Regulation 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5
Section 100

Complete Rule Making File

OAL Approval with Approved Text Regulation 1532, 1533.1, 1534, 1535

Index

1. *Form 400 and Proposed Regulation 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5*
2. *Statement of Explanation*
3. Court of Appeal Diageo-Guinness USA, Inc. v. Board of Equalization

Other Documents Relied upon

A. *Chief Counsel Memo Dated 10/25/12*

B. *Draft Minutes, 11/15/12*

C. *Reporters Transcript, 11/15/12*

RECEIVED
JAN 10 2013
by EXECUTIVE DIRECTOR'S OFFICE
STATE BOARD OF EQUALIZATION

State of California
Office of Administrative Law

In re:	**NOTICE OF APPROVAL OF CHANGES WITHOUT REGULATORY EFFECT**
Board of Equalization	
Regulatory Action:	**California Code of Regulations, Title 1, Section 100**
Title 18, California Code of Regulations	
Adopt sections: **Amend sections:** **Repeal sections: 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5**	**OAL File No. 2012-1130-02 N**

This change without regulatory effect by the State Board of Equalization repeals sections 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5, of Title 18, of the California Code of Regulations. The changes are necessary because a California court of competent jurisdiction held the regulations to be invalid.

OAL approves this change without regulatory effect as meeting the requirements of California Code of Regulations, Title 1, section 100.

Date: 1/8/2013

Beverly J. Johnson
Deputy Director

For: DEBRA M. CORNEZ
Director

Original: Kristine Cazadd
Copy: Richard Bennion

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Richard Bennion
FROM: OAL Front Desk
DATE: 1/9/2013
RE: Return of Approved Rulemaking Materials
OAL File No. 2012-1130-02N

OAL hereby returns this file your agency submitted for our review (OAL File No. 2012-1130-02N regarding Distilled Spirits).

If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved regulation is specified on the Form 400 (see item B.5). **Beginning January 1, 2013**, unless an exemption applies, Government Code section 11343.4 states the effective date of an approved regulation is determined by the date the regulation is filed with the Secretary of State (see the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State) as follows:

(1) **January 1** if the regulation or order of repeal is filed on September 1 to November 30, inclusive.
(2) **April 1** if the regulation or order of repeal is filed on December 1 to February 29, inclusive.
(3) **July 1** if the regulation or order of repeal is filed on March 1 to May 31, inclusive.
(4) **October 1** if the regulation or order of repeal is filed on June 1 to August 31, inclusive.

If an exemption applies concerning the effective date of the regulation approved in this file, then it will be specified on the Form 400. The Notice of Approval that OAL sends to the state agency will contain the effective date of the regulation. The history note that will appear at the end of the regulation section in the California Code of Regulations will also include the regulation's effective date. Additionally, the effective date of the regulation will be noted on OAL's Web site once OAL posts the Internet Web site link to the full text of the regulation that is received from the state agency. (Gov. Code, secs. 11343 and 11344.)

Please note this new requirement: Government Code section 11343 now requires:

1. Section 11343(c)(1): Within 15 days of OAL filing a state agency's regulation with the Secretary of State, the state agency is required to post the regulation on its Internet Web site in an easily marked and identifiable location. The state agency shall keep the regulation posted on its Internet Web site for at least six months from the date the regulation is filed with the Secretary of State.

2. Section 11343(c)(2): Within five (5) days of posting its regulation on its Internet Web site, the state agency shall send to OAL the Internet Web site link of each regulation that the agency posts on its Internet Web site pursuant to section 11343(c)(1).

OAL has established an email address for state agencies to send the Internet Web site link to for each regulation the agency posts. Please send the Internet Web site link for each regulation posted to OAL at **postedregslink@oal.ca.gov**.

DO NOT DISCARD OR DESTROY THIS FILE

Due to its legal significance, you are required by law to preserve this rulemaking record. Government Code section 11347.3(d) requires that this record be available to the public and to the courts for possible later review. Government Code section 11347.3(e) further provides that "....no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of." See also the Records Management Act (Government Code section 14740 et seq.) and the State Administrative Manual (SAM) section 1600 et seq.) regarding retention of your records.

If you decide not to keep the rulemaking records at your agency/office or at the State Records Center, you may transmit it to the State Archives with instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. See Government Code section 11347.3(f).

Enclosures

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NONSUBSTANTIVE

NOTICE PUBLICATION/REGULATION SUBMISSION

(See instructions on reverse)

STD. 400 (REV. 01-09)

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-	2012-1130-02N	

For use by Office of Administrative Law (OAL) only

2012 NOV 30 AM 11:34

OFFICE OF ADMINISTRATIVE LAW

2013 JAN -8 PM 3:00

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
State Board of Equalization

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Distilled Spirits

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT

AMEND

TITLE(S)
18

REPEAL
2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☒ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☒ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Richard E. Bennion	(916) 445-2130	(916) 324-3984	rbennion@boe.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE
Joann Richmond

DATE
November 29, 2012

TYPED NAME AND TITLE OF SIGNATORY
Joann Richmond, Chief, Board Proceedings Division

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JAN 08 2013

Office of Administrative L

Text of Proposed Changes to

Title 18. Public Revenue

~~Regulation 2558. Distilled Spirits.~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, is a distilled spirit.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2558.1. Wine.~~

~~(a) Effective January 1, 2012, wine as defined by Business and Professions Code section 23007 does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation of fermented agricultural products other than from the particular agricultural product or products of which the wine is made.~~

~~(b) Except as provided in subdivision (a), wine-based products authorized for sale as wine by the Department of Alcoholic Beverage Control are deemed to be wine as defined by Business and Professions Code section 23007 for purposes of the Alcoholic Beverage Tax Law.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 23007, Business and Professions Code; and Sections 32002 and 32152, Revenue and Taxation Code.~~

~~Regulation 2559. Presumption - Distilled Spirits.~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, is presumed to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, unless this presumption is rebutted pursuant to Regulation 2559.1.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

Text of Proposed Changes to

Title 18. Public Revenue

~~**Regulation 2559.1. Rebuttable Presumption – Distilled Spirits.**~~

~~(a) On or after July 10, 2008, the presumption in Regulation 2559 may be rebutted by the manufacturer of the alcoholic beverage filing a report, under penalty of perjury, with the Board stating that the alcoholic beverage contains less than 0.5 percent alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products and specifying the sources of the alcohol content of the alcoholic beverage, including the alcohol by volume derived from flavors or other ingredients containing alcohol obtained by distillation.~~

~~(b) The Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under subdivision (a); or (2) for purposes of verifying any report filed under subdivision (a).~~

~~(c)(1) If the Board determines that a manufacturer has not successfully rebutted the presumption in Regulation 2559, the Board shall notify the manufacturer of such determination, and the manufacturer may petition for a redetermination.~~

~~(2) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(3) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(4) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(5) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(6) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally~~

~~by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Sections 32002, 32452 and 32453, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.3. Internet List.~~

~~(a) Not later than October 1, 2008, and updated on a quarterly basis thereafter to add or remove from the list, the Board shall develop, publish and maintain on its Internet site a listing of all alcoholic beverages that have been found to have successfully rebutted the presumption set forth in Regulation 2559.~~

~~(b) Notwithstanding the addition of an alcoholic beverage to the list, the Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under Regulation 2559.1, subdivision (a); or (2) for purposes of verifying any report filed under Regulation 2559.1, subdivision (a).~~

~~(c) The Board shall remove from the list an alcoholic beverage that is finally determined under subdivision (d) to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, as set forth in Regulation 2558. Before the removal may take effect, the Board shall notify the manufacturer of this determination.~~

~~(d)(1) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(2) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(3) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(4) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(5) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.5. Correct Classification.~~

~~Effective October 1, 2008, for purposes of tax reporting, a taxpayer will be deemed to have correctly classified an alcoholic beverage as not being a distilled spirit, as defined by Business and Professions Code section 23005, if at the time taxes are imposed, as set forth in the Revenue and Taxation Code, division 2, part 14, chapters 4, 5 and 5.5, the alcoholic beverage was included on the Board's list pursuant to Regulation 2559.3.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

PROPOSITION 65

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT

SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65) NOTICE TO INTERESTED PARTIES January 18, 2013 DEVELOPMENTAL AND REPRODUCTIVE TOXICANT IDENTIFICATION COMMITTEE MEETING DATE

The Developmental and Reproductive Toxicant Identification Committee is scheduled to meet on Monday, February 25, 2013, in the Coastal Hearing Room of the California Environmental Protection Agency headquarters building located at 1001 I Street, Sacramento beginning at 10:00 a.m. and continuing until all business is conducted or 5:00 p.m. The meeting agenda will be posted on the Office of Environmental Health Hazard Assessment (OEHHA) web site at http://www.oehha.ca.gov/prop65.html in advance of the meeting.

