For purposes of Regulations 23663-1 through 23663-5, inclusive, the following definitions shall apply:

Section 23663-1 is adopted to read:

§ 23663-1. Definitions.

(a) *Adjustment Date.* The term "adjustment date" shall mean the calendar date on which any adjustment under Regulations 23663-2 through 23663-5 is made by either the mailing by the Franchise Tax Board of a notice of corrected credit adjustments under Regulations 23663-2 through 23663-5, including a notice of proposed assessment under Revenue and Taxation Code section 19033, or the date on which the FTB receives a request which is later approved for either a correction of an error under Regulation 23663-4 or to apply Regulation 23663-2 or 23663-3. To the extent a final determination of a notice mailed by the FTB modifies, in whole or in part, the allocations reflected in that notice, then such modifications are treated as if made on the adjustment date on which that notice was mailed.

(b) *Affiliated Corporation.* The term "affiliated corporation" shall mean any corporation that is a member of the same commonly controlled group within the meaning of Revenue and Taxation Code section 25105 as the assignor.

(c) *Aggregated Eligible Assignees.* The term "aggregated eligible assignees" shall mean all eligible assignees assigned the same type of identical credits in the same taxable year.

(d) *Assignee.* The term "assignee" shall mean any corporation (including a successor in interest) to whom an assignor has made an election to assign a credit under Revenue and Taxation Code section 23663, and shall also include any affiliated corporation (including a successor in interest) whose identifying information is listed on the defective assignment.

(e) *Assignment*. The term "assignment" shall mean any election by an assignor to assign a credit to an assignee under the provisions of Revenue and Taxation Code section 23663. For purposes of Regulations 23663-1 through 23663-5, each election by an assignor to assign any credit to an assignee shall be treated as a separate assignment.

(f) *Assignor*. The term "assignor" shall mean any taxpayer (including any successor in interest) who made an election to assign any credit to an assignee.

(g) *Closed Year*. The term "closed year" shall mean any taxable year for which the Franchise Tax Board determines that it is precluded from mailing a notice of proposed deficiency assessment.

(h) *Defective Assignment*.

(1) The term "defective assignment" shall mean any assignment under Revenue and Taxation Code section 23663 which does not comply with the requirements of

Revenue and Taxation Code section 23663, including, but not limited to, any assignment which:

(A) fails to clearly identify the taxable year from which the credit to be assigned was earned by the assignor;

(B) fails to clearly identify the amount of any credit to be assigned;

(C) fails to clearly identify the type of credit intended to be assigned;

(D) assigns an amount of credit, or when aggregated with other assignments of the same credit in the same taxable year, which exceeds the amount of the assignor's eligible credits for that taxable year;

(E) assigns a credit that is not an eligible credit; or

(F) assigns a credit to an assignee who is not clearly identified or who is not an eligible assignee.

(2) An assignor's intent or purpose in making an assignment is not relevant in determining whether an assignment is a defective assignment.

(3) Examples.

Example 1: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y. Subsequently, X discovers that it only had $120 of 2010 R & D credits. The assignment to Y is a not a defective assignment because X had the $100 of 2010 R & D credits assigned to Y. The fact that X retained less 2010 R & D credits than it expected does not make the assignment to Y a defective assignment. Therefore, X retained $20 of 2010 R & D credits and Y received $100 of 2010 R & D credits.

Example 2: Assume the same facts as in Example 1, except that X elects to assign all $200 of the 2010 R & D credits to Y. Subsequently, X discovers that it had $300 of 2010 R & D credits. The assignment to Y is a not a defective assignment because X had all $200 of the 2010 R & D credits assigned to Y. Even if X can demonstrate that X intended to assign all of its 2010 R & D credits to Y, the assignment of 2010 R & D credits to Y will be limited to $200 of 2010 R & D credits because this is the amount assigned in the valid assignment.

Example 3: Assume the same facts as in Example 1, except that X discovers that X has no credits and the election to assign credits to Y was meant to have been made by its affiliate, E, the entity that had $200 of 2010 R & D credits. No credits are transferred because the assignment of credits from X to Y was a defective assignment, and E did not elect to assign any credits. Therefore, E retained all $200 of 2010 R & D credits, and Y received no 2010 R & D credits.

Example 4: Assume the same facts as in Example 1, except that X can demonstrate with contemporaneous evidence, such as emails, correspondence, memos and tax preparation workpapers, that X intended to assign no credits to Y and, instead, meant to assign the $100 of 2010 R & D credits to M. Pursuant to paragraph (2), X's intent to assign to M is not relevant in determining whether the assignment is a defective assignment. Accordingly, the assignment of credits to Y is not a defective assignment. Therefore, X retained $50 of 2010 R & D credits, Y received $100 of 2010 R & D credits, and M received no credits.

Example 5: Assume the same facts as in Example 1, except that on X's original tax return for the 2010 taxable year, X did not elect to assign any credits, but Y's Form 3544A states that Y received $100 of 2010 R & D credits from X in 2010. An assignment of credits in 2010 did not occur because X did not make an election to assign credits on its original tax return. Therefore, X retained $200 of 2010 R & D credits and Y received no credits.

(i) *Effective Date of the Adjustment.* The term "effective date of the adjustment" shall mean the date an allocation or reduction pursuant to Regulations 23663-2 through 23663-5 is treated as having occurred, which date shall be the same time that an assignor or eligible assignee would otherwise have retained or received the credits if the original assignment had reflected such an allocation.

(j) *Election.* The term "election" shall mean an irrevocable election by an assignor to assign to an assignee a credit under the rules of Revenue and Taxation Code section 23663, in the form and manner specified by the FTB in forms and instructions, including FTB Form 3544 (and any successor form thereto).

(k) *Eligible Assignee*. The term "eligible assignee" shall mean any affiliated corporation that is properly treated as a member of the same combined reporting group under Revenue and Taxation Code sections 25101 or 25110 as the assignor, determined as of (i) in the case of credits earned in taxable years beginning before July 1, 2008, June 30, 2008 and the last day of the taxable year of the assignor in which the eligible credit is assigned, or (ii) in the case of credits earned in taxable years beginning on or after July 1, 2008, the last day of the first taxable year in which the credit was allowed to the assignor and the last day of the taxable year of the assignor in which the eligible credit is assigned.

(l) *Eligible Credit*. The term "eligible credit" shall mean any credit earned by a taxpayer (i) in a taxable year beginning on or after July 1, 2008, or (ii) in a taxable year beginning before July 1, 2008, provided that such pre-July 1, 2008 credit is eligible to be carried forward to the taxpayer's first taxable year beginning on or after July 1, 2008 under the provisions of Part 11 of the Revenue and Taxation Code.

