industry has experienced its exponential growth for nearly a decade.<sup>15</sup>

### III. BEER BY THE NUMBERS: THE COVID-19 PANDEMIC AND ON-PREMISES CRAFT BEER SALES

The United States is home to more than 8,000 craft breweries, which employ more than 160,000 workers in the United States.<sup>16</sup> Craft breweries, those which fall under the Brewers Association’s classification of “small” and

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8. See *Cal. Beer Wholesalers Ass’n, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal. 3d 402, 407 (1971); see also Daniel Croxall, *Let’s Make Sure We Are Talking About the Same Things: Tied-House Laws and the Three Tier System*, CRAFT BEER LAW PROF (Feb. 6, 2017), <https://www.craftbeerprofessor.com/2017/02/lets-make-sure-talking-things-tied-house-laws-three-tier-system/> (on file with the *University of the Pacific Law Review*).

9. *Cal. Beer Wholesalers Ass’n, Inc.*, 5 Cal. 3d at 407.

10. *Id.*

11. *Id.*; see also, Lindsey A. Zahn, *Is There a Future for the Three-Tier Alcohol Beverage Distribution System?*, ON RESERVE (July 28, 2010), <https://www.winelawonreserve.com/2010/07/> (last visited Feb. 20, 2021) (on file with the *University of the Pacific Law Review*).

12. Zahn, *supra* note 11.

13. Croxall, *supra* note 7, at 172.

14. See generally CAL. BUS. & PROF. CODE § 23357 (West 2021).

15. See generally *Sales & Production Data*, *supra* note 5.

16. Rachel Arthur, ‘*Craft Breweries Are Facing New Realities*’: *US Craft Beer Grew 4% in 2019 – but 2020 Will Be a Difficult Year*, BEVERAGEDAILY.COM (Apr. 15, 2020), <https://www.beveragedaily.com/article/2020/04/15/us-craft-beer-grew-4-in-2019-but-faces-difficult-2020-with-coronavirus> (quoting Bart Watson) (on file with the *University of the Pacific Law Review*).

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“independent,”<sup>17</sup> account for 13.6% of the total U.S. beer market and produced approximately 26 million barrels of beer in 2019.<sup>18</sup> Despite the overall United States beer market declining 1.6%, craft beer production experienced growth of 4% from 2018 to 2019.<sup>19</sup>

The majority of sales for craft breweries are made direct to consumers on the brewery premises.<sup>20</sup> These on-premises sales generate direct revenue for the brewery and create a need to employ retail workers at the taproom.<sup>21</sup> The taproom-focused business model is especially alluring for small or startup craft breweries who make up a staggering 74% of total breweries in the United States yet produce, on average, fewer than 1,000 barrels of beer annually.<sup>22</sup> On-premises sales of draught beer made at retail establishments, such as restaurants, bars, and hotels, also generate significant revenue for craft breweries. The U.S. alcohol marketplace is home to nearly 400,000 establishments where on-premises sales take place and represents 10% of all beer sales by volume.<sup>23</sup>

When the regional stay-at-home orders were handed down, it came as no surprise that breweries felt the biggest squeeze at the taproom. As consumers were forced to stay at home and brewery taproom doors remained closed, access to otherwise reliable on-premises sales vanished nearly overnight. According to self-reported sales data, craft breweries have experienced substantial drops in on-premises beer sales, down an average of 45% in the second quarter of 2020 and 25% in the third quarter.<sup>24</sup> The smallest craft breweries who rely the heaviest on on-premises sales experienced an even larger drop, closing out the third quarter

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17. Under the Brewers Association definition, a craft brewer is: (1) “Small” having an “[a]nual production of 6 million barrels of beer or less”; (2) “Independent” with less than 25 percent of the brewery being “owned or controlled . . . by an alcohol industry member that is not itself a craft brewer”; and (3) a “Brewer” who actually makes beer and who holds a Brewer’s Notice from the Alcohol and Tobacco Tax and Trade Bureau. *Craft Brewer Definition*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition/> (last visited Feb. 21, 2021) (on file with the *University of the Pacific Law Review*).

18. *Sales & Production Data*, *supra* note 5.