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA 95814, (916) 653–7715. Please have the agency name and the date filed (see below) when making a request.

File# 2012–1127–01
BOARD OF BEHAVIORAL SCIENCES
Advertising, Supervision & Continuing Education

This regulatory action, pursuant to AB 56 (Chapter 166, Statutes of 2011), makes some revisions to requirements for advertising by those regulated by the Board. It adds new requirements for interns for Marriage and Family Therapists and Professional Clinical Counselors. It also adds a requirement requiring two years of licensure prior to providing supervision of an associate clinical social worker.

Title 16
California Code of Regulations
AMEND: 1811, 1870, 1887.3
Filed 01/09/2013
Effective 04/01/2013
Agency Contact: Rosanne Helms (916) 574–7897

File# 2012–1130–02
BOARD OF EQUALIZATION
Distilled Spirits

This change without regulatory effect by the State Board of Equalization repeals sections 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5, of Title 18, of the California Code of Regulations. The changes are necessary because a California court of competent jurisdiction held the regulations to be invalid.

Title 18
California Code of Regulations
REPEAL: 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5
Filed 01/08/2013
Agency Contact:
Richard E. Bennion (916) 445–2130

File# 2012–1126–01
CALIFORNIA DEBT LIMIT ALLOCATION COMMITTEE
Administration of California's Limited Tax–Exempt Debt Authority

The California Debt Limit Allocation Committee submitted this timely certificate of compliance action to make various amendments to their title 4 regulations and seven related incorporated by reference forms, and to adopt a new incorporated by reference form. The action is mainly related to housing projects for lower income families and individuals, to preserve and rehabilitate existing govermental–assisted housing for lower income families and individuals, and to amend existing sustainable building and energy efficiency methods to align with similar requirements by the California Tax Credit Allocation Committee. The amendments also completely revised the application form for small–issue industrial development bond projects.

Title 4
California Code of Regulations
ADOPT: 5205 AMEND: 5000, 5054, 5144, 5170, 5190, 5200, 5230, 5350, 5370 REPEAL: 5133
Filed 01/08/2013
Effective 01/08/2013
Agency Contact: Misti Armstrong (916) 653–3461

Regulation 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5
Section 100

Index

1. *Form 400 and Proposed Regulation 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5*

2. *Statement of Explanation*

3. Court of Appeal Diageo-Guinness USA, Inc. v. Board of Equalization

STATE OF CALIFORNIA–OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

NONSUBSTANTIVE

(See instructions on reverse)

STD. 400 (REV. 01-09)

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-	2012-1130-02N	

For use by Office of Administrative Law (OAL) only

2012 NOV 30 AM 11:30

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
State Board of Equalization

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
Distilled Spirits	

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	
	ADOPT
	AMEND
TITLE(S) 18	REPEAL 2558, 2558.1, 2559, 2559.1, 2559.3, 2559.5

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☒ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☒ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Richard E. Bennion	(916) 445-2130	(916) 324-3984	rbennion@boe.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

For use by Office of Administrative Law (OAL) only

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Joann Richmond

DATE: November 29, 2012

TYPED NAME AND TITLE OF SIGNATORY
Joann Richmond, Chief, Board Proceedings Division

Text of Proposed Changes to

Title 18. Public Revenue

~~**Regulation 2558. Distilled Spirits.**~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, is a distilled spirit.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~**Regulation 2558.1. Wine.**~~

~~(a) Effective January 1, 2012, wine as defined by Business and Professions Code section 23007 does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation of fermented agricultural products other than from the particular agricultural product or products of which the wine is made.~~

~~(b) Except as provided in subdivision (a), wine-based products authorized for sale as wine by the Department of Alcoholic Beverage Control are deemed to be wine as defined by Business and Professions Code section 23007 for purposes of the Alcoholic Beverage Tax Law.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 23007, Business and Professions Code; and Sections 32002 and 32152, Revenue and Taxation Code.~~

~~**Regulation 2559. Presumption - Distilled Spirits.**~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, is presumed to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, unless this presumption is rebutted pursuant to Regulation 2559.1.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

Text of Proposed Changes to

Title 18. Public Revenue

~~**Regulation 2559.1. Rebuttable Presumption - Distilled Spirits.**~~

~~(a) On or after July 10, 2008, the presumption in Regulation 2559 may be rebutted by the manufacturer of the alcoholic beverage filing a report, under penalty of perjury, with the Board stating that the alcoholic beverage contains less than 0.5 percent alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products and specifying the sources of the alcohol content of the alcoholic beverage, including the alcohol by volume derived from flavors or other ingredients containing alcohol obtained by distillation.~~

~~(b) The Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under subdivision (a); or (2) for purposes of verifying any report filed under subdivision (a).~~

~~(c)(1) If the Board determines that a manufacturer has not successfully rebutted the presumption in Regulation 2559, the Board shall notify the manufacturer of such determination, and the manufacturer may petition for a redetermination.~~

~~(2) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(3) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(4) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(5) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(6) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally~~

~~by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Sections 32002, 32452 and 32453, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~**Regulation 2559.3. Internet List.**~~

~~(a) Not later than October 1, 2008, and updated on a quarterly basis thereafter to add or remove from the list, the Board shall develop, publish and maintain on its Internet site a listing of all alcoholic beverages that have been found to have successfully rebutted the presumption set forth in Regulation 2559.~~

~~(b) Notwithstanding the addition of an alcoholic beverage to the list, the Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under Regulation 2559.1, subdivision (a); or (2) for purposes of verifying any report filed under Regulation 2559.1, subdivision (a).~~

~~(c) The Board shall remove from the list an alcoholic beverage that is finally determined under subdivision (d) to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, as set forth in Regulation 2558. Before the removal may take effect, the Board shall notify the manufacturer of this determination.~~

~~(d)(1) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(2) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(3) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(4) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(5) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.5. Correct Classification.~~

~~Effective October 1, 2008, for purposes of tax reporting, a taxpayer will be deemed to have correctly classified an alcoholic beverage as not being a distilled spirit, as defined by Business and Professions Code section 23005, if at the time taxes are imposed, as set forth in the Revenue and Taxation Code, division 2, part 14, chapters 4, 5 and 5.5, the alcoholic beverage was included on the Board's list pursuant to Regulation 2559.3.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

CHANGES WITHOUT REGULATORY EFFECT UNDER CALIFORNIA CODE OF REGULATIONS, TITLE 1, SECTION 100

Statement of Explanation

Title 18. Public Revenues
Regulation 2558, *Distilled Spirits*
Regulation 2558.1, *Wine*
Regulation 2559, *Presumption - Distilled Spirits*
Regulation 2559.1, *Rebuttable Presumption - Distilled Spirits*
Regulation 2559.3, *Internet List*
Regulation 2559.5, *Correct Classification*

A. Factual Basis

On April 8, 2008, the State Board of Equalization (Board) adopted California Code of Regulations, title 18, sections (Regulations) 2558, *Distilled Spirits*, 2559, *Presumption – Distilled Spirits*, 2559.1, *Rebuttable Presumption – Distilled Spirits*, 2559.3, *Internet List*, and 2559.5, *Correct Classification*, to interpret, implement, and make specific Business and Professions Code (BPC) sections 23004, 23005, 23006, and 23007, which define the terms "alcoholic beverage," "distilled spirits," "beer," and "wine," respectively, for purposes of the Alcoholic Beverage Control (ABC) Act (BPC, § 23000 et seq.) and the Alcoholic Beverage Tax (Tax) Law (Rev. & Tax. Code, § 32001 et seq.). The regulations provide guidance regarding the proper classification of alcoholic beverage products, other than wine as defined in BPC section 23007, for alcoholic beverage tax purposes.