(m) *FTB*. The term "FTB" shall mean Franchise Tax Board.

(n) *First Contact.* The term "first contact" shall mean the date the initial audit contact as defined in Regulation 19032 is sent to any assignor or assignee with respect to any taxable year in which an assignment of credits is made or in which credits which were the subject of an assignment are claimed.

(o) *Identical Credit*. The term "identical credit" shall mean any credit that:

(1) is allowed under the same section of the Revenue and Taxation Code as any other credit,

(2) is originally allowed in the same taxable year, and

(3) in the case of certain credits, such as credits for activities in enterprise zones, program areas or similar geographic-based credits, is a credit based on activity in the same enterprise zone or program area.

(p) *Parties to a Defective Assignment.* The term "parties to a defective assignment" shall mean the assignor and each potential assignee for all defective assignments the assignor made of the same type of identical credit in the same taxable year as the defective assignment.

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 23663, Revenue and Taxation Code.

Section 23663-2 is adopted to read:

§ 23663-2. Assignor Has Less Credits Than Assigned.

(a) *In General.* Pursuant to Regulation 23663-5(a), no assignor, assignee, or any other taxpayer shall claim, assign or otherwise benefit from a credit which was assigned in a defective assignment, unless that credit is allocated to the assignor or assignee under Regulations 23663-2 through 23663-5. This regulation provides default rules for the allocation of credits in defective assignments when an assignor assigns more credits than it has, and also includes alternative allocation rules that are available before first contact. This regulation shall generally apply after any correction made under Regulation 23663-4.

(b) *Rules for Aggregating Defective Assignments*. If, in a single taxable year, an assignor makes multiple assignments of the same type of identical credit, these multiple assignments shall be aggregated for purposes of determining whether the assignments were defective assignments. If the assignor has less identical credits available than the aggregate amount assigned, then all assignments made in a single taxable year of that type of identical credit shall be defective assignments.

Example 1: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Subsequently, X discovers that it only had $120 of 2010 R & D credits. The assignments to Y and Z will be aggregated for purposes of determining whether both are defective assignments because both assignments involved the same type of identical credit and were made in the same taxable year. Both assignments will be treated as being defective assignments because X did not have the $200 of 2010 R & D credits which were assigned to Y and Z in the taxable year of the assignment.

Example 2: Assume the same facts as in Example 1, except that the assignment to Z was made on X's 2011 original tax return. While the assignments to X and Y deal with the same type of identical credit, the assignments were made in different taxable years and so are not aggregated for purposes of applying subsection (b). (See also Regulation 23663-5(d)(1).)

Example 3: Assume the same facts as in Example 1, except that instead of assigning $100 of 2010 R & D credits to Z in 2010, X assigned $100 of 2009 R & D credits to Z on its 2010 tax return. The assignments to Y and Z are not aggregated under this section because the 2009 R & D credits and 2010 R & D credits are not identical credits.

Example 4: Assume the same facts as in Example 3, except that instead of assigning $100 of 2009 R & D credits to Z, X assigned $100 of 2010 low income housing credits to Z. The assignments to Y and Z are not aggregated under this section because the 2010 R & D credits and 2010 low income housing credits are not identical credits.

(c) *Default Allocation*. For an assignment which is a defective assignment because an assignor's amount of identical credits available for assignment is less than the amount of those identical credits assigned, such identical credits shall be allocated according to the following rules as of an adjustment date:

(1) The assignor's identical credits, or remaining credits after adjusted by paragraph (2) if applicable, shall be allocated to the aggregated eligible assignees pro rata pursuant to the ratio of the identical credits assigned in the original defective assignments.

(2) If the assignor or any aggregated eligible assignees claimed credits in a closed year, then subparagraphs (A) and (B) shall apply.

(A) First, the assignor's identical credits shall be allocated to the assignor and any aggregated eligible assignees to the extent they claimed such credits in a closed year; except that if the amount of identical credits claimed in closed years by the assignor and aggregated eligible assignees exceeds the assignor's amount of such identical credits available for assignment, then the credits shall be allocated to the assignor and aggregated eligible assignees pro rata based on the aggregate amount of credits each claimed in closed years.

(B) Second, any credits remaining after application of subparagraph (A) shall be allocated to the aggregated eligible assignees with the lowest pro rata allocation of credits until all aggregated eligible assignees have been allocated a pro rata portion of credits pursuant to the ratio of the identical credits assigned in the original defective assignments.

(3) *Examples*.

Example 5: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of the 2010 R & D credits. Subsequently, X discovers that it only had $150 of R & D credits in 2010. Pursuant to subsection (c)(1), as of the adjustment date, X's actual $150 of 2010 R & D credits will be allocated to the aggregated eligible assignees (Y and Z) as follows: for Y – $200 ($200 is the total 2010 R & D credits assigned to Y) / $300 ($300 is the total 2010 R & D credits assigned to eligible assignees) x $150 ($150 is X's actual amount of 2010 R & D credits) = $100 and for Z – $100 / $300 x $150 = $50. Therefore, under this regulation, X is treated as having retained no 2010 R & D credits, Y is treated as having received $100 of 2010 R & D credits, and Z is treated as having received $50 of 2010 R & D credits.

Example 6: Assume the same facts as in Example 5, except that X has claimed $30 of 2010 R & D credits in a closed year as of the adjustment date. Pursuant to subsection (c)(2)(A), the first $30 of 2010 R & D credits are allocated to X. Pursuant to subsection (c)(1), the remaining $120 of 2010 R & D credits ($150 less $30) will be

allocated to the aggregated eligible assignees as follows: for Y – $200 ($200 is the total 2010 R & D credits assigned to Y) / $300 ($300 is the total 2010 R & D credits assigned to eligible assignees) x $120 ($120 is X's remaining amount of 2010 R & D credits) = $80 and for Z – $100 / $300 x $120 = $40. Therefore, under this regulation, X is treated as having retained $30 of 2010 R & D credits (the $30 claimed in a closed year), Y is treated as having received $80 of 2010 R & D credits, and Z is treated as having received $40 of 2010 R & D credits.

