

**Department of
Alcoholic Beverage Control**

FINAL STATEMENT OF REASONS

PROPOSED ADOPTION OF REGULATIONS FOR
LICENSING OF PERMANENT NON-CONTIGUOUS AREAS

PROPOSED ADOPTIONS TO TITLE 4

SECTION 70

UPDATE OF INITIAL STATEMENT OF REASONS

ABC has no changes to the Initial Statement of Reasons noticed on February 18, 2022.

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws as described in the Notice of Proposed Action. However, ABC has made the following changes to the Informative Digest/Policy Statement Overview noticed on September 16, 2022.

UPDATED SUMMARY OF EXISTING LAWS AND REGULATIONS

During the COVID-19 pandemic, ABC instituted a regulatory relief notice that allowed licensees who sell alcohol to consumers for consumption on the licensed premises to obtain a COVID-19 Temporary Catering Authorization (TCA). The TCAs allowed expansions of licensed premises to limit the spread of COVID-19 while allowing licensees to remain open for business. These expansions were done without ABC investigation, but also could be revoked through complaints or objection by local law enforcement without a formal administrative hearing process. This led to licensees seeking a large amount of premises expansions through the TCA program in a short amount of time, some of them non-contiguous to the licensed premises. Pursuant to AB 61 (Gabriel, Chapter 651, Statutes of 2021) and SB 314 (Wiener, Chapter 656, Statutes of 2021), the Legislature temporarily continued the TCA program by referring to the Fourth Notice of Regulatory Relief implemented by ABC within Business and Professions Code section 25750.5.

In the past, ABC issued some permanent licenses to non-contiguous expanded premises on a limited case-by-case basis while making sure each one was not a danger to the public health, safety, or welfare. ABC anticipates many requests for permanent extensions of licensed premises for non-contiguous areas due to the large influx of temporary non-contiguous premises expansions pursuant to the new law. It is necessary for ABC to establish a standard policy for permanent non-contiguous licensed premises away from the main licensed premises to protect the public health, safety, and welfare.

UPDATED SUMMARY OF EFFECT

The proposed regulations seek to formally implement standards ABC has used on a case-by-case basis for the approval of non-contiguous licensed premises whether as a part of an initial application or an application for an expansion of an existing licensed premises.

The regulatory package was created in response to the influx of non-contiguous COVID-19 Temporary Catering Authorizations (TCA) requested pursuant to the Fourth Notice of Regulatory Relief instituted by ABC in response to the COVID-19 state of emergency, and the Legislature's subsequent codification of the program in Business and Professions Code section 25750.5. ABC anticipates many licensees will seek to make their non-contiguous TCA's permanent prior to when they expire pursuant to Business and Professions Code section 25750.5. However, this proposed regulatory package has no effect upon the currently operable TCAs instituted by the Legislature that are set to expire pursuant to Business and Professions Code section 25750.5.

The regulatory package will notify the public, ABC licensees, local governments, and local law enforcement agencies of the standards that ABC will apply when approving permanent non-contiguous licensed areas for use by licensees whether as a part of an initial application or an application for an expansion of an existing licensed premises, regardless of whether the licensee held a TCA previously or not.

The modifications to the text noticed on January 25, 2023, at the start of the second 45-day comment period, were made to incorporate alternatives that had been suggested by commenters during the initial 45-day comment period that would be as effective but less burdensome on affected persons.

The substantive modifications to the text during the second 45-day comment period noticed on January 25, 2023, are as follows:

- 1) Clarifying the intent of the regulation by specifying that licensing of non-contiguous areas is intended for spaces that are operating as an extension of the main licensed area and not operating independently from the main licensed area.
- 2) Clarifying the language describing beverages passing between a main licensed area and non-contiguous areas.
- 3) Modifying the definition of "open and operating" by specifying that this regulation applies at all times during which the licensed premises is open to patrons for the purpose of receiving services and stating that non-contiguous areas are not necessarily open during all times that the main licensed premises is open and operating.
- 4) Modifying the definition of "actively monitored" by requiring that all non-contiguous areas be monitored in a manner that allows patron conduct to be readily discernable. Changes to this definition also allow licensees more options to comply with the requirement to actively monitor the non-contiguous licensed area.

- 5) Clarifying language by replacing the word “observation” with “actively monitored.”
- 6) Eliminating language that requires an employee or agent of a licensee to deliver alcoholic beverages to patrons within a non-contiguous area.
- 7) Adding language authorizing persons to traverse between the main licensed area and a non-contiguous area in possession of an open alcoholic beverage container if allowed by local law but not authorizing persons to consume alcoholic beverages in unlicensed areas.
- 8) Adding requirements for posting signs in connection with licensure of non-contiguous areas.
- 9) Clarifying the types of licensees that may utilize a shared licensed consumption area.
- 10) Clarifying language limiting the administrative responsibility of licensees if a non-contiguous area may be accessed by the public while the non-contiguous area is not being utilized by the licensee.
- 11) Removing language preventing a dispensing point located within a non-contiguous area.
- 12) Adding language to allow for and regulating an approved bar or dispensing point located within the non-contiguous area.
- 13) Adding language that clarifies licensing procedures. This includes addressing possible operating conditions, noticing the public, and appropriate posting of notice required by law.