On May 25, 2011, the Board adopted Regulation 2558.1, *Wine*, to further clarify that, for alcoholic beverage tax purposes, the term "wine," as defined in BPC section 23007, "does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation of fermented agricultural products other than from the particular agricultural product or products of which the wine is made." As a result, Regulation 2558.1 requires such products to be classified as distilled spirits under Regulation 2558, for alcoholic beverage tax purposes.

In *Diageo-Guinness USA, Inc. v. Board of Equalization* (2012) 205 Cal.App.4th 907, 922 (hereafter *Diageo*), the Court of Appeal held that the Board lacked the authority to adopt Regulations 2558, 2559, 2559.1, 2559.3, and 2559.5 because "the Legislature did not delegate authority to the Board to adopt its own classification of alcoholic beverages for purposes of excise taxation. The Legislature directed that the definitions in the ABC Act apply to the Tax Law, and it is the Department [of Alcoholic Beverage Control], not the Board, that is authorized to interpret as necessary the provisions of the ABC Act, including the relevant alcoholic beverage definitions." Although Regulation 2558.1 was not expressly at issue in *Diageo* because it was adopted after the litigation began, the Court of Appeal's holding in *Diageo* also applies to Regulation 2558.1 because Regulation 2558.1 was also adopted to classify alcoholic beverages for alcoholic beverage tax purposes and, in *Diageo*, the Court of Appeal held that the Legislature did not delegate authority to the Board to adopt its own classification of alcoholic beverages for purposes of excise taxation. Therefore, the Board now proposes to repeal Regulations 2558, 2558.1, 2559, 2559.1, 2559.3, and 2559.5, under California Code of Regulations, title 1, section

(Rule) 100, in order to conform the California Code of Regulations to the Court of Appeal's holding in *Diageo*.

B. Proposed Changes

Rule 100 changes are proposed to repeal Regulations 2558, 2558.1, 2559, 2559.1, 2559.3, and 2559.5. The foregoing changes are appropriate for processing under Rule 100 because they are changes without regulatory effect and do not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision. Furthermore, these changes are necessary to delete regulations that were held invalid in a judgment entered by a California court of competent jurisdiction that has become final.

PROPOSED CHANGES

Repeal Regulations 2558, 2558.1, 2559, 2559.1, 2559.3, and 2559.5 as follows:

~~Regulation 2558. Distilled Spirits.~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, is a distilled spirit.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2558.1. Wine.~~

~~(a) Effective January 1, 2012, wine as defined by Business and Professions Code section 23007 does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation of fermented agricultural products other than from the particular agricultural product or products of which the wine is made.~~

~~(b) Except as provided in subdivision (a), wine-based products authorized for sale as wine by the Department of Alcoholic Beverage Control are deemed to be wine as defined by Business and Professions Code section 23007 for purposes of the Alcoholic Beverage Tax Law.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 23007, Business and Professions Code; and Sections 32002 and 32152, Revenue and Taxation Code.~~

~~Regulation 2559. Presumption - Distilled Spirits.~~

~~Effective October 1, 2008, any alcoholic beverage, except wine as defined by Business and Professions Code section 23007, is presumed to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of~~

~~fermented agricultural products, unless this presumption is rebutted pursuant to Regulation 2559.1.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.1. Rebuttable Presumption - Distilled Spirits.~~

~~(a) On or after July 10, 2008, the presumption in Regulation 2559 may be rebutted by the manufacturer of the alcoholic beverage filing a report, under penalty of perjury, with the Board stating that the alcoholic beverage contains less than 0.5 percent alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products and specifying the sources of the alcohol content of the alcoholic beverage, including the alcohol by volume derived from flavors or other ingredients containing alcohol obtained by distillation.~~

~~(b) The Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under subdivision (a); or (2) for purposes of verifying any report filed under subdivision (a).~~

~~(c)(1) If the Board determines that a manufacturer has not successfully rebutted the presumption in Regulation 2559, the Board shall notify the manufacturer of such determination, and the manufacturer may petition for a redetermination.~~

~~(2) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(3) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(4) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(5) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(6) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail~~

~~chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Sections 32002, 32452 and 32453, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.3. Internet List.~~

~~(a) Not later than October 1, 2008, and updated on a quarterly basis thereafter to add or remove from the list, the Board shall develop, publish and maintain on its Internet site a listing of all alcoholic beverages that have been found to have successfully rebutted the presumption set forth in Regulation 2559.~~

~~(b) Notwithstanding the addition of an alcoholic beverage to the list, the Board shall require a manufacturer's "Statement of Process" or "Formula" filed with the Alcohol and Tobacco Tax Trade Bureau, its predecessor agency or successor, under the following circumstances: (1) if the Board obtains information that casts doubt on the accuracy or truthfulness of a report filed under Regulation 2559.1, subdivision (a); or (2) for purposes of verifying any report filed under Regulation 2559.1, subdivision (a).~~

~~(c) The Board shall remove from the list an alcoholic beverage that is finally determined under subdivision (d) to contain 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, as set forth in Regulation 2558. Before the removal may take effect, the Board shall notify the manufacturer of this determination.~~

~~(d)(1) Upon receiving notice from the Board, the manufacturer may petition the Board's determination within 30 days. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the 30-day period.~~

~~(2) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.~~

~~(3) The Board shall reconsider the determination pursuant to its administrative appeals process set forth in California Code of Regulations, title 18, sections 5260-5271 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the manufacturer. Any Board hearing will be governed by the rules set forth in California Code of Regulation, title 18, sections 5510-5576.~~

~~(4) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the manufacturer, except as provided in California Code of Regulations, title 18, section 5560.~~

~~(5) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the manufacturer at the manufacturer's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure, title 5, chapter 4 (§ 416.10 et seq.).~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

~~Regulation 2559.5. Correct Classification.~~

~~Effective October 1, 2008, for purposes of tax reporting, a taxpayer will be deemed to have correctly classified an alcoholic beverage as not being a distilled spirit, as defined by Business and Professions Code section 23005, if at the time taxes are imposed, as set forth in the Revenue and Taxation Code, division 2, part 14, chapters 4, 5 and 5.5, the alcoholic beverage was included on the Board's list pursuant to Regulation 2559.3.~~

~~Note: Authority cited: California Constitution, Article XX, Section 22; and Section 32451, Revenue and Taxation Code. Reference: Section 32002, Revenue and Taxation Code; and Sections 23004, 23005, 23006 and 23007, Business and Professions Code.~~

DIAGEO-GUINNESS USA, INC., et al., Plaintiffs and Appellants, v. BOARD OF EQUALIZATION, Defendant and Respondent.

C061227

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

205 Cal. App. 4th 907*; *140 Cal. Rptr. 3d 358*; *2012 Cal. App. LEXIS 505

April 30, 2012, Opinion Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended *Diageo-Guinness USA, Inc. v. State Board of Equalization, 2012 Cal. LEXIS 6383 (Cal., June 29, 2012)*
Review denied by, Request denied by *Diageo-Guinness United States v. State Bd. of Equalization, 2012 Cal. LEXIS 8365 (Cal., Aug. 29, 2012)*

PRIOR HISTORY: [***1]
APPEAL from a judgment of the Superior Court of Sacramento County, No. 34-2008-00013031-CU-JR-GDS, Shelleyanne W. L. Chang, Judge.