Example 7: Assume the same facts as in Example 6, except that Y has also claimed $40 of 2010 R & D credits in a closed year as of the adjustment date. Pursuant to subsection (c)(2)(A), $30 of 2010 R & D credits are first allocated to X and $40 of 2010 R & D credits to Y. Next, pursuant to subsection (c)(2)(B),of the remaining $80 of 2010 R & D credits ($150 less $70), $20 of 2010 R & D credits will be allocated to Z so that Y and Z end up with a pro rata allocation of credits using the original defective assignment amounts. $40 ($40 is the 2010 R & D credits already allocated to Y) / $200 ($200 is the total 2010 R & D credits assigned to Y) = 20% x $100 ($100 is the total 2010 R & D credits assigned to Z) = $20. Finally, pursuant to subsection (c)(1), the remaining $60 of 2010 R & D credits ($150 less $70 less $20) will be allocated as follows: for Y – $200 ($200 is the total 2010 R & D credits assigned to Y) / $300 ($300 is the total 2010 R & D credits assigned to aggregated eligible assignees) x $60 ($60 is X's remaining amount of 2010 R & D credits) = $40 and for Z – $100 / $300 x $60 = $20. Therefore, under this regulation, X is treated as having retained $30 of 2010 R & D credits, Y is treated as having received $80 of 2010 R & D credits and Z is treated as having received $40 of R & D credits.

Example 8: Assume the same facts as in Example 5, except that instead of assigning credits to Y and Z in the amounts listed, X assigns $150 of the 2010 R & D credits to Y, $100 of the 2010 R & D credits to Z, and $50 of the 2010 R & D credits to T. As of the adjustment date, Y has claimed $90 of 2010 R & D credits in a closed year and Z has also claimed $10 of 2010 R & D credits in a closed year. Pursuant to subsection (c)(2)(A), as of the adjustment date, X's actual $150 of 2010 R & D credits will be allocated to the aggregated eligible assignees (Y, Z and T) as follows: $90 of 2010 R & D credits are first allocated to Y and $10 of 2010 R & D credits to Z. Therefore, after this first step, Y, Z and T have received the following percentage of the credits assigned to them in the original defective assignments: Y – 60% ($90 / $150), Z – 10% ($10 / $100) and T – 0% ($0 / $50).

Next, pursuant to subsection (c)(2)(B),$5 of 2010 R & D credits (10% x 50 credits assigned to T) will be allocated to T so that T has the same 10% allocation as Z. Z and T now both have a 10% allocation of the 2010 R & D credits assigned to them in the original defective assignments. The remaining $45 of 2010 R & D credits ($150 less $100 less $5) will be allocated to Z and T until they both have received a 60% allocation of 2010 R & D credits. The credits to be allocated to Z and T are calculated as follows:

(i) for Z – 60% x $100 = $60 less the $10 already allocated to Z = $50, and
(ii) for T – 60% x $50 = $30 less the $5 already allocated to Z = $25.

Therefore, a total of $75 of 2010 R & D credits are to be allocated to Z and T.

However, because X only has $45 of 2010 R & D credits remaining to be allocated to the aggregate eligible assignees after the earlier adjustments (instead of $75), the $45 of 2010 R & D credits are allocated pro rata between Z and T as follows:

(iii) for Z – $45 x $100 (the amount of credits assigned to Z in the original assignment) / $150 (total credits assigned to Z and T on the original assignment) = $30 of 2010 R & D credits to go to Z, and
(iv) for T – $45 x $50 / $150 = $15 of 2010 R & D credits to go to T.

Therefore, under this regulation, X is treated as having retained $0 of 2010 R & D credits, Y is treated as having received $90 of 2010 R & D credits, Z is treated as having received $40 of 2010 R & D credits and T is treated as having received $20 of 2010 R & D credits.

(d) *Alternative Allocation*. Any request for an alternative allocation of a defective assignment under this regulation shall meet all of the following conditions:

(1) *Maximum Credits to Assignor.* The alternative allocation shall not allocate to the assignor a higher amount of identical credits than the amount the assignor would have retained had all defective assignments of identical credits aggregated under subsection (b) been valid, as increased by the amount of identical credits otherwise allocated to the assignor pursuant to Regulation 23663-3.

(2) *Maximum Credits to Assignees*. The alternative allocation shall not allocate to any eligible assignee a higher amount of identical credits than the amount assigned to such eligible assignee in the original defective assignment.

(3) *Eligible Parties*. The alternative allocation shall only allocate credits to the assignor and those aggregated eligible assignees of the defective assignment who have joined the assignor's request for an alternative allocation.

(4) *Included Credits.* An alternative allocation shall be limited to the type of identical credit which was assigned in the defective assignment for which an alternative allocation is being requested.

(5) *Excluded Credits.* An alternative allocation shall not include the following:

(A) The aggregate amount of identical credits assigned in the same taxable year to assignees who do not join in the assignor's request for an alternative allocation, except to the extent Regulations 23663-3 and 23663-4 have already allocated such amounts to the assignor.

(B) The amount of identical credits which would create the actuality or possibility of that amount of identical credits being claimed more than once if they were to be included in the alternative allocation.

(6) *Closed Years*. An alternative allocation shall first allocate identical credits pursuant to subsection (c)(2).

(7) *First Contact*. An assignor may only request application of this subsection before first contact.

(8) *Limitation on Requests*. The assignor or any members of the same combined reporting group (pursuant to Revenue and Taxation Code sections 25101 or 25110) shall not have requested another alternative allocation in any other taxable year within a four taxable year period. For purposes of the preceding sentence, the four taxable year period means the taxable year of the defective assignment for which the alternative allocation is being requested, and the three taxable years immediately preceding that taxable year and the three taxable years immediately following that taxable year.

(9) *Examples*.

Example 9: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of the 2010 R & D credits. Subsequently, X discovers that it only generated $150 of R & D credits in 2010. X makes a request, joined by Y and Z, for an alternative allocation under this subsection to allocate X's $150 of 2010 R & D credits from X's aggregated defective assignments as follows: $50 of 2010 R & D credits to X and $100 of 2010 R & D credits to Y. Assuming all other conditions of this subsection are satisfied, the FTB would approve X's request; therefore, under this regulation, X is treated as having retained $50 of 2010 R & D credits, Y is treated as having received $100 of 2010 R & D credits, and Z is treated as having received $0 of R & D credits.

Example 10: Assume the same facts as in Example 9, except that X, joined by Y and Z, requests an alternative allocation under this subsection to allocate all of X's $150 of 2010 R & D credits from its aggregated defective assignments to X. Under these facts, the FTB would reject X's request because under paragraph (1) it would result in X being treated as retaining more 2010 R & D credits than X would have retained had the defective assignments been valid.

Example 11: Assume the same facts as in Example 9, except that X, joined by Y and Z, requests to allocate X's $150 of 2010 R & D credits from its aggregated defective assignments to K. Under these facts, the FTB would reject X's request because under paragraph (3), K is not an aggregated eligible assignee.

