

**Department of
Alcoholic Beverage Control**

INITIAL STATEMENT OF REASONS

**PROPOSED ADOPTION OF REGULATIONS FOR
DELIVERY MINOR DECOY REQUIREMENTS**

PROPOSED ADOPTIONS TO TITLE 4:

SECTION 141.1.

PROBLEM STATEMENT AND PURPOSE

Current ABC regulations did not include an enforcement mechanism addressing retail alcoholic beverage delivery away from the licensed premises for off-premises consumption. ABC has already enacted these regulations on an emergency basis, but there is a need for these regulations to be adopted permanently to ensure the increase in delivery of alcoholic beverages does not result in persons under 21 years of age obtaining alcohol. The department has updated and clarified the language from the emergency regulatory action to make this proposed language clearer and more concise as discussed below.

BENEFITS

By continuing the use of minor decoy operations for off-premises delivery of alcoholic beverages, ABC can investigate actions of licensees, their agents, or employees who are furnishing alcoholic beverages to minors in violation of the law and hold licensees accountable for such violations through enforcement actions. Although this issue was identified as an emergency due to the COVID-19 pandemic and the subsequent change of focus by licensed businesses to delivering alcoholic beverages, the increase in legal alcohol delivery is not anticipated to cease once the pandemic circumstances are over. This will require ABC to continue to monitor and hold ABC licensees accountable long after the industry returns to a new normal.

AUTHORITY

Business and Professions Code Section 25658 and 25750.

NECESSITY

The specific purpose for each proposed section is as follows:

§ 141.1 (a)

The proposed subsection is necessary to establish the policy of fairness in conducting delivery minor decoy operations and to require all law enforcement agencies, including ABC, to follow the specified

regulatory standard. This subsection also establishes that the new delivery minor decoy standards should be construed consistently with the standards long established by both precedential decisions and industry policies for “normal” (in-person purchases) minor decoy operations found in Title 2 California Code of Regulations section 141. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity.

§ 141.1 (b)

The proposed subsection establishes a definition for “delivery” in the context of delivery minor decoy operations. This subsection is necessary to delineate the difference of the proposed regulation standards for delivery minor decoy requirements to the standards of traditional minor decoy requirements for sales done in person. Although the standards are similar and fairness should be preserved in both, delivery minor decoy requirements must be different due to the change in location of the transfer of alcohol. The standards found in Title 2 California Code of Regulations section 141 for minor decoy operations apply to in-person service and sales on an ABC licensed premises. The proposed regulatory package is intended to apply an operation run by law enforcement for any alcohol service, sale, or delivery that occurs away from the licensed premises. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity.

§ 141.1 (c)

The proposed subsection establishes a definition for “agent” in the context of delivery minor decoy operations. This subsection is necessary to establish with clarity that those delivering alcoholic beverages to consumers on behalf of an ABC licensee are considered by the department as agents acting on behalf of the ABC licensee, whether a licensee, an employee of a licensee, or a contractor working for a third-party delivery service working on behalf of an ABC licensee. Many ABC licensees contract with third-party delivery services to accomplish their deliveries. These third-party delivery services are not regulated by the department and cannot exercise any alcohol license privileges, such as selling or delivering alcohol, without approval an ABC licensee. This relationship is already established under existing law. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity.

§ 141.1 (d)

The proposed subsection defines that a “minor decoy” is a person who is working with law enforcement as outlined in Business and Professions Code section 25658(f). This subsection is necessary to ensure the standard term “minor decoy” is established and understood by all parties who are affected by this regulatory action. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity by moving the former subsection (d) to modify the requirement in subparagraph (e)(4) rather than have the two requirements be separate.

§ 141.1 (e)

The proposed subsection establishes the requirements of a minor decoy targeting alcohol delivery in an operation carried out by law enforcement. This subsection is necessary to establish the regulatory standards that promote fairness in delivery minor decoy operations, as opposed to the normal in-person minor decoy process established in Title 2 California Code of Regulations section 141. This regulation informs ABC licensees, their employees, their agents, and the public, the process that law enforcement will use to ensure deliveries do not furnish alcohol to a person under 21 years of age. This subsection makes the new delivery minor decoy fairness standards consistent with the standards long established by both precedential decisions and industry policies for traditional minor decoy operations found in Title 2 California Code of Regulations section 141(b). This subsection was modified from the approved emergency regulation for grammatical consistency and clarity.