The modification to the text noticed on May 5, 2023, for a 15-day comment period was made to clarify additions made in the first modification and in response to applications received by ABC based on the public interpretation of the regulation.

The modification to the text during the 15-day comment period beginning May 5, 2023, is as follows:

- 1) Clarifying the intent of the regulation by specifying that the main licensed premises must satisfy all requirements for exercising privileges of the license issued.

The modification to the text noticed on September 14, 2023, for a 45-day comment period was made in response to a disapproval of the proposed regulations due to lack of clarity in some sections on July 26, 2023.

The modification to the text during the 45-day comment period beginning September 14, 2023, are as follows:

- 1) Changing for clarification and consistency all mentions of the “main licensed area” to the same wording within the proposed regulation.
- 2) Clarifying the term “reasonable proximity” as used in the proposed regulatory text for the required distance between the main licensed premises and a non-contiguous license premises attached thereto.

- 3) Clarifying further the definition of “non-contiguous area” to better conform with the many prior changes to the nature of a non-contiguous area through the regulatory process.
- 4) Clarifying the term “liberally applied” within the definition of open and operating as established within the proposed regulation.
- 5) Clarifying the definitions of “actively monitored” to ensure they are consistent with the rest of the proposed text, as this definition changed multiple times over the course of the regulatory action. This change was also made to ensure the safety of the public in and around a non-contiguous area serving alcoholic beverages.
- 6) Clarifying when a licensee must continually staff an approved bar or dispensing point that is placed within a non-contiguous area, and more clearly defining what an “unsecured alcoholic beverage” is.
- 7) Clarifying how an approved bar or dispensing point must operate to ensure a non-contiguous area is not operating independently from the main licensed area.
- 8) Clarifying the authority and process of ABC placing conditions upon either the non-contiguous area, the main licensed area, or both during ABC’s investigation and approval process for an application containing a non-contiguous licensed area.
- 9) Clarifying the definition of “function independently” to ensure licensees know how a non-contiguous area must function in relation to the main licensed premises. This ensures that non-contiguous areas are not used to obtain a second location without a full license, especially with license types restricted by law for a specific amount pursuant to the population of a county.
- 10) Clarifying notice requirements for residents and owners of real property within 500 feet are measured from both the main licensed area and the non-contiguous area for purposes of determining who needs to receive the required notice.
- 11) Clarifying the requirement that the main licensed premises must alone satisfy all requirements, such as maintaining facilities or equipment, for their license type as established by law. The non-contiguous area cannot be used to satisfy further requirements of a license type.
- 12) Clarifying that nothing in the proposed regulation permits a licensee to exercise any privileges, or engage in any activities, in the non-contiguous area that are not authorized by the license issued.
- 13) Adding to the Authority and References sections of law that pertain to ABC’s normal application process, conditions process, sections explaining licensed privileges of various on-premises consumption license types, the statutory fee authorization for premises expansion applications, and the authority of ABC to regulate in all these areas pursuant to law and the California Constitution.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF SEPTEMBER 16, 2022, THROUGH NOVEMBER 1, 2022.

ABC thanks the community members, licensees, government officials, and other stakeholders who commented to help provide insight and alternatives to be considered in this regulatory action. ABC received 103 written comments during this comment period with 3 additional late comments after the comment period closed. In addition, ABC received 7 commenters at the public hearing held on November 1, 2022. ABC has responded to these comments in an attached document by each individual comment, often repeated across multiple commenters. Many of the comments received led to better alternatives that were just as effective but not as burdensome upon persons affected by the regulatory action. Please see attached Response to comments for initial 45-day comment period to see ABC's answer to each issue raised by written commenters during this period and speakers at the public hearing.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF JANUARY 25, 2023, THROUGH MARCH 13, 2023.

ABC received two written comments during the second 45-day comment period for this proposed regulation. Both comments were in support of the changes made by ABC in this regulatory action and noticed on January 25, 2023. ABC hereby responds to these two comments and thanks the commenters for their support of the modifications. These comments requested no further changes to be made to the proposed language.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF MAY 5, 2023, THROUGH MAY 22, 2023.

ABC received no comments from the public on any of the changes proposed to the regulatory language and noticed on May 5, 2023.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF SEPTEMBER 14, 2023, THROUGH OCTOBER 30, 2023.

ABC received no comments from the public on any of the changes proposed to the regulatory language and noticed on September 14, 2023.

SUMMARY OF THE NECESSITY OF CHANGES NOTICED ON JANUARY 25, 2023; MAY 5, 2023; AND SEPTEMBER 14, 2023.

§ 70 (a)

The proposed subsection establishes the intent and focus of the proposed section as the parameters and policies for approving and enforcing uniform standards upon permanent non-contiguous licensed premises throughout the state. This subsection is necessary to establish that the rules and procedures

apply to permanent non-contiguous licensed areas away from a licensee's main licensed premises, but not to areas that are contiguous to the licensed premises or to currently operating Temporary Catering Authorizations ("TCAs") pursuant to Business and Professions Code section 25750.5.