Example 12: X reported that it has $200 of 2009 R & D credits and $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100

of the 2009 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $100 of the 2009 R & D credits and $100 of the 2010 R & D credits. Subsequently, X discovers that it only generated $50 of 2009 R & D credits and $40 of 2010 R & D credits. X makes a request, joined by Y and Z, to allocate $50 of 2009 R & D credits and $40 of 2010 R & D credits to Y. Under these facts, the FTB would reject X's request because under paragraph (3) of this subsection, X and Y are not aggregated eligible assignees; therefore, the identical credits in X's defective assignment to Y cannot be combined with the identical credits in X's defective assignment to Z.

Example 13: Assume the same facts as in Example 9, except that X, only joined by Z, requests to allocate $100 of X's actual $150 of 2010 R & D credits from its aggregated defective assignments to Z. Under these facts, the FTB would reject X's request because under paragraph (5) of this subsection, X has only $50 of 2010 R & D credits available for an alternative allocation (X's actual $150 of 2010 R & D credits reduced by the $100 of 2010 R & D credits assigned to Y who did not join the request for an alternative allocation). See also Regulation 23663-5(e)(3).

Example 14: X reported that it has $350 of R & D credits generated in 2010. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of the 2010 R & D credits. Subsequently, X discovers that it only generated $150 of R & D credits in 2010. The FTB mails correspondence to Y regarding taxable year 2010. Subsequently, X mails a request for an alternative allocation to the FTB. Under these facts, the FTB would reject X's request because it was sent after first contact.

Example 15: Assume the same facts as in Example 9, except that in 2017, six taxable years after the alternative allocation adjustment, X requests an alternative allocation for a defective assignment made on X's original 2008 tax return. Under these facts, the FTB would reject X's request for the 2008 alternative allocation because pursuant to paragraph (8) of this subsection, the second alternative allocation request is for an alternative allocation for a taxable year (2008) that is within the four taxable year period of the alternative allocation request made for the 2010 taxable year.

(e) *Request to Apply this Regulation*. For rules governing the form and manner of any request by an assignor to apply this regulation, see Regulation 23663-5(f).

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 23663, Revenue and Taxation Code.

Section 23663-3 is adopted to read:

§ 23663-3. Other Defective Assignments.

(a) *In General.* Pursuant to Regulation 23663-5(a), no assignor, assignee, or any other taxpayer shall claim, assign or otherwise benefit from a credit which was assigned in a defective assignment, unless that credit is allocated to the assignor or assignee under Regulations 23663-2 through 23663-5. This regulation provides rules for the allocation of credits in all defective assignments not covered by Regulation 23663-2, relating to situations where an assignor assigns more credits than it has, and also includes additional restrictions for certain types of defective assignments. This regulation shall generally apply after any correction made under Regulation 23663-4.

(b) *Default Allocation*. For an assignment which is a defective assignment for any reason other than that listed in Regulation 23663-2(c), relating to situations where an assignor assigns more credits than it has, or subsection (c) of this regulation, the following allocation rules shall apply as of an adjustment date:

(1) The identical credits listed as assigned in the defective assignment, or remaining credits after reduction by paragraphs (2) and (3), if applicable, shall be allocated to the assignor.

(2) The identical credits listed as assigned in the defective assignment shall be reduced by the amount of such identical credits claimed in a closed year by the assignee.

(3) If a defective assignment has multiple potential assignees:

(A) Subsection (b)(2) shall apply to each potential assignee, and

(B) If the application of subparagraph (A) would reduce an assignor's identical credits by an amount in excess of the identical credits listed as being assigned on the defective assignment, the assignor's other identical credits shall be reduced as of the taxable year of the defective assignment.

(4) *Examples*.

Example 1: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of 2010 R & D credits. Further assume that Y was not an eligible assignee. Also, Y has claimed $30 of 2010 R & D credits in a closed year as of the adjustment date. Pursuant to subsection (b)(2), as of the adjustment date, the $200 of 2010 R & D credits assigned to Y will be reduced by the $30 which Y claimed in a closed year and the remainder of $170 will be allocated to X. Therefore, assuming any additional restrictions under this regulation have been satisfied, X is treated as having retained $220 of 2010 R & D

credits ($50 plus $170), Y is treated as having received no 2010 R & D credits, and Z received $100 of 2010 R & D credits.

Example 2: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits. However, X's assignment lists the name of Y but FEIN of Z. Subsequently, the FTB mails a notice of proposed assessment to X at which time Y has claimed $150 of 2010 R & D credits in closed years and Z has claimed $60 of 2010 R & D credits in closed years. The 2010 assignment is a defective assignment because it is not clear if Y or Z is the assignee. Under subsection (b)(3), X's $350 of 2010 R & D credits are reduced by the $210 ($150 + $60) of 2010 R & D credits claimed by Y and Z in closed years. Therefore, X is treated as having retained $140 of 2010 R & D credits ($350 less $210), and Y and Z are treated as having received no 2010 R & D credits.

(c) *Unspecified Type of Identical Credit or Amount*. In the case of any assignment which is a defective assignment under paragraphs (1), (2) or (3) of this subsection, the rules of paragraphs (4) through (7) shall apply in lieu of subsection (b).

(1) The type of identical credits being assigned is unspecified.

(2) The amount of identical credits being assigned is unspecified.

(3) Both paragraphs (1) and (2) apply.

(4) If the assignee claimed credits in a closed year, then as of an adjustment date, the assignor's credits listed as assigned in the defective assignment and the assignor's other credits as of the effective date of the adjustment shall be reduced as follows:

(A) First, the assignor's unclaimed and unassigned credits shall be reduced.

(i) The assignor's credits shall be reduced beginning with the oldest unclaimed and unassigned credits.

(ii) If after reducing all of the assignor's oldest credits, the amount of credits reduced does not equal the amount of credits claimed by the assignee in a closed year, then the assignor's next oldest unclaimed and unassigned credits shall be reduced. This reduction shall continue until the assignor's credits have been reduced in an amount equal to the amount of credits claimed by the assignee in a closed year.

(iii) If an assignor has multiple types of unclaimed and unassigned identical credits which were generated in the same taxable year, then each type of identical credit shall be reduced pro rata based on the assignor's amount of such identical credits.

(B) Second, if after reducing all of an assignor's unclaimed and unassigned credits pursuant to subparagraph (A), an assignor's credits have not been

reduced in an amount equal to the credits claimed by an assignee in a closed year, then the following shall apply:

(i) The assignor's claimed credits shall be reduced beginning with the assignor's most recent taxable year for which the extended filing date has passed and which is not a closed year.

(ii) If after reducing all of the assignor's credits claimed in its most recent taxable year for which the extended filing date has passed, the amount of credits reduced does not equal the amount of credits claimed by the assignee in a closed year, then the assignor's claimed credits in its next most recent taxable year for which the extended filing date has passed and which is not a closed year shall be reduced. This reduction shall continue until the assignor's credits have been reduced in an amount equal to the amount of credits claimed by the assignee in a closed year.