DISPOSITION: Reversed with directions.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary judgment to California's Board of Equalization on a complaint for declaratory relief challenging the validity of regulations adopted by the board that redefined distilled spirits, for purposes of excise taxation, to include flavored malt beverages. The challenged regulations defined distilled spirits as beverages containing 0.5 percent or more alcohol derived from flavors or other ingredients containing alcohol from distillation. This definition encompassed flavored malt beverages, which the California Department of Alcoholic Beverage Control treated as beer for purposes of licensing and regulation, and which were classified as beer under federal regulations. (Superior Court of Sacramento County, No. 34-2008-00013031-CU-JR-GDS, Shelleyanne W. L. Chang, Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to vacate its orders, to enter new orders granting the taxpayers' motion for summary judgment and denying that of the board, and to enter final judgment for the taxpayers. The court held that the board exceeded its rulemaking authority (*Rev. & Tax. Code, § 32451*) because its regulations were inconsistent with the definitions of distilled spirits and beer (*Bus. & Prof. Code, §§ 23005, 23006*). The board was required to apply those definitions (*Rev. & Tax. Code, § 32002*) in accordance with legislative intent that there be a uniform system of classifications for alcoholic beverages. Moreover, the interpretation of those definitions was within the authority of California's Department of Alcoholic Beverage Control (*Bus. & Prof. Code, § 25750*) and not the board. The board was further required (*Rev. & Tax. Code, § 32152*) to coordinate its rules and regulations with the federal regulations pertaining to alcoholic beverage taxation. (Opinion by Hull, J., with Blease, Acting P. J., and Butz, J., concurring.) [*908]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Administrative Law § 30--Effect and Validity of Rules and Regulations--Necessity for Compliance with Enabling Statute--Delegated Powers.--Although the absence of a specific statutory authorization for a regulation does not mean the regulation necessarily exceeds statutory authority, agency action must nevertheless be based on at least an implied delegation of power. Actions exceeding express or implied delegated powers are void.

(2) Administrative Law § 16--Administrative Actions--Legislation or Rule Making--Categories of Rules.--There are two categories of administrative rules, and the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind--quasi-legislative rules--represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. Because agencies granted such substantive rulemaking power are truly making law, their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. The other category of administrative rules is interpretation. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this expertise, expressed as an interpretation (whether in a regulation or less formally), that is the source of the presumptive value of the agency's views.

(3) Administrative Law § 32--Effect and Validity of Rules and Regulations--Necessity for Compliance with Enabling Statute--Interpretation--Degree of Judicial Deference.--An important corollary of agency interpretations is their diminished power to bind. Because an interpretation is an agency's legal opinion, however expert, rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference.

(4) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts--Determining Legislative Intent from Whole System.--In matters of statutory interpretation, a court's fundamental concern is with legislative intent. The court determines such intent by looking first to the words of the enactment, giving them their usual and [*909] ordinary meaning. However, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. Legislative intent will be determined so far as possible from the language of the statutes, read as a whole.

(5) Alcoholic Beverages § 2--Definitions--Distilled Spirits.--The word "thereof" in the definition of distilled spirits in *Bus. & Prof. Code, § 23005*, means the mixture must be of the items listed earlier in the statute, i.e., alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin. This would not include an alcoholic beverage consisting of a distilled spirit mixed with beer.

(6) Administrative Law § 30--Effect and Validity of Rules and Regulations--Necessity for Compliance with Enabling Statute--Obligation of Courts to Strike Down Void Regulations.--Administrative regulations that alter or amend a statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.

(7) Alcoholic Beverages § 20--Alcoholic Beverage Control Act--Taxation--Uniform Classifications.--*Rev. & Tax. Code, § 32002*, demonstrates a legislative intent that a uniform system of classifications for alcoholic beverages be applied.

(8) Alcoholic Beverages § 20--Alcoholic Beverage Control Act--Taxation--Agency Authority to Classify Alcoholic Beverages.--The Legislature did not delegate authority to California's Board of Equalization to adopt its own classification of alcoholic beverages for purposes of excise taxation. The Legislature directed that the definitions in the Alcoholic Beverage Control Act (ABC Act) (*Bus. & Prof. Code, § 23000 et seq.*) apply to the Alcoholic Beverage Tax Law (*Rev. & Tax. Code, § 32001 et seq.*), and it is California's Department of Alcoholic Beverage Control, not the board, that is authorized to interpret as necessary the provisions of the ABC Act, including the relevant alcoholic beverage definitions. The board instead adopted regulations that utilized different classifications than those adopted by the department. The board's regulations therefore could not stand.

[Cal. Forms of Pleading and Practice (2012) ch. 472B, Review of Agency Rulemaking, § 472B.13.] [*910]

COUNSEL: McDermott Will & Emery, Elizabeth Mann, Jessica Thomas, Allan L. Schare and Marc Sorini for Plaintiffs and Appellants.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Paul D. Gifford, Assistant Attorney General, William L. Carter, Steven J. Green and Robert E. Asperger, Deputy Attorneys General, for Defendant and Respondent.

JUDGES: Opinion by Hull, J., with Blease, Acting P. J., and Butz, J., concurring.

OPINION BY: Hull, J.

OPINION

[**360] **HULL, J.**--Plaintiffs Diageo-Guinness USA, Inc. (Diageo-Guinness), and The Flavored Malt Beverage Coalition (Coalition) appeal from a judgment entered in favor of defendant Board of Equalization (Board) on plaintiffs' complaint for declaratory relief. Plaintiffs had sought a declaration that regulations adopted by the Board, which redefined "distilled spirits" to include flavored malt beverages (FMB's) for purposes of excise taxation are void. Plaintiffs contend the classification of alcoholic beverages is within the exclusive jurisdiction of the Department of Alcoholic Beverage Control (Department), and [***2] the Department has consistently classified FMB's as beer, which is subject to a much lower tax rate. We agree the Board exceeded its statutory powers and reverse.

FACTS AND PROCEEDINGS

Prior to 1955, the manufacture, distribution and sale of alcoholic beverages was regulated by the Board. In November 1954, *article XX, section 22, of the state Constitution* was amended, transferring such regulatory power to the Department. As later amended, it reads in relevant part:

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The [D]epartment shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than [***3] a licensee of said [D]epartment to manufacture, import or sell alcoholic beverages in this State. [¶] ... [¶] [*911]

"Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in [various establishments], and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the *Alcoholic Beverage Control Act*, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged [various establishments] for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

"The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State."

To implement the foregoing, the Legislature enacted the Alcoholic Beverage Control Act (the ABC Act) (*Bus. & Prof. Code, § 23000 et seq.*). [***4] (*People v. Frangadakis (1960) 184 Cal.App.2d 540, 551 [7 Cal. Rptr. 776].*) *Business and Professions Code section 23001* declares: "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, [**361] and to promote temperance in the use and consumption of alcoholic beverages. ..."

Business and Professions Code section 23051 states: "On and after January 1, 1955, the [D]epartment shall succeed to all of the powers, duties, purposes, responsibilities, and jurisdiction now conferred on the [Board] under Section 22 of Article XX of the Constitution and this division, except the power to assess and collect such excise taxes as are or may

be imposed by law on account of the manufacture, importation, and sale of alcoholic beverages in this State, which shall remain the exclusive power of the [Board]."