ABC modified this subsection to include the phrase "and not operating independently from." The modification was necessary to ensure that non-contiguous licensed premises were not in and of themselves being operated as a secondary premises that should properly hold its own separate license. Other changes to the proposed text will allow more independence of a non-contiguous space through distance and independent alcohol disbursement points, but the non-contiguous space must rely upon the main licensed area and be a bona fide extension of the main premises to be approved under this section. This ensures that non-contiguous licensed areas cannot be unreasonably far from the main licensed area, and that licensees understand that an independent non-contiguous space should be licensed under a separate license, not attached as a non-contiguous space to an existing one. This was a less burdensome alternative to the previous limitations on non-contiguous spaces initially proposed by ABC in the original proposed regulation text.

ABC further modified this subsection to ensure clarity in the regulation as a whole in referencing the "main licensed area." This change was necessary for clarity and consistency throughout the proposed regulatory language.

§ 70 (a)(1)

ABC made the addition of this subparagraph to establish a definition of "reasonable proximity" in enforcing the distances between a main licensed area and the non-contiguous area. This subparagraph sets the maximum distance at twenty-five feet between these two areas of the licensed premises. This specific measured distance is necessary to provide clarity to ABC staff, licensees, local governments, and the public to how far away a non-contiguous area can be from the main licensed area and still be licensed under one singular license with an unlicensed area between them. ABC discussed this distance as no less than a wide sidewalk, most of which even in Downtown San Francisco do not exceed twenty feet in width, and the maximum necessary for a licensee to be able to exercise control over both the non-contiguous area and ensure no consuming of alcoholic beverages is occurring on the unlicensed area between the main licensed area and the non-contiguous area. ABC received no comments or alternatives to this proposed maximum distance and believes that the industry believes this standard is reasonable and certain in practice.

§ 70 (b)

The proposed subsection establishes a definition of "non-contiguous area." This subsection is necessary to put licensees on notice of the area(s) on their premises that must comply with the regulations set forth in this section.

ABC modified this subsection to clarify that the unlicensed area between a main license area and the non-contiguous licensed area is also unlicensed for the consumption of alcoholic beverages and not just for delivery. This change was necessary due to the modifications made in Title 4 California Code of Regulations section 70(d)(3) allowing patrons to traverse the unlicensed area with an open container of alcohol unless otherwise prohibited by local law, but not consume alcohol within that area.

ABC further modified this subsection to clarify the definition of a “non-contiguous area.” This change was necessary to simplify the definition so that ABC staff, licensees, local governments, and the public will be able to understand what constitutes a non-contiguous area of a licensed premises. This definition provides more clarity and more specific meaning to the term “non-contiguous area.”

§ 70 (c)

The proposed subsection establishes a definition of “open and operating” for purposes of this section to mean all times during which an area of the licensed premises is open to patrons for the purpose of receiving services from the licensed business. This definition is necessary to ensure licensees, the public, local governments, and law enforcement know when various subparagraphs apply to a non-contiguous area seeking permanent licensure. It is anticipated that due to the way some non-contiguous areas are currently implemented the main licensed area may be open and operating while the non-contiguous area is not. The included definition is seeking to eliminate licensees from asserting that they were not currently open and operating due to a posted sign, or during their prep time, or after last call even though they continue to have patrons in the non-contiguous area.

ABC’s modification of this subsection was necessary to better clarify its intent, and ABC relied upon language within the comments received in the first 45-day comment period to ensure the new definition is meeting ABC’s intent to require that licensee’s control and monitor a non-contiguous licensed area when they are open and operating. In addition, ABC made an addition to the proposed subsection to clarify that the definition of “open and operating” can apply separately to the main licensed area and non-contiguous licensed area at varying times. This addition is necessary to formalize the intent of ABC expressed in the initial statement of reasons for this subsection.

ABC modified this subsection further to simplify its definition of “open and operating.” Previously ABC used the language “liberally applied” which was not seen as a clear standard of enforcement. Thus, ABC limited the definition of “open and operating” as broader than the hours of operations posted or advertised by a licensee. This definition is simple and clear for ABC staff, licensees, local governments, and the public to understand when knowing when a licensee is “open and operating” under the proposed regulation.

§ 70 (d) (1)

The proposed subparagraph requires the non-contiguous area be actively monitored in such a manner to readily discern the appearance and conduct of all persons in the non-contiguous area while it is open and

operating. This subparagraph is necessary to ensure licensees maintain awareness of all activities occurring on a non-contiguous area during the hours in which the non-contiguous area is open and operating. Diligent management and observation will help ensure licensees maintain a lawful premises and prevent any licensed area from becoming a threat or danger to the public health, safety, or welfare. The dangers to public health, safety, and welfare are exacerbated in a non-contiguous area to a licensed premises due to its separation from the main licensed premises as well as the unlicensed area which separates portions of the licensed premises not being under the control of the licensee.

ABC modified this subparagraph to include when a licensee is required to actively monitor the non-contiguous licensed premises rather than being in a separate subparagraph. This modification was necessary to better state the intent of ABC, ensure public understanding, and for better grammatical and statutory construction. This amendment also allowed ABC to include other types of “active monitoring” for licensees to choose from that commentators considered as effective in protecting public safety, while being less burdensome on affected persons. This requirement ensures that licensees, their agents, or their employees can readily “discern the appearance and conduct of all persons and patrons in the non-contiguous area,” as required by this subparagraph.