(iii) If an assignor has multiple types of claimed identical credits in a taxable year, then each type of identical credit shall be reduced pro rata based on the assignor's amount of such identical credits.

(C) Finally, if after reducing all of an assignor's credits claimed in taxable years which are not closed years pursuant to subparagraph (B), an assignor's credits have not been reduced in an amount equal to the credits claimed by an assignee in a closed year, then the following shall apply:

(i) The assignor's assigned credits shall be reduced beginning with the assignor's most recent taxable year for which the extended due date for filing has passed and which is not a closed year.

(ii) If after reducing all of the assignor's credits assigned in its most recent taxable year for which the extended due date for filing has passed and which is not a closed year, the amount of credits reduced does not equal the amount of credits claimed by the assignee in a closed year, then the assignor's assigned credits in its next most recent taxable year for which the extended filing date has passed and which is not a closed year shall be reduced. This reduction shall continue until the first of the following occurs 1) the assigned credits have been reduced through the taxable year subsequent to the taxable year of the defective assignment or 2) the assignor's credits have been reduced in an amount equal to the amount of credits claimed by the assignee in a closed year.

(iii) If an assignor has multiple assignments in a taxable year, then each such assignment shall be reduced pro rata based on the amount of credits assigned over the total assignments in that taxable year.

(D) Any assigned credits reduced pursuant to subparagraph (C) shall be treated as if such credits had never been assigned, so that the assignee listed on the assignment shall not be entitled to claim or otherwise benefit from such credits.

(5) If the defective assignment clearly identifies the amount of credits being assigned, then the assignor's credits reduced under paragraph (4) shall be limited to such amount of credits for each potential assignee.

(6) If the defective assignment does not clearly identify the type of identical credit being assigned only because it does not clearly identify the year such credits were generated, then subparagraphs (A) through (C) of paragraph (4) shall first be applied in regard to that partially identified type of identical credit.

(7) If the defective assignment clearly identifies the type of identical credit being assigned, then subparagraphs (A) through (C) of paragraph (4) shall first be applied in regard to that identified type of identical credit.

(8) *Examples*.

Example 3: X reported that it has $300 of 2010 R & D credits, $100 of 2010 low income housing ("LIH") credits, and $200 of 2011 R & D credits. On its original tax return for the 2011 taxable year, X elects to assign $200 of R & D credits to Y, except that the assignment lists the taxable year the credit was generated as "various". The assignment to Y is a defective assignment because the assigned credits did not identify the year the credits were generated. Y has claimed $100 of 2011 R & D credits in a closed year as of the adjustment date. Y has not shown that it earned or received the 2011 R & D credits from any other source. Pursuant to paragraphs (4) and (6), as of the adjustment date, X's 2010 R & D credits are reduced by $100. Notably, the year in which Y listed the R & D credits as generated does not impact the application of this subsection. Therefore, under this regulation, X is treated as having retained $200 of 2010 R & D credits, $100 of 2010 LIH credits, and $200 of 2011 R & D credits, and Y is treated as having received no credits.

Example 4: Assume the same facts as in Example 3, except that in addition to not listing the year of R & D credits being assigned, X's assignment of credits to Y also does not list the amount of credits being assigned. Assume further that instead of having claimed $100 of 2011 R & D credits, Y has claimed $300 of 2010 R & D credits in a closed year as of the adjustment date, and X has also claimed $300 of 2010 R & D credits and $50 of 2010 LIH credits in a taxable year which is not a closed year as of the adjustment date. Pursuant to paragraphs (4) and (6), the following reductions to X's credits occur as of the adjustment date: first, X's $200 of unclaimed, unassigned 2011 R & D credits are reduced to $0 ($300 claimed by Y in a closed year less $200 of X's 2011 R & D credits = $100 of credits remaining to be reduced). Next, X's $50 of unclaimed, unassigned 2010 LIH credits are reduced to $0 ($100 of credits remaining to be reduced less $50 of X's 2010 LIH credits = $50 of credits remaining to be reduced). Finally, $50 of X's claimed 2010 R & D credits are reduced, which may result in an additional assessment to X. Therefore, under this regulation, X is treated as having retained $250 of claimed 2010 R & D credits, $50 of claimed 2010 LIH, and no 2011 R & D credits, and Y is treated as having received no credits.

Example 5: Assume the same facts as in Example 4, except that as of the adjustment date, X has subsequently generated $100 of 2013 R & D credits. The result would be the same as the result in Example 4 because under paragraph (4) the reduction is limited to the assignor's credits as of the effective date of the adjustment.

Example 6: X reported that it has $175 of 2010 R & D credits, $100 of 2010 low income housing ("LIH") credits, and $300 of 2011 R & D credits. On its original tax return for the 2011 taxable year, X elects to assign credits to Y, with the credits being assigned listed as "various" and the amount as $300. On its original tax return for the 2012 taxable year, X elects to assign $200 of 2011 R & D credits to Z. On its original tax return for the 2013 taxable year, X elects to assign $50 of 2010 R & D credits to W and $100 of 2011 R & D credits to Z. The adjustment date occurs in 2016. As of the adjustment date, Y has claimed $300 of 2011 R & D credits in a closed year, and X has claimed $75 of 2010 R & D credits in 2014 which is not a closed year. Y has not shown that it earned or received the 2011 R & D credits from any other source.

Under the assumed facts above, the 2011 assignment to Y is a defective assignment because the credits being assigned were not identified. Under this subsection, X's credits are reduced by the $300 of credits Y claimed in a closed year. Pursuant to paragraph (4)(A), as of the adjustment date, X's oldest unclaimed and unassigned credits are reduced first. Accordingly, X's $50 of unclaimed, unassigned 2010 R & D credits and $100 of 2010 LIH credits are first reduced. After these reductions, the $300 of credits claimed by Y has been reduced to $150 ($300 less $150 = $150 of credits remaining to be reduced). Next, pursuant to paragraph (4)(B), X's $75 of claimed 2010 R & D credits are reduced, which may result in X being assessed additional tax for 2014 ($300 less $150 less $75 = $75 of credits remaining to be reduced). Finally, because X assigned both 2010 R & D credits and 2011 R & D credits in 2013, and the total credits assigned ($150) exceeds the remaining $75 of credits to be reduced, the 2013 assignments to Z and W shall be reduced pro rata pursuant to paragraph (4)(C) by the following amounts:

(i) Z's assigned $100 of 2011 R & D credits are reduced by $50, calculated as $75 credits to be reduced x $100 (2011 R & D credits assigned to Z in 2013) / $150 (total credits assigned by X in 2013).
(ii) W's assigned $50 of 2010 R & D credits are reduced by $25, calculated as $75 credits to be reduced x $50 (2010 R & D credits assigned to W) / $150 (total credits assigned by X in 2013).