§ 141.1 (e)(1)

The proposed subparagraph requires all minor decoys to be under 20 years of age. This subparagraph is necessary to reduce the potential risk of ABC licensees misreading or misunderstanding the “Age 21 in [current year]” banner on IDs to indicate that a minor decoy is of legal age, if the transaction falls within the same, current year. This fairness standard for minor decoys for in-person alcohol sales was established in Title 2 California Code of Regulations section 141(b)(1) and the same standard should be continued under the new delivery minor decoy requirements. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity. However, the changes are not meant to deviate from established standards and precedent set for the language found in Title 2 California Code of Regulations section 141(b)(1).

§ 141.1 (e)(2)

The proposed subparagraph requires all minor decoys to display the appearance of someone who is generally expected to be under the age of 21 at the time of the violation. This subparagraph is necessary to ensure ABC licensees, their employees, and their agents will not be purposefully misled by a minor decoy into thinking they are of legal age to obtain alcohol by their appearance. This fairness standard for minor decoys for in-person alcohol sales was established in Title 2 California Code of Regulations section 141(b)(2) and the same standard should be continued under the new delivery minor decoy requirements. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity. However, the changes are not meant to deviate from established standards and precedent set for the language found in Title 2 California Code of Regulations section 141(b)(2).

§ 141.1 (e)(3)

The proposed subparagraph requires all minor decoys to carry their own identification, or no identification, and to provide their identification upon the request of the person making the delivery if carried. This subparagraph is necessary to ensure ABC licensees, their employees, and their agents can

comply with industry standard policies and recognized best practices for checking identification of those purchasing alcohol. This fairness standard for minor decoys for in-person alcohol sales was established in Title 2 California Code of Regulations section 141(b)(3) and the same standard should be continued under the new delivery minor decoy requirements. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity. However, the changes are not meant to deviate from established standards and precedent set for the language found in Title 2 California Code of Regulations section 141(b)(3).

§ 141.1 (e)(4)

The proposed subparagraph requires all minor decoys to respond truthfully to any questions about their age when asked by an ABC licensee, their employee, or their agent at the time of delivery. It also allows a minor decoy to say they are over 21 years of age either electronically, in writing, or over the phone, at the time the alcoholic beverages are ordered. This subparagraph is necessary to ensure the ABC licensee, their employee, or their agent is correctly meeting their duty to deliver alcohol only to a person who is 21 years of age or older. ABC licensees have attempted to use age gating questions either by telephone, internet, or written questions to check for age at the time of the order. This is inappropriate for compliance with the licensee's duty to ensure alcohol is not furnished to those under 21 years of age because the ABC licensee cannot reasonably assess whether a person is under 21 years of age at the time of order. Without an order being placed, a delivery cannot occur and thus, the minor decoy is able to answer that they are over 21 years of age at the time of ordering whether by telephone, internet, or written. This subparagraph requires the minor decoy to answer truthfully all age-related questions at the time of delivery since this is the time an ABC licensee, their employee, or agent, would be able to fully assess whether the person receiving the alcohol is in fact 21 years of age or older. This fairness standard for minor decoys for in-person alcohol sales was established in Title 2 California Code of Regulations section 141(b)(4) and the same standard should be continued under the new delivery minor decoy requirements. This subsection was modified from the approved emergency regulation for grammatical consistency and clarity. However, the changes are not meant to deviate from established standards and precedent set for the language found in Title 2 California Code of Regulations section 141(b)(4).