§ 70 (d) (1) (A)

The proposed subparagraph establishes that the use of any of the three definitions of “actively monitored” outlined in the following subparagraphs can be relied upon by a licensee for compliance with Title 4 California Code of Regulations § 70 (d) (1). This subparagraph is necessary to inform ABC staff, the public, licensees, and other stakeholders of the definitions of “actively monitored” for compliance with Title 4 California Code of Regulations § 70 (d) (1). Without this section there would be a lack of clarity to the meaning of “actively monitored.”

The original proposed subparagraph was completely deleted and replaced with more specificity, and additional options for licensees to comply with the active monitoring requirement of Title 4 California Code of Regulations § 70 (d) (1). Much of the original language is reintroduced in various ways in the following subparagraphs. This amendment also allowed ABC to include other types of “active monitoring” for licensees to choose from that commentators considered as effective in protecting public safety, while being less burdensome on affected persons.

ABC further modified this subsection for grammar since there was a change from three possible standards to only two. This change was necessary for clarity and to make sure the regulation is cohesive in structure.

§ 70 (d) (1) (A) (i)

The proposed subparagraph was added to include ABC’s original definition of “actively monitored” that was previously proposed within Title 4 California Code of Regulations § 70 (d) (1) (A). This first way to “actively monitor” a non-contiguous licensed premises is by being able to observe the non-contiguous

area of the licensed premises from the interior of the main licensed area. This subparagraph is necessary to show one of the ways a licensee can comply with the requirement of Title 4 California Code of Regulations § 70 (d) (1) to be licensed as a permanent non-contiguous licensed area.

ABC modified this subparagraph to make the definition clearer and more concise. This modification was necessary to be better understood by ABC staff, licensees, local governments, and the public as to what constitutes “actively monitoring” by being able to observe the non-contiguous area from within the interior of the main licensed area.

§ 70 (d) (1) (A) (ii)

The proposed subparagraph was added to include a commenter-submitted alternative definition of “actively monitored” to comply with Title 4 California Code of Regulations § 70 (d) (1). This second way to “actively monitor” a non-contiguous licensed area is by having the licensee, or an employee or agent of the licensee, within the non-contiguous area of the licensed premises whenever it is open and operating. This subparagraph is necessary to show one of the ways a licensee can comply with the requirement of Title 4 California Code of Regulations § 70 (d) (1) to be licensed as a permanent non-contiguous licensed area.

ABC modified this subparagraph to clarify that the licensee, or an employee or agent of the licensee must be physically present in the non-contiguous area to actively monitor it, if the non-contiguous area cannot be observed from within the main licensed area. This change was necessary to clarify how a licensee, or their employees or agents, must be present within the non-contiguous area to maintain control of it, if it cannot be observed from within the licensed premises.

§ 70 (d) (1) (A) (ii) (a)

ABC added this subparagraph to allow a licensee, or employee or agent of the licensee, who is physically present in the non-contiguous area for the purposes of actively monitoring the space to leave for a period not to exceed five minutes for the service of patron of the licensed premises in the non-contiguous area. This exception is necessary to allow a licensee, their employee or agent, to leave the non-contiguous area for short periods of time to provide service to patrons, within the non-contiguous area, while continuing to maintain control over the licensed premises and “actively monitoring” the non-contiguous area as required. ABC received no comments or alternatives to this proposed maximum time the non-contiguous area be left unattended and believes that the industry believes this standard is reasonable and certain in practice.

The subparagraph further states that the above exception does not apply if the non-contiguous area has an alcoholic beverage dispensing point, and unsecured alcoholic beverages pursuant to Title 4 California Code of Regulations section 70 (d) (8). This would be contrary to the requirement that the licensee, an employee or agent of the licensee, be constantly staffing an alcoholic beverage dispensing point with unsecured alcoholic beverages in a non-contiguous area. The further requirement is necessary because a

non-contiguous area is often less secure than the main licensed area and unattended unsecure alcoholic beverages can lead to furnishing alcoholic beverages both to minors and obviously intoxicated persons.

§ 70 (d) (1) (A) (iii)

The proposed subparagraph was added to include a commenter-submitted alternative definition of “actively monitored” to comply with Title 4 California Code of Regulations § 70 (d) (1). This third way to “actively monitor” a non-contiguous licensed area is by providing regular and consistent bona fide service within the non-contiguous area whenever it is open and operating. This subparagraph is necessary to show one of the ways a licensee can comply with the requirement of Title 4 California Code of Regulations § 70 (d) (1) to be licensed as a permanent non-contiguous licensed area.

ABC removed this subparagraph because “regular and consistent bona fide service” lacked the clarity of a regulation, because it had no further definition or factors and could lead to varied understanding and enforcement.

§ 70 (d) (1) (B)

The proposed paragraph was added to include the language previously proposed within Title 4 California Code of Regulations § 70 (d) (1) (A) regarding the use of electronic video surveillance to meet the “actively monitored” requirement of Title 4 California Code of Regulations § 70 (d) (1). Video surveillance is an important tool for actively monitoring an area, but often is used to determine the events after they happen, not when they happen. Relying solely on video surveillance would not provide a licensee or their agents with the real time information of a person assigned to watch the non-contiguous area that would satisfy ABC’s intent of “actively monitoring” the non-contiguous licensed area.