Therefore, under this regulation, X is treated as having retained no 2010 R & D credits, no 2010 LIH credits, and no 2011 R & D credits, Y is treated as having received no credits, the 2012 assignment of $200 of 2010 R & D credits to Z was valid, the otherwise valid 2013 assignment of $100 of 2011 R & D credits to Z is reduced to $50 of 2011 R & D credits, and the otherwise valid 2013 assignment of $50 of 2010 R & D credits to W is reduced to $25 of 2010 R & D credits.

Example 7: X reported that it has $300 of 2010 R & D credits and $200 of 2011 low income housing ("LIH") credits. On its original tax return for the 2011 taxable year, X

elects to assign credits; however, X's assignment lists the name of Y but FEIN of Z, and also the assignment does not list the type or amount of credits being assigned. As of the adjustment date in 2016, Y has claimed $150 of 2010 R & D credits in closed years and Z has claimed $300 of 2010 R & D credits in closed years. Y and Z have not shown that they earned or received the claimed credits from any other source. The 2011 assignment is a defective assignment because the assignee is uncertain and the credits being assigned were not identified. Under this subsection, as of the adjustment date, X's credits are reduced based on the total amount of $450 of credits claimed by Y and Z in closed years. First, X's $300 of 2010 R & D credits are reduced by $300 ($450 less $300 = $150 of credits remaining to be reduced). Next, X's $200 of 2011 LIH credits are reduced by $150. Therefore, under this regulation, X is treated as having retained no 2010 R & D credits and $50 of 2011 LIH credits, and Y and Z are treated as having received no credits.

(d) *Ineligible Assignees*. For the portion of any defective assignment which is a defective assignment only because the assignee is not an eligible assignee, the portion of any such credits shall not be allocated to the assignor, so that the assignor shall neither claim nor assign such credits, unless the FTB approves a request under paragraph (1), or the assignor and assignee meet the conditions set forth in paragraph (2).

(1) The assignor and assignee shall make a request, in the form and manner specified under Regulation 23663-5(f), that the FTB determine that the assignee was not an eligible assignee for purposes of this regulation.

(A) The FTB shall have six months from the receipt of the request to approve the request, unless a longer time period is agreed upon by the FTB, the assignor and the assignee. The FTB may request any information from the assignor and assignee as it deems necessary to make this determination, including any information that might otherwise be requested under Revenue and Taxation Code section 19032 and the regulations thereunder.

(B) At or before the end of the time period specified in subparagraph (A), the FTB shall notify the assignor and the assignee in writing of its determination; otherwise, the request shall be deemed rejected.

(C) If the FTB approves the request that an assignee be found to not be an eligible assignee, then the credits assigned to the assignee in the defective assignment shall be allocated in accordance with subsection (b) and shall be binding on all parties and may not later be changed, even if it is later determined that the assignee was in fact an eligible assignee.

(D) As a condition for approval of a request under this paragraph, the assignor and assignee shall agree that they will not later assert the assignor and assignee are unitary, including filing a claim for refund, for the taxable year or years for which the request asserted the assignee was not an eligible assignee.

(E) The determination made by the FTB under this subsection shall be limited to Revenue and Taxation Code section 23663 and the regulations thereunder, and no inference shall be drawn for any other purpose under Part 11 of the Revenue and Taxation Code.

(2) If the FTB asserts that an assignee is not an eligible assignee, then the limitations of this subsection shall not be removed until a final determination that the assignee is not an eligible assignee has been made for both the assignor and assignee. If, after an FTB assertion in this paragraph, a final determination is made for both the assignor and assignee that the assignee was not an eligible assignee, then the credits in the defective assignment shall neither be claimed by nor benefit the assignee under any circumstances.

(3) For purposes of paragraph (2), a final determination means the date on which a deficiency becomes final pursuant to Revenue and Taxation Code section 19049 or an action on a refund claim becomes final under Revenue and Taxation Code section 19321.

(4) *Examples*.

Example 8: X reported that it has $100 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y. Subsequently, the FTB mails a notice of proposed assessment to X and Y stating that X and Y were not unitary in 2010 and assessing X $150 of additional tax liability for other reasons. The assignment of credits from X to Y is a defective assignment because Y is not an eligible assignee. X and Y protest the notice of proposed assessment. Under this subsection, as of the adjustment date, Y would be treated as having received no 2010 R & D credits and X would be treated as having retained $100 of 2010 R & D credits, but under this subsection, X would not be allowed to claim those $100 of 2010 R & D credits against its $150 of additional tax liability until a final determination of whether Y was an eligible assignee has been made for both X and Y.

Example 9: Assume the same facts as in Example 8, except that the notice of proposed assessment is mailed to X only. X does not protest the notice of proposed assessment, so that the notice goes final. Under this subsection, X is still not allowed to claim or assign the $100 of 2010 R & D credits because a final determination has not been made for Y as to whether Y is an eligible assignee.

Example 10: X reported that it has $100 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y. The assignor and assignee make a request under paragraph (1) that Y be found to not be an eligible assignee on the basis that X and Y were not unitary in 2010. The FTB approved X and Y's request. Subsequently, Y files amended tax returns asserting that it was unitary with X in 2010. The FTB would reject Y's amended tax returns because Y agreed under paragraph (1)(D) that it would not assert that it was unitary with X for 2010.

Example 11: Assume the same facts as in Example 10, except that two years after the FTB approves the request in Example 10, the FTB audits X and Y and determines that X and Y were unitary in 2010. The allocation of credits to X under the approved request would be unaffected by the FTB's subsequent determination and the $100 of 2010 R & D credits would remain with X and be available to be claimed or assigned as of the adjustment date (the date the FTB approved the request in Example 10).

(e) *Request to Apply this Regulation*. For rules governing the form and manner of any request by an assignor to apply this regulation, see Regulation 23663-5(f).

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 23663, Revenue and Taxation Code.

Section 23663-4 is adopted to read:

§ 23663-4. Correction of Error.

(a) *In General*. Pursuant to Regulation 23663-5(a), no assignor, assignee, or any other taxpayer shall claim, assign or otherwise benefit from a credit which was assigned in a defective assignment, unless that credit is allocated to the assignor or assignee under Regulations 23663-2 through 23663-5. Under this regulation, parties to a defective assignment may, prior to the filing of their subsequent taxable year's tax return, request permission to correct errors in an assignment made pursuant to Revenue and Taxation Code section 23663. For example, parties to a defective assignment that filed original assignment forms with unclear, inconsistent or incomplete information, or forms containing erroneous assignors, assignees, credit types or credit amounts, may request permission to correct such errors subject to the limitations and requirements of this regulation.