19. *Id.*

20. See Bart Watson, *Brewery Visit Data Suggests Customers Are Visiting Less but Spending More*, BREWERS ASS’N (Oct. 27, 2020), <https://www.brewersassociation.org/insights/brewery-visit-data-suggest-customers-are-visiting-less-but-spending-more/> (on file with the *University of the Pacific Law Review*).

21. *Id.*

22. *Breaking Down the Taproom-Focused Brewery Model*, CRAFT BREWERY FIN. TRAINING, <https://craftbreweryfinance.com/2018/10/18/breaking-down-the-taproom-focused-brewery-model/> (last visited Apr. 15, 2021) (on file with the *University of the Pacific Law Review*); see also, Bart Watson, *Brewery Onsite Sales*, BREWERS ASS’N (Mar. 28, 2018), <https://www.brewersassociation.org/insights/brewery-onsite-sales-members-only-data/> (on file with the *University of the Pacific Law Review*).

23. *COVID-19’s Impact on the Beer Industry*, NAT’L BEER WHOLESALERS ASS’N (Sept. 3, 2020), <https://www.nbwa.org/news/covid-19%E2%80%99s-impact-beer-industry> (on file with the *University of the Pacific Law Review*).

24. Bart Watson, *Q3 Survey Shows Improvement, but Sales Still Depressed*, BREWERS ASS’N (Oct. 21, 2020), <https://www.brewersassociation.org/insights/q3-survey-shows-improvement-but-sales-still-depressed/> (on file with the *University of the Pacific Law Review*).

of 2020 with a 30% decrease in on-premises sales.<sup>25</sup>

#### IV. THE ABC'S REGULATORY RELIEF FOR CRAFT BREWERIES IN RESPONSE TO THE COVID-19 PANDEMIC

The ABC is responsible for overseeing the licensing, regulation, and enforcement of the manufacture and sale of alcohol in California.<sup>26</sup> The Pandemic would prove to be especially troublesome for more than 50,000 ABC-licensed businesses who offered on-premises service, including restaurants, bars, craft breweries, brewpubs, and wineries, and the hundreds of thousands of employees they employ.<sup>27</sup> Thankfully, when the stay-at-home order took effect, it did not take long for the ABC to recognize the impact on its licensees and take action.<sup>28</sup>

On March 19, 2020, the same day California Governor Gavin Newsom ordered the statewide shelter-in-place order, the ABC announced that it would be “temporarily suspending enforcement of specific legal prohibitions,” noting its duty to “balance the needs of the alcohol and hospitality industry with public safety concerns.”<sup>29</sup> These relief measures (“Regulatory Relief”) were implemented to provide an emergency rolling-back of longstanding legal prohibitions while simultaneously supporting licensees in their efforts to reduce the spread of COVID-19.<sup>30</sup> Rather than implementing permanent measures to directly address these new challenges, the ABC opted to temporarily suspend enforcement of the specific laws most likely to create economic disadvantages to licensees in the industry.<sup>31</sup> The temporary nature of the Regulatory Relief was novel and encouraging, but remains troubling as the ABC will discontinue such relief when the Pandemic comes to an end.<sup>32</sup>

In its implementation of the Regulatory Relief, the ABC showed that it is capable of responding to a crisis in an efficient manner while taking into account modern developments in the alcohol industry, including online ordering and

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25. Watson, *supra* note 3.

26. See CAL. CONST. art. XX, § 22 (West 2020).

27. *Frequently Asked Questions*, CAL. DEP'T ALCOHOLIC BEVERAGE CONTROL, <https://www.abc.ca.gov/law-and-policy/coronavirus19/frequently-asked-questions/> (last visited Feb. 28, 2021) (on file with the *University of the Pacific Law Review*).

28. See *id.*

29. See *id.*; see also Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf> (on file with the *University of the Pacific Law Review*).

30. *First Notice of Regulatory Relief*, CAL. DEP'T ALCOHOLIC BEVERAGE CONTROL (Mar. 19, 2020), <https://www.abc.ca.gov/notice-of-regulatory-relief/> (on file with the *University of the Pacific Law Review*).

31. *Id.*

32. *Frequently Asked Questions*, *supra* note 27 (“These are temporary measures intended to provide immediate relief during this crisis only. ABC will not continue the policies contained in the Notice of Regulatory Relief when the pandemic has ended.”).

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third-party delivery services. In spite of the temporary status of the Regulatory Relief, it offered the craft beer industry a lifeline that, while taprooms were closed, would provide necessary aid to weather the proverbial storm.