The ABC Act defines "alcoholic beverage" to include "alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of [***5] alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances." (*Bus. & Prof. Code, § 23004.*) "Beer" is defined as "any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water, and includes ale, porter, brown, stout, lager beer, small beer, and strong beer but does not include sake, known as Japanese rice wine." (*Bus. & Prof. Code, § 23006.*) "Distilled spirits" is [*912] defined as "an alcoholic beverage obtained by the distillation of fermented agricultural products, and includes alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin, including all dilutions and mixtures thereof." (*Bus. & Prof. Code, § 23005.*)

The Legislature also enacted the Alcoholic Beverage Tax Law (the Tax Law) (*Rev. & Tax. Code, § 32001 et seq.*). Under the Tax Law, "[t]he issuance of any manufacturer's, winegrower's, wine blender's, distilled spirits manufacturer's agent's, rectifier's, wholesaler's, importer's, customs broker's license, or wine direct shipper permit under [the ABC Act] shall constitute the registration of the [***6] person to whom the license or permit is issued as a taxpayer under [the Tax Law]. ..." (*Rev. & Tax. Code, § 32101.*)

Beer is taxed at a rate of $0.04 per gallon plus a surcharge of $0.16 per gallon, for a total of $0.20 per gallon. (*Rev. & Tax. Code, §§ 32151, subd. (a), 32220, subd. (a).*) Distilled spirits are taxed at the considerably higher aggregate rates of either $3.30 or $6.60 per gallon, depending on alcohol content. (*Rev. & Tax. Code, §§ 32201, 32220, subds. (e) & (f).*)

An FMB is a hybrid containing characteristics of both beer and distilled spirits. As described by the Board, "FMBs are produced from a base of fermented malt beverage that is treated to remove the basic characteristics of a malt beverage, including color, bitterness, and taste. The base is then mixed with flavorings or other ingredients containing distilled alcohol." Plaintiffs describe FMB's somewhat differently: FMB's "begin with a base of brewed and fermented beer, to which a variety of ingredients are added. Those ingredients include one or more flavors, which ordinarily contain alcohol obtained by distillation, but which are 'unfit for beverage purposes' ... ." Plaintiffs explain the fact that an ingredient [***7] is "unfit for beverage purposes" does not mean it is unfit for human consumption. Rather, the term "is derived from the Prohibition era when the Legislature wanted to exempt liquids containing alcohol, like kitchen flavors, that were not consumed like a typical alcohol beverage from the ban required by Prohibition."

FMB's have traditionally been classified by the Department as beer for purposes of licensing and regulation. Prior to the regulations [**362] at issue in this matter, the Board likewise taxed FMB's as beer.

In October 2006, the Board received a petition requesting that it begin taxing FMB's as distilled spirits, and the Board thereafter initiated formal rulemaking procedures. On April 8, 2008, the Board adopted regulations redefining "beer" and "distilled spirits" for purposes of taxation. Those regulations were approved by the Office of Administrative Law on June 10, 2008. [*913]

The new regulations are contained in *title 18 of the California Code of Regulations as section 2558 et seq.* (Hereafter these regulations shall be referred to as Regulation followed by the section number or collectively as the FMB Regulations.) *Regulation 2558* reads: "Effective October 1, 2008, any alcoholic [***8] beverage, except wine ... , which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products, is a distilled spirit."

Regulation 2559 creates a rebuttable presumption that any alcoholic beverage other than wine is a distilled spirit within the meaning of *Regulation 2558. Regulation 2559.1* provides the means by which an interested party may rebut the presumption. *Subdivision (a) of Regulation 2559.1* reads: "On or after July 10, 2008, the presumption in *Regulation 2559* may be rebutted by the manufacturer of the alcoholic beverage filing a report, under penalty of perjury, with the Board stating that the alcoholic beverage contains less than 0.5 percent alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products and specifying the sources of the alcohol content of the alcoholic beverage, including the alcohol by volume derived from flavors or other ingredients containing alcohol obtained by distillation."

Regulation 2559.3 requires the Board to maintain a list of all alcoholic beverages "that [***9] have been found to have successfully rebutted the presumption set forth in *Regulation 2559.*" (*Regulation 2559.3, subd. (a).*) Finally, *Regulation 2559.5* reads: "Effective October 1, 2008, for purposes of tax reporting, a taxpayer will be deemed to have cor-

rectly classified an alcoholic beverage as not being a distilled spirit, as defined by *Business and Professions Code section 23005*, if at the time taxes are imposed, as set forth in the Revenue and Taxation Code, division 2, part 14, chapters 4, 5 and 5.5, the alcoholic beverage was included on the Board's list pursuant to *Regulation 2559.3*."

Diageo-Guinness is a Delaware corporation with its principal place of business in Connecticut. It holds a type 10 license (beer and wine importer) from the Department and sells beer and FMB's to California wholesalers. The Coalition is an association of six manufacturers and/or marketers of alcoholic beverages, including FMB's. On June 12, 2008, plaintiffs filed a complaint against the Board containing two causes of action, one seeking a declaration that the FMB Regulations are void as beyond the Board's authority and not reasonably necessary to effectuate the Board's taxing function and the other [***10] claiming a violation of the *commerce clause of the United States Constitution*. Plaintiffs later dropped their commerce clause claim. [*914]

Plaintiffs moved for a preliminary injunction to prevent the Board from implementing the Regulations. The trial court denied the motion. Plaintiffs thereafter moved for summary judgment. The Board moved for summary judgment as well.

[**363] The trial court denied plaintiffs' motion for summary judgment but granted that of the Board. The court concluded the Board has authority to adopt classifications of alcoholic beverages for taxation purposes that are different from the classifications adopted by the Department for purposes of licensing and regulation. According to the court: "[T]he Board's obligation to impose and enforce taxation under the ... Tax Law is founded in large part upon the clear classification of alcoholic beverages. Absent specific legislative guidance on the classification of FMBs, the Board must do so itself to effectuate proper taxation." The court thereafter entered judgment for the Board.

DISCUSSION

The trial court granted the Board's motion for summary judgment and denied that of plaintiffs. Normally, on a motion for summary judgment, the [***11] issue is whether there are material issues of fact requiring a trial. (*Code Civ. Proc., § 437c, subd. (c)*.) In this instance, the parties agree there are no material issues of fact and summary judgment is appropriate. The only question is which side is entitled to judgment in its favor. Resolution of that question turns on the lawfulness of the FMB Regulations.

The Department has for years informally classified FMB's as beer for purposes of licensing and regulation. The federal government, through its Alcohol and Tobacco Tax and Trade Bureau (TTB), classifies FMB's as beer if (1) they contain no more than 6 percent alcohol by volume and derive no more than 49 percent of that alcohol content from "flavors and other nonbeverage ingredients containing alcohol" or (2) they contain more than 6 percent alcohol by volume but no more than 1.5 percent of the overall volume of the beverage consists of "alcohol derived from added flavors and other nonbeverage ingredients containing alcohol." (*27 C.F.R. §§ 7.11 (a)(1), (2)* (2011), *25.15(b)* (2011).) Plaintiffs assert the Department "follows TTB's classification rule for FMBs."

By virtue of the FMB Regulations, the Board has undertaken to classify an FMB for purposes of [***12] excise taxation as a distilled spirit rather than a beer if it "contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products." (*Regulation 2558*.) The Board has also created a rebuttable presumption that every alcoholic beverage other than wine falls within the foregoing definition. (*Regulation 2559*.) Plaintiffs contend the Board did not have the legal authority to do so. [*915]

The trial court concluded "[t]he Board does not lack authority to enact beverage classification regulations for taxation purposes inconsistent with [the Department's] classification and licensing decisions ... ." The court noted the Board had previously deferred to the Department's classification, but "there is no statute that clearly compelled it to do so." The court further explained "there are no statutes which bestow upon [the Department] the exclusive power to classify FMBs, or any power to classify FMBs for taxation purposes." According to the court: "[T]he Board's obligation to impose and enforce taxation under the ... Tax Law is founded in large part upon the clear classification of alcoholic [***13] beverages. Absent specific legislative guidance on the classification of FMBs, the Board must do so itself to effectuate proper taxation."

The trial court's analysis boils down to this: Because there is no legislation expressly prohibiting the Board from adopting regulations defining FMB's as distilled [**364] spirits, and because the Board must classify FMB's as something for purposes of assessing excise taxes, the Board had the power to adopt the FMB Regulations.

(1) This analysis assumes the existence of a regulatory power based on the absence of a prohibition against the exercise of such a power. Although the absence of a *specific* statutory authorization for a regulation does not mean the regulation necessarily exceeds statutory authority (*Mineral Associations Coalition v. State Mining & Geology Bd. (2006) 138 Cal.App.4th 574, 589 [41 Cal. Rptr. 3d 544])*, agency action must nevertheless be based on at least an implied delegation of power. Actions exceeding express or implied delegated powers are void. (*American Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal.4th 1017, 1042 [56 Cal. Rptr. 2d 109, 920 P.2d 1314].*)

We begin our analysis with a consideration of the applicable standard of review. Plaintiffs contend the FMB Regulations are quasi-legislative [***14] acts subject to review under a standard of "respectful non-deference." Under this standard, the issue is whether the Board exceeded its delegated powers. This is an issue of law subject to independent review. The Board agrees the FMB Regulations amount to quasi-legislative acts. As such, review is limited to whether the regulations fall within the delegated power and are reasonably necessary to implement the purposes of the Tax Law. Hence, the parties agree the initial question presented is whether the Board exceeded its delegated powers in adopting the FMB Regulations, and this is a question of law subject to independent review.