Example 1: In its election to assign credits, X includes the name of Y but the FEIN of Z. This is a defective assignment because the identity of the assignee is uncertain. Under these facts and assuming the other requirements of this regulation were met, X would be able to request correction of the defective assignment.

Example 2: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $10 of the 2010 R & D credits to Y. However, X now asserts that it intended to assign $100 of the 2010 R & D credits to Y. No correction would be allowed under this regulation because X's assignment to Y was not a defective assignment.

(b) *Requirements to Request a Correction of an Error*. An assignor may request the correction of an error in the form and manner specified in Regulation 23663-5(f), provided all of the following conditions are met:

(1) The assignment for which a correction is requested is a defective assignment;

(2) All parties to a defective assignment consent in writing to such a correction;

(3) The assignor demonstrates by clear and convincing objective evidence contemporaneous to the time of the original assignment that an error was made;

(4) The assignor demonstrates by clear and convincing objective evidence contemporaneous to the time of the original assignment that the correction is consistent with the assignor's original intent;

(5) The corrected assignment meets the requirements of a valid assignment as set forth in Revenue and Taxation Code section 23663, except for the requirement under Revenue and Taxation Code section 23663(c) that the assignment must be made on an original return; and

(6) The request is made no later than 60 days before the earlier of the filing date or the extended due date of the assignor's or any parties to the defective assignment's subsequent taxable year's tax return following the taxable year of the original assignment.

(7) *Examples.*

Example 3: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $1,000 of the R & D credits to Y. X's assignment form shows X as having $200 of 2010 R & D credits, assigning $1,000 of these credits to Y and retaining $100 of these credits. X intended to assign $100 of the credits to Y. Here, the assignment is defective due to the error in the amount of credits X assigned to Y on the original assignment form. If X satisfied all the other requirements under this regulation, X would be able to request use of this regulation to correct the defective assignment to Y of $1,000 of 2010 R & D credits to $100 of the credits.

Example 4: Assume the same facts as in Example 3, except that on its original tax return for the 2010 taxable year, X assigned $100 of the 2010 R & D Credits to Y and $100 of the 2010 R & D credits to Z. Three months after filing its 2010 tax return, X requests a correction of an error and has contemporaneous evidence sufficient to meet the conditions in paragraphs (3) and (4) to demonstrate that X intended to assign $100 of 2010 R & D credits to W, and not Z. Under these facts, X would not be able to use this regulation because the original assignment to Z was not a defective assignment.

Example 5: In its election to assign credits, X includes the name of Y but the FEIN of Z. X requests a correction of an error to show that W was the intended assignee, and provides an affidavit from X's chief financial officer stating that X intended to assign credits to W. Under these facts, X would not be able to use this regulation because it did not provide contemporaneous evidence as required by paragraphs (3) and (4).

Example 6: Assume the same facts as in Example 5, except that instead of the affidavit, X provides forms and schedules which are consistent with the requested correction and were filed with the original tax return in the year of the defective assignment, contemporaneous tax preparation workpapers, emails, correspondence, and memos as evidence to demonstrate that W was the intended assignee. Under these facts and assuming the other requirements of this regulation were met, X would be able to request a correction of an error under this regulation to correct the assignment substituting W for Z.

Example 7: Assume the same facts as in Example 5, except that instead of the affidavit, X provides W's Form 3544A which was filed with the original tax return in the year of the defective assignment and which shows W as receiving the assigned credits from X. X also provides contemporaneous tax preparation workpapers. Under these facts and assuming the other requirements of this regulation were met, X would be

able to request a correction of an error under this regulation because it provided contemporaneous evidence sufficient to meet the conditions in paragraphs (3) and (4).

Example 8: Assume the same facts as in Example 7, except that W, Y and Z's Forms 3544A all show that they each received the same identical credits from X. Under these facts, X would not be able to use this regulation to correct the defective assignment because the Forms 3544A that were provided are conflicting and thus X did not provide clear and convincing objective evidence of the assignor's original intent as required in paragraph (4).

Example 9: Assume the same facts as in Example 7, except that instead of providing W's Form 3544A, X only provides contemporaneous tax preparation workpapers that do not include copies of contemporaneous emails, correspondence, and memos demonstrating that W was the intended assignee. X provides no other contemporaneous evidence. Under these facts, X would not be able to use this regulation because, for purposes of this regulation, tax preparation workpapers alone do not provide clear and convincing objective evidence of the assignor's original intent as required in paragraph (4).

(c) *Excluded Credits*. A correction of an error shall not be made for any credits to which such correction would result in the actuality or possibility of the credits being claimed more than once.

(d) *Additional Limitations*. For defective assignments made in taxable years beginning on or after January 1, 2017, the following limitations shall apply:

(1) The amount of credits that may be allocated pursuant to a request for a correction of an error under this regulation shall not exceed the amount originally assigned in the defective assignment for which a correction is requested under this regulation.

(2) If the assignor or any members of the same combined reporting group (pursuant to Revenue and Taxation Code sections 25101 or 25110) have requested another correction of an error in any other taxable year within a four taxable year period, then no additional correction of an error shall be allowed for the defective assignments listed in paragraph (3). For purposes of the preceding sentence, the four taxable year period means the taxable year of the defective assignment for which the correction of an error is being requested, and the three taxable years immediately preceding that taxable year and the three taxable years immediately following that taxable year.

(3) Paragraph (2) shall apply to the following defective assignments:

(A) Wrong assignor;
(B) Wrong, ineligible or unspecified assignee;
(C) Wrong or unspecified type of identical credit; or
(D) Wrong or unspecified amount of credits was assigned.

(4) *Examples.*

Example 10: X reported that it has $100 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X assigned $25 of 2010 R & D credits to Y and $25 of 2010 R & D credits to Z. The assignees' FEINs on X's Form 3544 do not match Y and Z's FEINs, so the assignments to Y and Z are defective. X provides Y and Z's Forms 3544A and tax preparation workpapers to show that it intended to assign $50 of 2010 R & D credits each to Y and Z. Under these facts, and assuming the other requirements of this regulation were met, X may request a correction of an error to use this regulation to correct the FEINs on the original defective assignments, but would not be able to allocate $50 of 2010 R & D credits each to Y and Z because the amount allocated would exceed the maximum amount that may be allocated under paragraph (1).