The Regulatory Relief, as it applies to craft breweries, can be divided into four categories: (A) retail relationships; (B) on-premises sales; (C) off-premises sales; and (D) brewpub production.

*A. Craft Breweries' Relationships with Retailers*

The First Notice of Regulatory Relief (the “First Notice”) took aim at two longstanding rules that regulated how craft breweries and retailers handled product returns and extensions of credit. The Sixth Notice of Regulatory Relief (the “Sixth Notice”) provided guidance to craft breweries and retailers about how to conduct virtual beermaker dinner type events during the Pandemic without violating the statutory provisions governing such events.

*1. The First Notice: Alcohol Returns and Extensions of Credit to Retailers*

The original rule for a retailer to return beer to either a craft brewery or distributor requires that the returned beer is exchanged for the same quantity and brand of beer.<sup>33</sup> There are exceptions to this rule,<sup>34</sup> but the majority of returns that occur in the marketplace mirror this rule. The original rule for credit terms prohibits breweries from extending credit to retailers beyond thirty days and requires, by statute, breweries to charge interest on delinquent retailer accounts.<sup>35</sup>

These original rules relate to the ABC’s longstanding prohibition against “tied-house” arrangements between manufacturers and retailers. Daniel Croxall, professor of Craft Beer Law at McGeorge School of Law, explains the concept of the tied house well:

In pre-prohibition days, manufacturers often would provide retailers (bars, saloons, etc.) with free gifts, services, or cash in exchange for the expectation of pushing that manufacturer’s alcoholic beverages to the maximum extent possible. That retailer, beholden to the manufacturer, was known as a “tied-house.” That is, the retailer was contractually or otherwise obligated to give that manufacturer preferential treatment—sometimes exclusive treatment.<sup>36</sup>

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33. See CAL. BUS. AND PROF. CODE § 23104.2 (West 2021).

34. See BUS. AND PROF. § 23104.2(b)(2)(A)–(B).

35. See BUS. AND PROF. § 25509.

36. Croxall, *supra* note 7, at 171–72 (referencing CAL. BUS. & PROF. CODE §§ 25500–25512 and WASH. REV. CODE § 66.28.285(6)).

The First Notice permits craft breweries to set their own terms for accepting returns and extending credit, provided that they do not require the retailer to “purchase specific products or quantities of products in the future as a condition to the acceptance of a return of alcoholic beverages.”<sup>37</sup> Permitting flexibility for returns and credit extensions provides emergency relief for both retailers and manufacturers, allowing each to mitigate decreases in sales caused by fewer customers leaving their homes during the Pandemic. Retailers have the opportunity to return product they anticipated to have otherwise sold, and craft breweries may now remove out-of-code or expired beer from the marketplace without pressure to replace said beer. The First Notice displayed a prioritization of the ABC’s licensees over potential tied-house violations that may otherwise occur from such product return and credit arrangements.

## *2. The Sixth Notice: Virtual Meet the Brewer Dinner*

The Sixth Notice was intended to allow craft breweries to host virtual “meet the brewer” type events in partnership with retailers.<sup>38</sup> Section 25503.45 of the California Business and Professions Code typically requires that such events take place at the licensed premises of an on-sale retailer. The Sixth Notice suspends enforcement of this provision, provided that the event complies with other requirements.<sup>39</sup> Many consumers undoubtedly yearn to attend beer events in-person once again, but it is likely that at least some craft brewers and retailers will continue hosting virtual beer events if given the opportunity. Virtual events are preferential during a Pandemic for obvious reasons, but they also create opportunity for craft breweries to connect with consumers in different regions, build relationships with retailers, and generate sales without the added costs of hosting an in-person event. This type of relief would be a relatively simple and safe way to expand a craft brewery’s potential customer base and generate sales.

## *B. Craft Brewery On-Premises Privileges*

The Fourth Notice of Regulatory Relief (the “Fourth Notice”) permits a craft brewery, via a temporary catering license application (“Catering Authorization”), to temporarily expand their outdoor service area to adjacent territory controlled by the brewery.<sup>40</sup> The Catering Authorization grants this privilege upon filing the application without having to go through the process of updating the license on

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37. *First Notice of Regulatory Relief*, *supra* note 30; *see* Croxall, *supra* note 7, at 171–72.