§ 70 (d) (3)

This subparagraph was deleted in its entirety and substituted with an alternative submitted by commenters in the first 45-day comment period that ABC determined to be less restrictive on affected persons, and as effective at protecting the public safety. This subparagraph allows all persons to travel between the main licensed area and a licensed non-contiguous area with an open alcoholic beverage container if it is not prohibited by local law. In addition, this subparagraph prohibits the licensee from permitting any person to travel away from the licensed areas with an open alcoholic beverage except for the express purpose of traversing an unlicensed area between the two areas of the licensed premises. Thus, they cannot leave to go elsewhere with an open alcoholic beverage container. Finally, this subparagraph prohibited the licensee from allowing any person to consume alcoholic beverages in an unlicensed area used for the traversal from the main licensed area and a licensed non-contiguous area. This subparagraph is necessary to establish rules for persons traversing unlicensed areas between the licensed areas that are non-contiguous. It places a burden upon the licensee to ensure the public, customers, and employees are following these rules and ensure the public safety of those around the

licensed premises. ABC modified this subparagraph to institute rules for traversal as it was determined that the prohibition of patrons from making that traversal was overly burdensome upon affected persons.

This subsection was further modified for a grammatical change.

§ 70 (d) (4)

This subparagraph mandates that a licensee always exercise full control over the non-contiguous area when the licensed premises is open and operating in the non-contiguous area. This includes the right to prohibit any person from entering or remaining in the non-contiguous area. If a licensee is not able to control a portion of its licensed location, including who is present, who can obtain and imbibe alcoholic beverages, and deescalate any disturbances that may occur, that area of the licensed premises may become a threat or danger to the public health, safety, or welfare. This subsection is necessary to ensure the licensee can actively maintain a lawful premises and prevent the non-contiguous area from becoming a threat or danger to the public health, safety, or welfare prior to being permanently licensed.

ABC modified this subparagraph for statutory and grammatical consistency, and to better align with the intent stated in the initial statement of reasons. Comments received in the first 45-day comment period expressed the need for clarification of this subparagraph to ensure ABC's intent was clear and enforceable upon licensees and not overburdensome.

§ 70 (d) (5)

This subparagraph requires the non-contiguous area be clearly delineated in a manner prescribed by ABC. It also requires the posting of signs to remind patrons that they cannot consume alcoholic beverages in unlicensed areas, including between the main licensed premises and any non-contiguous licensed area. This subparagraph is necessary to provide to the public and law enforcement notice of the scope of the licensed premises and the area in which the licensee may exercise license privileges. This is important for compliance purposes and to ensure a licensee is responsible for the area licensed. This delineation is a standard requirement for licensure usually accomplished with outer barriers to the licensed premises. However, since there are unlicensed areas between the main licensed premises and a non-contiguous area it becomes increasingly important to ensure patrons, the public, law enforcement, and ABC can see the delineations of which areas are licensed for the consumption of alcoholic beverages and which are not. Due to the varying nature of each individual licensed premises, and the needs of the local jurisdiction within which the license resides, the rules regarding these barriers will of necessity be delineated by ABC on a case-by-case basis. Numerous factors are considered during ABC's investigation, including but not limited to the local zoning requirements, the locations of both the main licensed premises and the non-contiguous licensed premises, the nature of the areas between the licensed locations, whether the non-contiguous area is the only use, or if it can be only used during specific periods, adjacent licensed premises, adjacent buildings, and if there are nearby residences. Each of these factors can affect the need for different barriers or delineations between the licensed and unlicensed areas so that all involved can quickly understand where alcohol is allowed and where it is prohibited.

This regulation cannot be made more specific for the type and nature of the barriers to be required, since it will be applied on a case-by-case basis, but there will be a need for some type of barrier or delineation in each instance of a non-contiguous licensed area.

This subparagraph was modified to better delineate that ABC approves the means a potential licensee chooses to delineate, rather than prescribing the required means of delineation. In addition, the subparagraph was modified to require specifically that ABC approve based on the unique facts with each specific application as stated in the original intent within the initial statement of reasons for these proposed regulations. These changes were made to alleviate a concern that ABC would establish a universal hard barrier rule rather than take these on a case-by-case basis as intended. Further, the subparagraph was modified to establish the need for signs to inform patrons of the prohibition on consuming alcohol in the unlicensed area in response to changes made to Title 4 California Code of Regulations § 70 (d) (3) that allows patrons to traverse the unlicensed areas with open alcoholic beverage containers. The required signs are less restrictive than the previous complete prohibition on patrons possessing alcoholic beverages within and while crossing the unlicensed area.

This subsection was further modified to clarify the department is approving how the licensee proposes to identify the boundaries of the non-contiguous area. This change was necessary to inform ABC staff, licensees, local governments, and the public that the identification of the boundaries are proposed by the licensee, and ABC will approve or deny that proposal during the investigation process using the factors in the subparagraphs following this subsection.

