

## 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 *RMF*  
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.

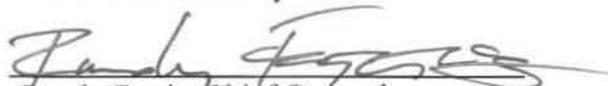
On May 25, 2011, the Board adopted Alcoholic Beverage Tax Regulation 2558.1 to further clarify that, for alcoholic beverage tax purposes, the term "wine," as defined in BPC section 23007, "does not include any alcoholic beverage containing 0.5 percent or more alcohol by volume obtained from the distillation 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 \_\_\_\_\_ 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