38. *Sixth Notice of Regulatory Relief*, CAL. DEP’T ALCOHOLIC BEVERAGE CONTROL (Oct. 8, 2020), <https://www.abc.ca.gov/sixth-notice-of-regulatory-relief/> (on file with the *University of the Pacific Law Review*); *see also* CAL. BUS. & PROF. CODE § 25503.45 (West 2021).

39. *See* BUS. & PROF. § 25503.45; *see also* *Sixth Notice of Regulatory Relief*, *supra* note 38.

40. *Fourth Notice of Regulatory Relief*, CAL. DEP’T ALCOHOLIC BEVERAGE CONTROL (May 15, 2020), <https://www.abc.ca.gov/fourth-notice-of-regulatory-relief/>, (last visited Feb. 24, 2021) (on file with the *University of the Pacific Law Review*).



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file at the ABC, which can take months to accomplish. The Catering Authorization applies to licensees that also provide food service, though craft breweries without a bona fide eating place are permitted to contract with a food provider to qualify for the above privileges.<sup>41</sup> By expanding a craft brewery's outdoor service area, the brewery is able to serve more customers in a safer setting while the COVID-19 pandemic continues.<sup>42</sup>

As previously discussed, on-premises sales are vital to a craft brewery's success, especially smaller or new craft breweries that may not have an established distribution program. It was crucial, then, that the ABC issue relief specifically targeting the lost sales from the taproom. Since the Fourth Notice was issued in May 2020, California has seen licensees of all types take advantage of the Catering Authorization, often in partnership with cities and local municipalities.<sup>43</sup> The popularity of these new outdoor expansions is an example of what can be done when urgency and, perhaps most importantly, safety are among the top priorities of regulating bodies.

### *C. Craft Brewery Off-Premises Sales Privileges*

Both the First Notice and the Second Notice of Regulatory Relief (the "Second Notice") sought to address off-premises challenges, including expansion of the hours off-premises sales may take place and restrictions on deliveries of alcoholic beverages to consumers.<sup>44</sup>

Hours of operation for retail sales are limited by state law and, occasionally, by a "License Condition" imposed by the ABC when issuing a license.<sup>45</sup> The First Notice "suspends enforcement of any license condition restricting the hours of sales and service for licensees exercising off-sale privileges."<sup>46</sup> This means that any craft brewery who previously had its hours restricted by a License

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41. *Id.*

42. Gillian Garrett, *The ABC's Fourth Round of Regulatory Relief - Expanded License Footprints Through Temporary Covid-19 Catering Authorizations, and Expanded Privileges for Club Licensees*, BOOZE RULES BLOG (May 19, 2020), <https://www.beveragelaw.com/booze-rules/2020/brround4anocdapq3p9> (on file with the *University of the Pacific Law Review*); see also *ABC-218 CV19 Instructions*, CAL. DEP'T ALCOHOLIC BEVERAGE CONTROL (June 2020), <https://www.abc.ca.gov/abc-218-cv19-instructions/> (on file with the *University of the Pacific Law Review*).

43. See, e.g., *L.A. Al Fresco*, CITY OF L.A., <https://corona-virus.la/laalfresco> (last visited Feb. 27, 2021) (on file with the *University of the Pacific Law Review*).

44. See *First Notice of Regulatory Relief*, *supra* note 30; see also *Second Notice of Regulatory Relief*, CAL. DEP'T ALCOHOLIC BEVERAGE CONTROL (Apr. 1, 2020), <https://www.abc.ca.gov/second-notice-of-regulatory-relief/> (on file with the *University of the Pacific Law Review*).

45. *License Application Process*, CAL. DEP'T ALCOHOLIC BEVERAGE CONTROL, <https://www.abc.ca.gov/licensing/apply-for-a-new-license/license-application-process/> (last visited Feb. 27, 2021) (on file with the *University of the Pacific Law Review*) ("License conditions are special restrictions placed on a license . . . [and] may limit the hours of alcohol sales, the type of entertainment allowed or other aspects of the business.").

46. See *First Notice of Regulatory Relief*, *supra* note 30.

Condition could now make unrestricted off-premises sales.