§ 70 (d) (5) (A)

ABC added this subparagraph to clarify the factors ABC shall consider when evaluating a proposed indication of the boundaries of a non-contiguous area during a license investigation. This subparagraph is necessary to establish a unified standard of factors for consideration in each licensing investigation involving a proposed licensed premises with a non-contiguous area. This unified standard can be easily understood by ABC staff, licensees, local governments, and the public in being able to understand how ABC will approve or deny proposed identifiers of the boundaries of non-contiguous areas when included within a license application.

§ 70 (d) (5) (A) (i)

ABC added this subparagraph to establish that the clarity of separation of the noncontiguous area from the unlicensed areas surrounding it is one factor ABC will consider when approving a proposed identifier for the boundaries of a non-contiguous area. This subparagraph is necessary to establish one of the consideration points ABC shall consider when making the decision to approve an identifier for a non-contiguous area proposed by an applicant within their application to become a licensee.

§ 70 (d) (5) (A) (ii)

ABC added this subparagraph to establish compliance with any city or county zoning requirements where the licensed premises is located is one factor ABC will consider when approving a proposed identifier for the boundaries of a non-contiguous area. This subparagraph is necessary to establish one of the consideration points ABC shall consider when making the decision to approve an identifier for a non-contiguous area proposed by an applicant within their application to become a licensee.

§ 70 (d) (5) (A) (iii)

ABC added this subparagraph to establish the use, if any, of the non-contiguous area when it is not open and operating is one factor ABC will consider when approving a proposed identifier for the boundaries of a non-contiguous area. This subparagraph is necessary to establish one of the consideration points ABC shall consider when making the decision to approve an identifier for a non-contiguous area proposed by an applicant within their application to become a licensee.

§ 70 (d) (5) (A) (iv)

ABC added this subparagraph to establish the proximity of neighboring businesses or residences is one factor ABC will consider when approving a proposed identifier for the boundaries of a non-contiguous area. This subparagraph is necessary to establish one of the consideration points ABC shall consider when making the decision to approve an identifier for a non-contiguous area proposed by an applicant within their application to become a licensee.

§ 70 (d) (5) (A) (v)

ABC added this subparagraph to establish the location of the licensed premises and any anticipated foot traffic, especially within the in the unlicensed area connecting the main licensed area to the non-contiguous licensed area as one factor ABC will consider when approving a proposed identifier for the boundaries of a non-contiguous area. This subparagraph is necessary to establish one of the consideration points ABC shall consider when making the decision to approve an identifier for a non-contiguous area proposed by an applicant within their application to become a licensee.

§ 70 (d) (5) (B)

This subparagraph was added to support the additional requirement of signs to be displayed in Title 4 California Code of Regulations § 70 (d) (5). This subparagraph requires that the signs be conspicuously posted at all entrances to and exits from both the main licensed area and the non-contiguous area and shall be written in no smaller than size 36 font and shall measure at least five inches wide and five inches tall. This subparagraph is necessary to ensure the signs are readable by patrons, and that patrons

are notified by licensees that they cannot consume alcoholic beverages in the unlicensed areas between the main licensed premises and the non-contiguous licensed area.

This subparagraph was further modified and renumbered for grammar and consistency.

§ 70 (d) (5) (B) (i)

This subparagraph was added to define the minimum requirements of the required signs in this section. This is necessary to ensure that the required signs are visible and conspicuously posted to fulfill the notice to consumers for which they were required. Each of the elements required is similar to other notice and signage requirements through California law and regulation. ABC received no comments on the proposed standards in this subparagraph for sign requirements and believes that the industry believes this standard is reasonable and certain in practice.

This subparagraph was further modified and renumbered for grammar and consistency.

§ 70 (d) (6)

This subparagraph allows licensees to share a common licensed non-contiguous area only when they hold licenses authorizing the exact same privileges for on-sale consumption, except as otherwise authorized by current law. To protect the public health, safety, and welfare, ABC has determined it is best to prohibit licensees with different licenses that hold different license privileges to participate in a shared space in non-contiguous areas. The subparagraph also assigns to all licensees sharing a common non-contiguous area responsibility for all activities occurring in the common area. This subparagraph is necessary to provide guidance to licensees on the creation and management of shared non-contiguous areas and what types of shared spaces may be allowed in non-contiguous areas. It also encourages all licensees who participate in a shared space to actively monitor them to ensure the area does not become a threat or danger to the public health, safety, or welfare because all will be held responsible for violations that occur upon them. It is necessary to limit shared spaces to licenses that share the same privileges, because if they do not, the shared space would present violations if one license has privileges not held by another license. For example, if one license allows service of distilled spirits or allows the presence of minors, but another license sharing the space is not allowed to have distilled spirits on the premises or minors present on its licensed premises, it necessarily results in a violation for the license which has the more restrictive privileges. This creates a compliance problem and puts licensees with varied privileges in shared spaces in adversarial positions. Due to ABC's flexibility in the issuance of TCAs during the COVID-19 state of emergency without prior investigations, it is anticipated few TCAs may currently operate with licenses sharing space with differing privileges and may be in violation of their main license. This subparagraph will require all permanently licensed non-contiguous areas to comply with having all licenses sharing non-contiguous areas to have the same privileges for on-premises consumption.