(2) It is not quite so clear the FMB Regulations are the product of quasi-legislative action entitled to deferential review. "It is a 'black letter' [*916] proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind--quasi-legislative rules--represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. [Citations.] Because [***15] agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. ..." (*Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 10 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]* (*Yamaha*).)

(3) The other category of administrative rules is interpretation. "Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation (whether in a regulation or less formally ...), that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated [***16] legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Yamaha, supra, 19 Cal.4th at p. 11.*)

The ABC Act contains express definitions of beer and distilled spirits. A beer is "any alcoholic beverage obtained by the fermentation [**365] of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water ... ." (*Bus. & Prof. Code, § 23006.*) A distilled spirit is "an alcoholic beverage obtained by the distillation of fermented agricultural products ... ." (*Bus. & Prof. Code, § 23005.*) An FMB is a mixture of beer with one or more flavors or ingredients containing alcohol that would be distilled spirits but for the fact they are unfit for human consumption. An FMB does not fit neatly within either statutory definition.

According to plaintiffs, the Department has informally determined to follow the TTB's definition of an FMB as beer so long as it contains no more than 6 percent alcohol and no more than 49 percent of that alcohol comes from flavors or other nonbeverage ingredients or, if it contains more than 6 percent alcohol, no more than 1.5 percent of the beverage consists of alcohol from flavors or [***17] other nonbeverage ingredients. [*917]

The determination by the Department to follow the TTB definition of FMB's would appear to be a matter of *interpretation* of the definitions of beer and distilled spirits found in the ABC Act. Essentially, the Department has determined that an alcoholic beverage falling within the statutory definition of a beer that is then mixed with flavors or other nonbeverage ingredients remains a beer so long as the volume of these added ingredients is sufficiently low.

The Board has chosen a more formal approach to categorizing FMB's for purposes of taxation. Nevertheless, the FMB Regulations would appear to be an attempt to interpret the definitions of beer and distilled spirits so as to encompass FMB's.

In *Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785 [85 Cal. Rptr. 2d 844, 978 P.2d 2]* (*Ramirez*), the state high court considered *Labor Code section 1171*, which expressly excludes from overtime laws an "outside salesperson." The Industrial Welfare Commission (IWC), the state agency charged with implementing the statute, issued a wage order defining the term "outside salesman" as one who regularly works more than half the time away from the employer's

premises selling or obtaining orders. The issue presented [***18] on appeal was the validity of that wage order. (*20 Cal.4th at pp. 789-790, 795.*)

The high court noted the IWC "is the state agency empowered to formulate regulations (known as wage orders) governing minimum wages, maximum hours, and overtime pay ... ." (*Ramirez, supra, 20 Cal.4th at p. 795.*) The court determined the wage order had both quasi-legislative and interpretive aspects. (*Id. at p. 799.*) According to the court: "The Legislature has expressly delegated to the IWC the authority to promulgate wage orders setting 'minimum wages, maximum hours and standard conditions of labor for all employees.' ([*Lab. Code,] § 1185.*) 'Judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion. [Citations.] [¶] Because of the quasi-legislative nature of the IWC's authority, the judiciary has recognized that its review of the commission's wage orders is properly circumscribed.' [Citation.] ... [T]his delegation of legislative authority includes the power to elaborate the meaning [***19] of key statutory terms. On the other hand, since the IWC is engaged in construing the meaning of a portion of *section 1171*, its regulation is in some sense interpretive." ([**366] *Ramirez, supra, 20 Cal.4th at pp. 799-800.*)

The high court went on to find the wage order valid as either a quasi-legislative or an interpretive regulation. (*Ramirez, supra, 20 Cal.4th at pp. 800-801.*) Regarding the latter, the court explained: The wage order "has [*918] two attributes which weigh in favor of considerable judicial deference to the agency's interpretation. First, the interpretation is contained in a regulation formally adopted pursuant to the Administrative Procedure Act. ... Second, the regulation is entitled to greater deference because it embodies a statutory interpretation that the administrative agency '"has consistently maintained"' and '"is [of] long-standing"' [citation], i.e., for almost 20 years." (*Id. at p. 801.*)

In *Megrabian v. Saenz (2005) 130 Cal.App.4th 468 [30 Cal. Rptr. 3d 262]* (*Megrabian*), the Court of Appeal considered a provision of the state's cash assistance program for aged, blind, and disabled legal immigrants (CAPI) (*Welf. & Inst. Code, § 18937 et seq.*) which bases eligibility for benefits in part [***20] on whether the person " 'entered the United States' " before a certain date. (*Megrabian, at p. 473.*) The State Department of Social Services (DSS) interpreted the phrase "entered the United States" to be "based not on the date an immigrant physically arrived in the United States, but on 'the effective date of the non-citizen's current immigration status as determined by the Immigration and Naturalization Service.'" (*Id. at p. 476.*)

As in *Ramirez*, the court found the agency's interpretation had both quasi-legislative and interpretive characteristics. The court explained: "Its interpretation, now embodied in a regulation, was quasi-legislative because the Legislature gave the DSS the power to 'adopt regulations, orders, or standards of general application to implement, interpret, or make specific the law enforced by' it, including CAPI. [Citations.] On the other hand, the DSS construed the meaning of a portion of a statute, and thus 'its regulation is in some sense interpretive.' [Citation.]" (*Megrabian, supra, 130 Cal.App.4th at p. 479.*)

The Board's regulatory power under the Tax Law is found in *Revenue and Taxation Code section 32451*, which reads: "The board shall enforce the provisions of this [***21] part and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part." The FMB Regulations are, at least arguably, an attempt to interpret the terms "beer" and "distilled spirit" as those terms relate to FMB's. They therefore have attributes of both quasi-legislative and interpretive regulations.

But we need not decide the applicable standard of review in this matter. As we shall explain, assuming we are dealing with quasi-legislative action subject to the most deferential review, the FMB Regulations do not withstand even this relaxed scrutiny.

(4) The question whether *Revenue and Taxation Code section 32451* can be read to authorize the Board to classify FMB's as distilled spirits for [*919] purposes of taxation is one of statutory construction. In matters of statutory interpretation, our fundamental concern is with legislative intent. (*Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 724 [257 Cal. Rptr. 708, 771 P.2d 406].*) We determine such intent by looking first to the words of the enactment, giving them their usual and ordinary meaning. (*Trope v. Katz (1995) 11 Cal.4th 274, 280 [45 Cal. Rptr. 2d 241, 902 P.2d 259].*) However, "every statute should be construed [**367] with reference to the whole system of law of [***22] which it is a part, so that all may be harmonized and have effect. [Citation.] Legislative intent will be determined so far as possible from the language of the statutes, read as a whole." (*County of Fresno v. Clovis Unified School Dist. (1988) 204 Cal.App.3d 417, 426 [251 Cal. Rptr. 170].*)

Under the Tax Law, the Board is tasked with assessing and collecting excise tax on the sale of alcoholic beverages in the state. The Tax Law recognizes three general classes of alcoholic beverages--beer, wine and distilled spirits--and applies different taxation rates to each. Those three classes are expressly defined in the ABC Act but not the Tax Law. The Tax Law provides that, "[u]nless the context otherwise requires, the definitions set forth in [the Tax Law] and those in [the ABC Act] govern the construction of [the Tax Law]." (*Rev. & Tax. Code, § 32002.*) Thus, since the Tax Law does not define beer, wine or distilled spirits, in determining what tax rate to apply to a particular alcoholic beverage, the Board must look to the definitions in the ABC Act.