Deliveries by craft breweries to consumers are generally permitted by law provided that the sales transaction occurs on the licensed premises.<sup>47</sup> This means that the “order must be received, and the payment processed, at the licensed premises . . . .”<sup>48</sup> Further, craft breweries are prohibited from providing “premium, gift, or free goods” in connection with the sale, marketing, or distribution of beer, and free delivery is considered as such.<sup>49</sup> This is problematic language because it can be construed so broadly so as to prevent a manufacturer from engaging in otherwise completely normal and safe business behavior. The trend toward online ordering, not just for alcohol but for all consumer goods, has also caused a shift in the consumer’s expectation of free delivery.<sup>50</sup>

Consumer purchasing habits have evolved at a rapid pace, with the market seeing a shift from taproom to at-home consumption. Though largely influenced by the Pandemic and resulting stay-at-home orders, creative business models and younger, tech-savvy consumers have been driving the trend toward alcohol delivery.<sup>51</sup> Whether purchased from a liquor store, bottle shop, directly from the brewery, or through a third-party app, off-premises sales have become the means by which the majority of craft beer consumers purchase products during the Pandemic.<sup>52</sup> The e-commerce market for alcohol has grown 80%, “from \$3 billion to nearly \$5.6 billion,” since the start of the Pandemic.<sup>53</sup> Taproom closures forced craft breweries throughout the United States to shift their focus and efforts to packaging their products for direct sale and distribution.<sup>54</sup> Many states have scrambled to address this shift in purchasing and have authorized online sales and delivery of alcohol, albeit largely on a temporary basis.<sup>55</sup> Direct-

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47. *See id.*

48. *Id.*

49. *Second Notice of Regulatory Relief*, *supra* note 44.

50. *See* Anne Stych, *Free Shipping Has Become an Expectation for Most Shoppers*, BIZWOMEN (Feb. 21, 2020, 9:11 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/02/free-shipping-has-become-an-expectation-for-most.html?page=all> (on file with the *University of the Pacific Law Review*).

51. *See* Bart Watson, *Gen Z Comes of Age with New Preferences*, BREWERS ASS’N (Dec. 18, 2020), <https://www.brewersassociation.org/insights/gen-z-comes-of-age-with-new-preferences/> (on file with the *University of the Pacific Law Review*); *see generally* C. Jarrett Dieterle & Teri Quimby, *A Chance to Liberate Booze Delivery — If Government Allows It*, GOVERNING (Feb. 11, 2021), <https://www.governing.com/now/A-Chance-to-Liberate-Booze-Delivery-if-Government-Allows-It.html> (on file with the *University of the Pacific Law Review*).

52. *See* *Ecommerce Sales of Booze Are Reaching New Highs*, BUS. OBSERVER (Jan. 9, 2021), <https://www.businessobserverfl.com/article/from-tequila-to-whiskey-alcohol-sales-are-on-the-rise> (on file with the *University of the Pacific Law Review*).

53. *See id.*

54. *See* Laura Reiley, *We Have Too Much Beer (and Soda, and Seltzer), and Not Enough Cans*, WASH. POST (Oct. 8, 2020, 7:06 AM), <https://www.washingtonpost.com/road-to-recovery/2020/10/08/craft-beer-cans-shortage/> (on file with the *University of the Pacific Law Review*).

55. *See id.*; *see also*, Dee-Ann Durbin & The Associated Press, *Number of States Allowing To-Go Cocktails Has Surged from 2 to 33 During Coronavirus*, FORTUNE (Aug. 24, 2020, 12:38 PM), <https://fortune.com/2020/08/24/states-allowing-to-go-cocktails-surges-liquor-laws-coronavirus/> (on file with the *University of the Pacific Law Review*).

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to-consumer sales, for example, “were at least partially allowed in 35 states, up from fewer than a dozen prior to the pandemic.”<sup>56</sup> Thankfully, the ABC also anticipated this shift and attempted to make off-premises sales easier for craft breweries through the First Notice and Second Notice.

The ABC has rightly halted the enforcement of the rules related to time of payment and free deliveries. Craft breweries are now permitted to accept payment not only at the brewery, but also at the time of delivery, opening another potential method of payment—i.e., cash—for delivery orders. In addition, craft breweries are currently able to provide delivery services for free, as the ABC has suspended the enforcement of the prohibition against providing gifts in connection with a beer sale. The ABC has an opportunity to recognize the trend toward online ordering and plan ahead to ensure that its enforcement of the above provisions is consistent with the times.