This subparagraph was modified to more clearly express ABC’s intent that only licensees with the same privileges for consumption on their licensed premises can share a non-contiguous licensed premises unless otherwise allowed by law to share a consumption space in another way. This paragraph was also modified to clarify the intent of ABC by changing the term “the common area” to “a non-contiguous shared area.” These changes were necessary to improve understanding of the proposed language and for better statutory construction expressing the intent of the proposed regulation.

This subparagraph was further modified for grammar and consistency.

§ 70 (d) (7)

This subparagraph assigns to the licensee responsibility for all activities occurring on a non-contiguous area only during such times that the non-contiguous is open and operating if the area may be accessed by members of the public at times during which the licensed premises is not open. This subparagraph is necessary to establish the parameters of the licensee’s administrative liability for activities occurring on their non-contiguous area when the licensee is not exercising license privileges in the non-contiguous area. It ensures the scope of the licensee’s liability is not overbroad such that a violation of the ABC Act occurring in the non-contiguous area would not be held against the license by ABC if they were not actually operating the non-contiguous area at the time the violation occurred. This results in fair outcomes for the licensee.

This subparagraph was modified to clarify language and ensure it is more in line with ABC’s intent expressed in the initial statement of reasons. The expressed intent was that ABC would not find administrative violations occurring within the non-contiguous licensed area if the non-contiguous area was accessible to the public and the licensee was not open and operating within the non-contiguous licensed area at the time of the incident. The changes were necessary for clarity and to ensure the construction was expressing the intent of ABC in proposing this subparagraph.

§ 70 (d) (8)

This subparagraph was removed and replaced by ABC. ABC determined that a less restrictive alternative to prohibiting alcohol dispensing points in non-contiguous licensed areas may be achieved by allowing such operation under specific rules tied to their use. ABC determined that this less restrictive alternative would be as effective in keeping the public safe as the previously used alternative. This subparagraph requires that the licensee always have staff at the dispensing point in the non-contiguous licensed area whenever unsecured alcoholic beverages are present. This subparagraph also defines “unsecured alcoholic beverage” as any alcoholic beverage container, even if manufacturer sealed, that is unattended by the licensee or a patron, and not secured within a locked fixture. The subsection also establishes that the fixture referenced in this subsection does not need to be permanently affixed within the non-contiguous area. This subparagraph is necessary to ensure a dispensing point placed within a non-contiguous licensed area does not become a danger to public safety, health, or welfare when alcoholic beverages may be accessed by patrons without licensee oversight, while also allowing such

dispensing points to exist. This alternative was proposed by commenters during the first 45-day comment period as a less burdensome but as effective alternative to the previously proposed Title 4 California Code of Regulations § 70 (d) (8).

This subparagraph was further modified to clarify both that the requirement of a dispensing point in a non-contiguous area being always staffed only applying when unsecured alcoholic beverages are present in the non-contiguous area, and the definition of “unsecured alcoholic beverages.” These changes were necessary to provide clarity and a standard uniform understanding for ABC staff, licensees, local governments, and the public. These changes did not change the intent or necessity of the regulation as discussed above.

§ 70 (e)

ABC added this subsection during its first modification to the proposed regulations to aid in the understanding of the public, ABC staff, local governments, and licensees, due to confusion of the implementation of temporary COVID-19 non-contiguous licensed areas throughout the state. The process of licensing these areas on an emergency temporary basis did not go through the statutorily required process, and ABC never intended to change any of the licensing requirements and procedures as otherwise mandated by law by proposing these proposed regulations. However, in the context that the temporary COVID-19 permits have now been codified and extended for a period, this subsection became necessary to distinguish the permanent licensure of non-contiguous areas from the process for temporary COVID-19 permits for noncontiguous spaces that are not permanent.

This subparagraph was further modified for grammar and consistency.

§ 70 (f)

ABC added this subsection during its first modification to the proposed regulations to aid in the understanding of the public, ABC staff, local governments, and licensees for the implementation of conditions for licenses with non-contiguous licensed areas that may have two sets of conditions, or additional conditions placed on the licensed premises based on the permanent addition of a non-contiguous licensed area. Although conditions on licenses are a part of the current licensing procedures described in Title 4 California Code of Regulations § 70 (e), conditions on varying sections have rarely been implemented by ABC, and additional conditions on the main licensed premises may be appropriate when the nature of the licenses is changed at the request of the licensee to add a non-contiguous licensed space. This subsection was necessary to ensure understanding by the public, ABC staff, local governments, and licensees for this new process of permanently licensing non-contiguous areas for the consumption of alcoholic beverages.

This subparagraph was further modified for grammar and consistency and to cite the authority by which ABC imposes conditions upon licenses issued.

§ 70 (g)

ABC added this subsection during its first modification to the proposed regulations to aid in the understanding of the public, ABC staff, local governments, and licensees for the implementation of permanent licensure of non-contiguous areas. This subsection requires a non-contiguous area to be reasonably close to the main licensed area and not be operated as an independent licensed area when open and operating. This subsection specifies that if a non-contiguous area is open and operating independently of the main licensed area it should be licensed under a separate license appropriate to the privileges exercised while open and operating. This subsection is necessary to establish that non-contiguous spaces should be an extension of the licensed premises, and not as way to operate in locations that would otherwise require a separate license, to circumvent the restrictions on the number of licenses by population in a location under California law, or to otherwise circumvent legal restrictions (such as, for example, a determination of public convenience or necessity in areas of high crime or overconcentration).