(5) The ABC Act contains no express definition of an FMB. The Board contends the definition of distilled spirits encompasses FMB's because it includes "[a]ny alcoholic [***23] beverage that is a mixture and includes alcohol 'obtained by the distillation of fermented agricultural products.'" This is an obvious misreading of the relevant statute. As noted above, a distilled spirit is defined under the ABC Act as "an alcoholic beverage obtained by the distillation of fermented agricultural products, and includes alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin, *including all dilutions and mixtures thereof.*" (*Bus. & Prof. Code, § 23005*, italics added.) The word "thereof" in the foregoing definition clearly means the mixture must be of the items listed earlier, i.e., "alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin." This would not include an alcoholic beverage consisting of a distilled spirit mixed with beer.

Regulation 2558 defines a distilled spirit, for purposes of taxation, as "any alcoholic beverage, except wine ... , which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products." Under this regulation, a beer is now defined as any alcoholic beverage except wine that contains *less than* 0.5 [***24] percent alcohol so derived. Although perhaps [*920] intended as a means of bridging the gap between beer and distilled spirits to include FMB's, *Regulation 2558* essentially redefines beer and distilled spirits. Under the regulation, a beer is *any* alcoholic beverage, except wine, that contains less than 0.5 percent alcohol, regardless of whether the beverage is "obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water." (*Bus. & Prof. Code, § 23006.*) This does not appear to be simply an interpretation of the statutory definition of beer but a wholesale rewrite, at least for purposes of taxation.

(6) "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams (1967) 67 Cal.2d 733, 748 [63 Cal. Rptr. 689, 433 P.2d 697].*)

But even if *Regulation 2558* amounted to a reasonable interpretation of the statutory definitions of beer and distilled spirits, it is beyond the Board's delegated authority.

The ABC Act contains statutory definitions of beer and distilled spirits. *Business and Professions Code section 25750* [***25] [**368] states: "(a) The department shall make and prescribe those reasonable rules as may be necessary or proper to carry out the purposes and intent of *Section 22 of Article XX of the California Constitution* and to enable it to exercise the powers and perform the duties conferred upon it by that section or by [the ABC Act], not inconsistent with any statute of this state, including particularly [the ABC Act] ... ." To the extent interpretation of the statutory definitions of beer and distilled spirits found in the ABC Act is necessary to carry out the purposes of the ABC Act, this would fall within the authority of the Department.

The Board contends, and the trial court agreed, that the Department's interpretation of the statutory definitions for purposes of licensing and regulation does not preclude the Board from adopting different interpretations for purposes of taxation. The Board cites *Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192 [46 Cal. Rptr. 3d 41, 138 P.3d 193]* and *Los Angeles Unified School Dist. v. Superior Court (2007) 151 Cal.App.4th 759 [60 Cal. Rptr. 3d 445]* for the proposition that "[t]he rule that identical statutory language should be interpreted the same way 'applies only when the statutes in question [***26] cover "the same or an analogous subject" matter.'" According to the Board, registration and licensing under the ABC Act is not the same subject matter as taxation under the Tax Law.

(7) The short answer to the Board's argument is that, if the Legislature had intended to permit different interpretations of the terms beer and distilled [*921] spirits under the ABC Act and the Tax Law, it would not have provided in *Revenue and Taxation Code section 32002* that the definitions contained in the ABC Act apply to the Tax Law. In our view, this provision demonstrates a legislative intent that a uniform system of classifications for alcoholic beverages be applied.

This intent is further demonstrated by the interplay between *Business and Professions Code section 23661* and *Revenue and Taxation Code section 32111*. The former reads in relevant part:

"Except as otherwise provided in this section, alcoholic beverages may be brought into this state from without this state for delivery or use within the state only by common carriers and only when the alcoholic beverages are consigned to a licensed importer ... . [¶] ... [¶]

"A manufacturer of distilled spirits may transport such distilled spirits into this state [***27] in motor vehicles owned by or leased to the manufacturer, and operated by employees of the manufacturer, if:

"(a) Such distilled spirits are transported into this state from a place of manufacture within the United States; and

"(b) The manufacturer holds a California distilled spirits manufacturer's license; and

"(c) Delivery is made to the licensed premises of such distilled spirits manufacturer." (*Bus. & Prof. Code, § 23661.*)

Pursuant to this provision, a licensed manufacturer of distilled spirits may transport such product into the state in its own motor vehicles without using a common carrier and a licensed importer.

Revenue and Taxation Code section 32111 reads: "Before commencing to transport distilled spirits into this state pursuant to the provisions of [*Business and Professions Code section 23661*], the distilled spirits manufacturer shall register with the board and make application to the board for a manufacturer's interstate alcoholic beverage transporter's permit, which, [**369] upon issuance, shall be valid until revoked by the board."

Obviously, these provisions cannot work in tandem, as intended, if a different definition of distilled spirits applies to each.

Similar interrelated provisions apply to beer importation. [***28] (See *Bus. & Prof. Code, § 23661.5* and *Rev. & Tax. Code, § 32110.*) [*922]

In addition to the foregoing, *Revenue and Taxation Code section 32152* reads: "The board shall adopt such rules and regulations as may be necessary to coordinate so far as permitted by the provisions of this part the system of beer and wine taxation imposed by this part with the system of beer and wine taxation imposed by the internal revenue laws of the United States." Plaintiffs contend this provision requires the Board to adopt the same treatment of FMB's as that utilized by the TTB which, according to plaintiffs, is the approach taken by the Department.

The Board contends *Revenue and Taxation Code section 32152* is inapplicable to the present matter because it does not mention distilled spirits. However, to the extent the statute mentions beer and wine, and beer and wine encompass every alcoholic beverage except distilled spirits, we do not see how this makes a difference.

The Board further argues that if the Legislature had intended that it simply adopt the federal classification scheme for alcoholic beverages, it would have said so and would not have enacted its own definitions.

We are not altogether certain what the Legislature intended to accomplish with *Revenue and Taxation Code section 32152*. [***29] We agree with the Board that if the Legislature had intended the Board simply to adopt the federal classification scheme, it would have said so. Nevertheless, we note that *Revenue and Taxation Code section 32177.5* prohibits the imposition of tax on the sale of distilled spirits at any federal armed forces exchanges, officers' clubs or messes. To the extent the Board adopts a definition of distilled spirits different from that utilized by the TTB, this could lead to the taxation of products considered to be distilled spirits under federal law but classified as beer under *Regulation 2558*.

(8) We conclude the Legislature did not delegate authority to the Board to adopt its own classification of alcoholic beverages for purposes of excise taxation. The Legislature directed that the definitions in the ABC Act apply to the Tax Law, and it is the Department, not the Board, that is authorized to interpret as necessary the provisions of the ABC Act, including the relevant alcoholic beverage definitions. The Board instead adopted regulations that utilize different classifications than those adopted by the Department. The Board's regulations therefore cannot stand.

In reaching this conclusion, we have [***30] no occasion to consider the validity of the classification scheme adopted by the Department itself. According to plaintiffs, the Department has adopted the classifications used by the federal TTB. We decide here simply that, under the statutory scheme adopted by the Legislature in the ABC Act and the Tax Law, interpretation of the statutory [*923] definitions of alcoholic beverages is a matter for the Department, and

the Board cannot adopt its own classifications for taxation purposes. Because the trial court concluded otherwise, we reverse.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to vacate its orders denying plaintiffs' motion for summary judgment and granting [**370] that of the Board and to enter new orders granting plaintiffs' motion for summary judgment and denying that of the Board and to enter final judgment for plaintiffs. Plaintiffs are awarded their costs on appeal. (*Cal. Rules of Court, rule 8.278(a)(1).*)

Blease, Acting P. J., and Butz, J., concurred.

State of California

Board of Equalization
Legal Department-MIC:83
Office of the Chief Counsel
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Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: October 25, 2012

From: Randy Ferris
Chief Counsel

Subject: Board Meeting, November 13-15, 2012
Item J, Chief Counsel's Rulemaking Calendar
Regulations 2558 through 2559.5

We request your approval to place proposed changes to Alcoholic Beverage Tax Regulations 2558, *Distilled Spirits*, 2558.1, *Wine*, 2559, *Presumption – Distilled Spirits*, 2559.1, *Rebuttable Presumption – Distilled Spirits*, 2559.3, *Internet List*, and 2559.5, *Correct Classification*, on the Chief Counsel's Rulemaking Calendar for the November 13 to 15, 2012, Board meeting. In *Diageo-Guinness USA, Inc. v. Board of Equalization* (2012) 205 Cal.App.4th 907 (hereafter *Diageo*), the California Court of Appeal held that the Board lacked the authority to adopt the regulations. The proposed changes repeal the regulations in accordance with the Court of Appeal's holding in *Diageo*.