### *D. Type 75 Brewpub Minimum Production Requirement*

The Seventh Notice of Regulatory Relief (the “Seventh Notice”) applies specifically to holders of a Type 75 Brewpub Restaurant license (“Brewpub”). Business and Professions Code § 23396.3 requires a Brewpub to produce a minimum of 100 barrels of beer annually.<sup>57</sup> However, in light of the Pandemic, the ABC decided to relax enforcement of this statutory production requirement, while noting that the other elements of § 23396.3—the requirement for a seven-barrel commercial brewing system to be located onsite and the annual production limit of 5,000 barrels—would remain in effect.<sup>58</sup>

The minimum production requirement is intended to ensure that Brewpubs are, in fact, operating as such. In a recent investigation, the ABC found that of the approximately 150 Brewpub licenses in California, about one third of those were not meeting these minimum requirements.<sup>59</sup> The component that distinguishes Brewpubs from, say, other restaurants is the actual production of beer:

California law gives a wide range of privileges to establishments licensed as brew pubs, including the ability to serve distilled spirits like vodka and whiskey, but it also requires that they operate as genuine brew pubs, which requires that they brew beer on the premises and operate a

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56. Watson, *supra* note 3.

57. *Seventh Notice of Regulatory Relief*, CAL. DEP’T ALCOHOLIC BEVERAGE CONTROL (Jan. 13, 2021), <https://www.abc.ca.gov/seventh-notice-of-regulatory-relief/> (on file with the *University of the Pacific Law Review*); see CAL. BUS. & PROF. CODE § 23396.3 (West 2021).

58. *Seventh Notice of Regulatory Relief*, *supra* note 58.

59. *ABC Conducts Investigation of Type 75 Brew Pub Restaurant Licenses*, CAL. DEP’T ALCOHOLIC BEVERAGE CONTROL, <https://www.abc.ca.gov/abc-conducts-investigation-of-type-75-brew-pub-restaurant-licenses/> (last visited Mar. 5, 2021) (on file with the *University of the Pacific Law Review*).

restaurant.<sup>60</sup>

Waiving the minimum production requirement during the Pandemic was necessary, as forcing Brewpubs to produce potentially unsellable beer would be counter to the Regulatory Relief's stated purpose. A Type 75 Brewpub license should not, however, be used to circumvent the requirements for obtaining a liquor license, which allows a bar or restaurant to serve beer, wine, and distilled spirits.

#### V. THE BAR AND RESTAURANT RECOVERY ACT: WELL-INTENTIONED BUT LACKING

Senate Bill 314, known as the Bar and Restaurant Recovery Act ("SB-314"), intends to make certain pandemic emergency regulations permanent and increase flexibility for how certain licensees may operate and serve alcohol.<sup>61</sup> Some of the proposed ideas include: (1) expediting the alcohol licensing process by capping appeals and protest hearings to six months; (2) permitting cities and counties to create open container entertainment zones in public spaces, where adults can purchase and consume alcohol; and (3) making permanent the ABC's Catering Permit, allowing expanded outdoor bar and restaurant seating with alcohol service.<sup>62</sup> Each of these proposals are forward-looking and reflect the modern trends in alcohol consumption. The stated purpose of SB-314 is to help California "*restaurants, bars, and music venues*" recover from the Pandemic's economic impact "by creating more flexibility in how they can serve alcohol, including where they can serve and how they can share spaces with other businesses."<sup>63</sup> There is one glaring omission from the types of businesses included in the above list—can you guess what it is?

If you guessed craft breweries, you are right on the money. One of SB-314's objectives is to make the ABC's temporary Catering Authorization permanent;<sup>64</sup> however, the proposed language of the bill leaves out any mention of craft breweries.<sup>65</sup> The state's Pandemic response has created a patchwork of definitions that treat craft breweries like restaurants for some purposes and

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60. *Id.*

61. *Senator Wiener Introduces the Bar and Restaurant Recovery Act to Help Small Businesses Recover from Pandemic*, CAL. ST. SENATE DEMOCRATIC CAUCUS (Feb. 5, 2021), <https://sd11.senate.ca.gov/news/20210205-senator-wiener-introduces-bar-and-restaurant-recovery-act-help-small-businesses> (on file with the *University of the Pacific Law Review*).