§ 141.1 (e)(5) (removed)

The proposed subparagraph was removed from the approved emergency regulation because this standard does not apply when a delivery is being made. In a traditional minor decoy operation that takes place upon a licensed premises, there can be multiple ABC licensees, employees, or agents that may have participated in the furnishing of alcohol to the minor decoy. However, when a delivery is made off the licensed premises, there is a specific person or persons who arrive at the designated delivery place with the alcohol to furnish to the minor decoy. Since law enforcement is continually observing the delivery, there is no need for a face to face identification in this circumstance.

§ 141.1 (f)

The proposed subsection creates an affirmative defense for an ABC licensee if any of the standards found in subsection (e) are not followed by a minor decoy or law enforcement personnel during an operation that leads ABC to bring an administrative action against an ABC licensee for an alleged violation of Business and profession Code section 25658. This subsection is necessary because if any of the standards of fairness were not followed, ABC should not hold the ABC licensee responsible for a violation that was induced without the proper fairness standards being followed. This subsection creates an affirmative defense to an administrative action like the one found in Title 2 California Code of Regulations section 141(c).

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENTS RELIED UPON.

Department of Alcoholic Beverage Control Industry Advisory, *Delivery of Alcoholic Beverages*, Issued April 30, 2020. <https://www.abc.ca.gov/delivery-of-alcoholic-beverages/>

Department of Alcoholic Beverage Control Industry Advisory, *Delivery Minor Decoy Requirements Industry Advisory*, Issued June 5, 2020. <https://www.abc.ca.gov/delivery-minor-decoy-requirements-industry-advisory/>

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

ABC has over 93,000 licensed premises throughout the state. Most of these licenses come with the privilege to deliver or ship alcohol to consumers in their home. Those that do not have this privilege are currently able to perform this function through the Notices of Regulatory Relief released by ABC in response to the COVID-19 state of emergency. The number of alcohol licenses in the state has shown about a 2% yearly growth in recent years, but ABC anticipates the number of licenses to diminish due to the limiting factors of the pandemic and a loss of business in the hospitality sector in general throughout the state.

ABC's proposed regulation lays out the procedures and policies to ensure ABC licensees do not deliver alcoholic beverages to persons under 21 years of age as the industry shifts to delivery in response to the COVID-19 pandemic. ABC does not anticipate that the proposed regulation will change significantly the number of alcohol licensed premises in the state because it is limited to the enforcement of laws ABC licensees are already subject to. ABC anticipates educating licensees and working with them to become compliant with current law through the implementation of these regulations. If licensees continue to violate the law by delivering to persons under 21 years of age, the Department will suspend, and revoke licenses as needed. However, these actions should be a negligible change to the total number of licenses in California. With no substantial change to the number of licensees, or any other affiliated businesses created by the proposed regulation, there is no anticipated creation or elimination of jobs in State of

California, nor the creation or elimination of businesses, and the expansion of business within the State of California.

ABC does anticipate the proposed regulations will allow increased public health, safety, and welfare from a better check upon ABC licensees furnishing alcohol to persons under 21 years of age. It will provide clarity to both law enforcement officers, ABC licensees, and the public of the regulatory procedure to implement minor decoy operations for the delivery of alcoholic beverages in the state. This will promote more safety, as well as consistent enforcement of these laws throughout the state.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

ABC has made the determination that the adoption of this regulation will have negligible economic impact on a representative private person or business that does not violate the law. The laws that ABC seeks to enforce via the proposed regulation are laws to which persons and businesses are already subject. The proposed action only lays out the process by which ABC, or other law enforcement agencies will investigate potential violations and enforce these same laws. There is no foreseeable impact on representative private persons or businesses based on the process laid out in the proposed regulation.

Based on the above, ABC determined that the proposed regulatory action will not have a significant statewide adverse economic impact to businesses statewide including the ability of California businesses to compete with businesses in other states.

ALTERNATIVES CONSIDERED FOR THE IMPLEMENTATION OF THE PROPOSED REGULATION BY THE DEPARTMENT

There is no economic impact through the proposed regulatory package, and there are no alternatives considered for their implementation.

REGULATORY MANDATES

This regulatory package creates no new duties or regulatory mandates for ABC licensees, local governments, or the Department.