On April 8, 2008, the Board adopted Regulations 2558, 2559, 2559.1, 2559.3, and 2559.5 to interpret, implement, and make specific Business and Professions Code (BPC) sections 23004, 23005, 23006, and 23007, which define the terms "alcoholic beverage," "distilled spirits," "beer," and "wine," respectively, for purposes of the Alcoholic Beverage Control (ABC) Act (BPC, § 23000 et seq.) and Alcoholic Beverage Tax (Tax) Law (Rev. & Tax. Code, § 32001 et seq.). The regulations provide guidance regarding the proper classification of alcoholic beverage products, other than wine as defined in BPC section 23007, for alcoholic beverage tax purposes.

On May 25, 2011, the Board adopted Alcoholic Beverage Tax Regulation 2558.1 to further clarify that, for alcoholic beverage tax purposes, the term "wine," as defined in BPC section 23007, "does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation of fermented agricultural products other than from the particular agricultural product or products of which the wine is made." As a result, Regulation 2558.1 requires such products to be classified as distilled spirits under Regulation 2558, for alcoholic beverage tax purposes.

In *Diageo*, the Court of Appeal held that the Board lacked the authority to adopt Regulations 2558, 2559, 2559.1, 2559.3, and 2559.5 because "the Legislature did not delegate authority to the Board to adopt its own classification of alcoholic beverages for purposes of excise taxation. The Legislature directed that the definitions in the ABC Act apply to the Tax Law, and it is the Department [of Alcoholic Beverage Control], not the Board, that is authorized to interpret as necessary the provisions of the ABC Act, including the relevant alcoholic beverage definitions." (*Diageo*, *supra*, 205 Cal.App.4th at p. 922.) Although Regulation 2558.1 was not expressly at issue in *Diageo* because it was adopted after the litigation began, the Court of Appeal's holding in *Diageo* also applies to Regulation 2558.1 because it was adopted to classify alcoholic beverages for alcoholic beverage tax purposes.

As a result, Board staff will request the Board's authorization to repeal Regulations 2558, 2558.1, 2559, 2559.1, 2559.3, and 2559.5 under California Code of Regulations, title 1, section (Rule) 100 without the normal notice and public hearing process. These changes to the California Code of Regulations are appropriate for processing under Rule 100 because they make the code consistent with the Court of Appeal's holding in *Diageo*, and do not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

If you have any questions regarding this request, please let me know or contact Mr. Bradley Heller at 916-323-3091.

Recommendation by:

Randy Ferris, Chief Counsel

Approved:

Cynthia Bridges, Executive Director

Approved:

David Gau, Deputy Director
Property and Special Taxes Department

BOARD APPROVED
At the 11-15-12 Board Meeting

Joann Richmond, Chief
Board Proceedings Division

RF:BMH:yg

cc: Mr. David Gau MIC:63
Ms. Joann Richmond MIC:80
Mr. Robert Tucker MIC:82
Mr. Bradley M. Heller MIC:82
Ms. Lynn Bartolo MIC:57
Mr. Robert Zivkovich MIC:31

2012 MINUTES OF THE STATE BOARD OF EQUALIZATION

Thursday, November 15, 2012

Whether the 25-percent penalty for fraud or intent to evade is supported by clear and convincing evidence.
Action: Upon motion of Ms. Yee, seconded by Ms. Steel and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Retailers License Denial Appeal Hearing

D2 Cig Row, Inc., 588150 (ET)
08-02-11 Date of Citation
For Petitioner: Patrick Finnegan, Representative
Caitlin Colman, Representative
For Property and Special Taxes Department: Pamela Mash, Tax Counsel
Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.
Issue: Whether the Special Taxes and Fees Division of the Property and Special Taxes Department properly denied petitioner's application for a Cigarette and Tobacco Products Retailer's license.
Action: Upon motion of Ms. Yee, seconded by Mr. Runner and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

CHIEF COUNSEL MATTERS

[J] RULEMAKING

J1 Section 100 Changes to Alcoholic Beverage Tax Regulations 2558 through 2559.5

Bradley Heller, Tax Counsel, Tax and Fee Programs Division, Legal Department, was available to answer questions regarding the request for authorization to complete Rule 100 changes repealing the regulations in conformity with a published opinion from the Court of Appeal (Exhibit 11.5).

Action: Upon motion of Ms. Mandel, seconded by Ms. Yee and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board approved the section 100 changes as recommended by staff.

ADMINISTRATIVE SESSION

[N] ADMINISTRATIVE MATTERS, CONSENT

The Board deferred consideration of the following matters: *N5 Adoption of Affidavit of Cotenant Residency, form BOE-58-H;* and, *N6 Adoption of revisions to Change in Ownership Statement, Death of Real Property Owner, form BOE-502-D.*

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

NOVEMBER 15, 2012

CHIEF COUNSEL MATTERS

J RULEMAKING

J1 ALCOHOLOIC BEVERAGE TAX

REGULATIONS 2558 THROUGH 2559.5

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Reported by: Juli Price Jackson

No. CSR 5214

1 P R E S E N T

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3 For the Board of Equalization: Jerome E. Horton
Chairman

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5 Michelle Steel
Vice-Chairwoman

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7 Betty T. Yee
Member

8

9 George Runner
Member

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11 Marcy Jo Mandel
Appearing for John
12 Chiang, State
Controller (per
13 Government Code
Section 7.9)

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15 Joann Richmond
Chief, Board
16 Proceedings Division

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18 For Staff: Bradley Heller
Legal Department
19 Tax Counsel

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1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 NOVEMBER 15, 2012
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5 MS. RICHMOND: Our next item is Chief Counsel
6 Matters, J, Rulemaking, J1, Alcoholic Beverage Tax
7 Regulations 2558 through 2559.5.
8 MR. HORTON: Welcome, Mr. Keller (verbatim).
9 A motion, Members?
10 MR. HELLER: Good afternoon, Chairman Horton.
11 MS. MANDEL: I'll -- I'll move the regulations
12 (unintelligible).
13 MR. HORTON: Moved by Member Mandel, second by
14 Member Yee.
15 Without objection, Members? Such will be the
16 order.
17 Thank you very much.
18 MR. RUNNER: Nice job.
19 MR. HORTON: We'll receive and file your
20 presentation.
21 MR. HELLER: Thank you, Members of the Board.
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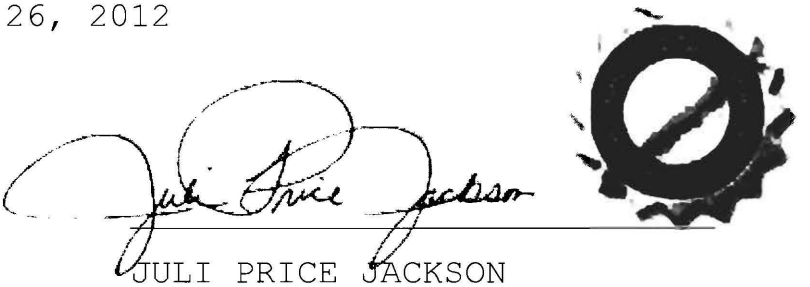
REPORTER'S CERTIFICATE.

State of California)
) ss
County of Sacramento)

I, JULI PRICE JACKSON, Hearing Reporter for the California State Board of Equalization certify that on NOVEMBER 15, 2012 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 3 constitute a complete and accurate transcription of the shorthand writing.

Dated: November 26, 2012



JULI PRICE JACKSON
Hearing Reporter

Electronically signed by Juli Jackson (001-065-206-4972) f291099d-df3f-4f97-9fd1-b927a4ced614