62. *Id.*

63. *Id.* (emphasis added).

64. *Id.*

65. *See* Bar and Restaurant Recovery Act, SB 314, 2021Leg., 2021–2022 Sess. (Cal. 2021) (as proposed on Feb. 4, 2021, but not yet enacted), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202102020SB314](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202102020SB314) (on file with the *University of the Pacific Law Review*).

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manufacturers for others.<sup>66</sup> The permitted expansion of a craft brewery's outdoor service area, as granted by the Catering Authorization, only becomes permanent if the language of SB-314 is amended to specifically include craft breweries. In furtherance of this objective, bars, wineries and other on-premises businesses that serve alcohol but are not bona fide eating establishments would also need to be included in the language of the bill.

Part of the challenge with the state's Pandemic response measures is that too much autonomy was given to counties and cities in regulating certain industries and businesses. For example, in June 2020, the Los Angeles County Board of Supervisors announced that only businesses with onsite kitchens would be permitted to operate for outdoor service, despite the ABC's and the state's guidance that allowed craft breweries to partner with third-party food vendors under the Catering Authorization.<sup>67</sup> Specific language granting craft breweries access to these relief measures needs to be included in SB-314 to ensure uniform treatment amongst businesses that serve alcohol and prevent local governments from discriminating against craft breweries. The state unrelentingly tries to reinforce a distinction among certain businesses that serve alcohol: those that serve food and those that do not. Unfortunately, SB-314 as written reinforces that distinction, and craft breweries, along with other alcohol-centric businesses that do not serve food, will not receive the same access to newly introduced statutory benefits as their food-serving counterparts.

## VI. CONCLUSION

Craft breweries have now seen how easily the government can make sweeping, necessary changes in times of crisis, and the recent reform efforts could give rise to a new trend toward loosening restrictions and prioritizing small business and individual prosperity over antiquated mission statements. The ABC's willingness to scrutinize and suspend enforcement of its own regulations to provide emergency aid demonstrates a recognition that the craft brewing industry has a function in our society that does not reflect the *evils of intemperance*.<sup>68</sup> Lasting change can most effectively be accomplished at the statutory level. However, as Bart Watson, Chief Economist at the Brewers

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66. See *Industry Guidance to Reduce Risk*, CA.GOV, <https://covid19.ca.gov/industry-guidance/#can-open> (last updated Mar. 11, 2021, 2:49 PM) (on file with the *University of the Pacific Law Review*).

67. See Frances Michelle Cannon, *Save LA Brewers! An Update on the State of #LABEER*, L.A. COUNTY BREWERS GUILD (Aug. 24, 2020), <https://labrewersguild.org/savelabrewers/> (on file with the *University of the Pacific Law Review*); see also Emily Henderson, *Craft Brewers Push LA Officials to Let Them Reopen for Outdoor Service*, LAIST (Sept. 1, 2020, 12:30 PM), [https://laist.com/latest/post/20200901/los\\_angeles\\_craft\\_brewers\\_push\\_local\\_officials\\_to\\_let\\_them\\_open\\_for\\_outdoor\\_service](https://laist.com/latest/post/20200901/los_angeles_craft_brewers_push_local_officials_to_let_them_open_for_outdoor_service) (on file with the *University of the Pacific Law Review*); *ABC-218 CV19 Instructions*, *supra* note 42.

68. See *Cal. Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal. 3d 402, 407 (1971).

Association posits, change at the regulatory level may come with strings attached:

It's easy to confuse the pendulum swing of more market access over the past decade as pure progress, whereas a longer-run look at beverage alcohol in the United States tells us market access often cycles with greater market control. In addition, even the market access opportunities that get made permanent will likely see additional rules going forward . . .<sup>69</sup>

As discussed, there are a number of ways in which the ABC itself relaxed enforcement of the items included in its Pandemic Regulatory Relief measures without a decrease in public safety. At the regulatory level, SB-314 is a good start, but it also demonstrates how easily certain businesses can get swept under the rug. For nearly a year now, the state has forced a distinction between businesses that can serve food and those that cannot. When the Pandemic ends, there will no longer be a justifiable reason to do so but, as Watson points out, "freer markets often lead to even more regulation."<sup>70</sup> Whether that is a good thing is yet to be seen.

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69. Watson, *supra* note 3.

70. *Id.*

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