ABC modified this subsection to limit a non-contiguous area to only operate at the same time a main licensed area is open and operating. This change was necessary for consistency with other changes made to the proposed regulatory language, and to ensure the non-contiguous area does not supersede the main licensed area in scope or function.

§ 70 (h)

ABC added this subsection during its first modification to the proposed regulations to aid in the understanding of the public, ABC staff, local governments, and licensees for the implementation of permanent licensure of non-contiguous areas. This subsection established that the statutory measurements required for notice shall be measured from the absolute boundaries of both the main licensed area and the non-contiguous area. This also includes areas where either employees or patrons may be present with open alcoholic beverages that may be unlicensed. This subsection is necessary to ensure the public, ABC staff, local governments, and licensees know where they must send notices to residents or other considerations points of their intention to sell alcoholic beverages when filing an application. This may greatly expand the amount of people encompassed in the statutory requirements, incrementally depending on how far away the non-contiguous licensed premises is from the main licensed premises. This was always the intent of ABC in this regulation, but it was not expressly stated prior to the modification issued on January 25, 2023.

ABC modified this subsection to better clarify when notices are required for any application for an alcoholic beverage license that includes a proposed non-contiguous area, and by which statute the notice requirements are required. This clarification was necessary to ensure understanding by ABC staff, licensees, local governments, and the public for when notice is required and how the required distances are measured from both the main licensed area and any non-contiguous area.

§ 70 (i)

ABC added this subsection during its first modification to the proposed regulations to aid in the understanding of the public, ABC staff, local governments, and licensees for the implementation of permanent licensure of non-contiguous areas. Existing law requires a posting at the licensed premises, but if that premises is separated ABC will require, by this regulation, that both areas have a posted notice. This subsection is necessary to ensure the public, ABC staff, local governments, and licensees know how to comply with posting requirements for the application and licensure process when there is a portion of the licensed premises that is non-contiguous from the main licensed premises, either in an original application, or in an application to expand their licensed footprint.

ABC modified this subsection to clarify how the posting of public notice works for applications that have both a main licensed area and a non-contiguous area under the same application, and that the required notice shall be posted at both locations for the entire period required by law. This modification for clarity does not change any of the intent or necessity discussed in the above paragraph.

§ 70 (j)

ABC added this subsection during its second modification noticed on May 5, 2023, to the proposed regulations to clarify the previously added Title 4 California Code of Regulations section 70 (g). This subsection is necessary to clarify that the main licensed area needs to satisfy all requirements for the license independently from any non-contiguous area approved under this section. ABC intended that the non-contiguous licensed area should not be able to act independently from the main licensed area, but also that the main licensed area would be independent from the non-contiguous licensed area, and no privileges exercised in either the main licensed area, or the non-contiguous license area., would be reliant upon equipment or facilities only found in the non-contiguous area. This is important for non-retail licenses, and bona fide eating place licenses, which often require certain equipment or availability of food to grant additional privileges to the licensed premises. A non-contiguous licensed area approved by this section was intended to focus on additional consumption and serving space, not to meet an essential required element of the main licensed premises. ABC has already received applications that are attempting to skirt the intent of Title 4 California Code of Regulations section 70 (g) and have the non-contiguous area provide essential requirements for the main licensed premises.

ABC removed and replaced this subsection to address clarity concerns and to better use language in line with the purpose, and necessity discussed in the paragraph above. These changes were necessary to ensure ABC staff, licensees, local governments, and the public understood the requirements of the main licensed premises in exercising privileges dependent on equipment or certain modes of operation upon a licensed premises by law.

§ 70 (k)

ABC added this subsection to ensure that nothing within the proposed regulation was construed to give licensees any authority to do anything on their non-contiguous areas that are not allowed to occur on their licensed premises by law. This subsection is necessary to ensure no language within the proposed regulation contradicts anything established elsewhere in law as a limitation on a licensed premises. This clarifies that the non-contiguous area has the same rights and privileges for a licensee as their main licensed area and having a non-contiguous area only extended the same privileges in existence in the main licensed area, not granting anything new or different.

ALTERNATIVES DETERMINATION

ABC adopted alternatives that were as effective in keeping the public safe, but less burdensome on affected persons with regards to Title 4 California Code of Regulations § 70 (c), 70 (d) (1), 70 (d) (3), and 70 (d) (8). Each of these alternatives presented by various commenters during the 45-day comment period were determined by ABC to provide alternatives to the initial proposal, not considered previously by ABC, to be as effective in protecting public health, safety, and welfare, but less burdensome on affected persons. For more in depth discussion on each of the alternatives and their necessity, please see the necessity sections above.

ABC has determined that no other alternatives considered by ABC would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons, and equally effective in implementing statutory policies or other provisions of law.

No other additional alternatives to the proposed regulation were presented or brought to ABC's attention through the comment periods by the public that would be equally effective in implementing the licensure of non-contiguous areas.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ADDITIONAL DOCUMENTS OR INFORMATION IN THE RULEMAKING FILE

ABC did not add any other documents or information to the rulemaking file.