Example 11: Assume the same facts as in Example 10, except that X assigned 2010 R & D credits to Y and Z and put "various" as the amount on X's Form 3544. X provides Y and Z's Forms 3544A and tax preparation workpapers to show that it intended to assign $50 of 2010 R & D credits each to Y and Z. Under these facts, X will not be able to allocate any amount of 2010 R & D credits to Y and Z because it did not specify an amount of credits on the original defective assignment, because, under paragraph (1), an assignment using the amount "various" shall be treated as though X assigned no credits.

Example 12: Assume the same facts as in Example 6, except that X makes its second request under this regulation within four taxable years for a correction of an error to show that W was the intended assignee. Under these facts, and assuming the other requirements of this regulation were met, X may not use this regulation to correct the assignee because paragraph (3)(B) applies.

(e) *Prior Defective Assignments*. For a period of one year from the effective date of this regulation for any defective assignments made prior to that date, an assignor may request a correction of an error under this regulation, without regard to the limitation set forth in subsection (b)(6).

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 23663, Revenue and Taxation Code.

Special Rules. For purposes of Regulations 23663-2 through 23663-5, inclusive, the following special rules shall apply:

Section 23663-5 is adopted to read:

§ 23663-5. Special Rules.

(a) *Credits Which Are the Subject of Defective Assignments.*

(1) No assignor, assignee, or any other taxpayer shall claim, assign or otherwise benefit from a credit which was assigned in a defective assignment, unless that credit is allocated to the assignor or assignee on an adjustment date pursuant to Regulations 23663-2 through 23663-5.

(2) Any assignment of an amount of identical credits by the assignor in a taxable year after the taxable year in which the defective assignment of that amount of identical credits was made, and before the adjustment date when an adjustment is made under Regulations 23663-2 through 23663-5, shall be invalid and may not be corrected or adjusted under Regulations 23663-2 through 23663-5.

(3) In any case where an assignee claims a credit in a closed year that was the subject of an invalid assignment under paragraph (2), then the assignor's credits shall be reduced in the same manner as set forth in Regulation 23663-3(c).

(4) *Example*.

Example 1: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits. However, X's assignment lists the name of Y but the FEIN of Z. X discovers that the 2010 assignment was a defective assignment, and in the 2013 taxable year X elects to assign the $200 of the 2010 R & D credits to T. In the 2014 taxable year, X, Y and Z request and are allowed application of the rules under Regulation 23663-3 so that the $200 of 2010 R & D credits assigned in the 2010 defective assignment are allocated to X as of the date of the defective assignment. However, pursuant to paragraph (2) the 2013 assignment of $200 of 2010 R & D credits to T is an invalid assignment because the assignment was made before the adjustment date in the 2014 taxable year. Therefore, under this regulation, X is treated as having retained $200 of 2010 R & D credits, and Y, Z and T are treated as having received no 2010 R & D credits.

(b) *Finality of Election to Assign Credits.* Except as otherwise specifically provided in Regulations 23663-1 through 23663-5, the election to assign credits under Revenue and Taxation Code section 23663 is irrevocable and final as of the date the assignor files its original tax return for the taxable year in which the assignment is made, and any subsequent adjustments to the assignor's tax liability for the taxable year in which the assignment was made cannot modify the original assigned amount of eligible credit. Within any taxable year, any credit assigned under Revenue and Taxation Code section 23663, or allocated or reduced under Regulations 23663-2 through 23663-5,

shall not be available for application against any tax liability of the assignor in the same taxable year.

Example 2: X reported that it has $500 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $250 of the 2010 R & D credits to Y and $250 of the 2010 R & D credits to Z. In 2015, a notice of proposed assessment for the 2010 taxable year makes an adjustment unrelated to the amount of R&D credits allowable, and increases X's tax liability by $300. X cannot claim the 2010 R&D credits to offset the increased 2010 tax liability because the assignments to Y and Z are valid assignments, and under this subsection, X's available 2010 R & D credits ($500) are first reduced by the amount of credits assigned to Y and Z ($250 + $250 = $500) before being available to X to offset the increased tax liability of $300. Therefore, X has no remaining 2010 R & D credits to offset the increased tax liability.

Example 3: Assume the same facts as Example 2, except that X had $700 of 2010 R&D credits in 2010 and carried the $200 excess forward to 2011. X can claim $200 of the 2010 R&D credits to offset the increased 2010 tax liability because X retained $200 of 2010 R & D credits after the valid assignments to Y and Z. Under this subsection, X's available 2010 R & D credits ($700) are first reduced by the amount of credits assigned to Y and Z ($250 + $250 = $500) before being available to X to offset the increased tax liability of $300. Therefore, X has $200 of remaining 2010 R & D credits to offset the increased tax liability of $300.

Example 4: Assume the same facts as in Example 3, except that on the 2010 assignment form X listed the name of Y but FEIN of W. X also claimed $50 of 2010 R & D credits against its own tax liability in 2010. As of the adjustment date, Y and W have each claimed $225 of 2010 R & D credits in a closed year. X's available 2010 R & D credits ($700) are first reduced by the amount of credits assigned to Z ($250). Next, pursuant to this subsection and Regulation 23663-3, X's remaining $450 of 2010 R & D credits are further reduced by the amount of credits claimed by Y and W in a closed year ($225 + $225 = $450). Therefore, X does not have the $50 of 2010 R & D credits that X claimed against its tax in 2010 nor does X have any 2010 R & D credits to offset the additional tax assessed by the notice of proposed assessment.

(c) *Ordering Rules.* In any case where there is an overlap between Regulations 23663-2 through 23663-4 on the adjustment date, the rules of those regulations shall be applied in the following order:

(1) If an assignor requests an adjustment (or multiple adjustments) prior to the earlier of the date set forth in Regulation 23663-4(b)(6), as modified by Regulation 23663-4(e), or first contact, and the requested adjustment (or multiple adjustments) could be made under the authority of either Regulation 23663-4 or Regulations 23663-2 or 23663-3, and the assignor has not clearly requested application of Regulations 23663-2 or 23663-3 pursuant to subsection (f)(1)(A), then the adjustment (or multiple adjustments) shall be treated as having been made under Regulation 23663-4.

(2) If multiple adjustments are being made simultaneously, and the adjustments to be made include both adjustments under Regulation 23663-2 and adjustments under Regulation 23663-3, then the adjustments under Regulation 23663-3 shall be treated as occurring first.

(3) (A) In any case where adjustments are being made under either, or both, Regulation 23663-2 and Regulation 23663-3, and a portion of the adjustments involve credits claimed in a closed year by either an assignor or an assignee, the amount of any closed year adjustments shall first be taken from any credits originally earned by the assignor or assignee, as the case may be, prior to reducing any credits received via assignment under Revenue and Taxation Code section 23663 or any other provision of Part 11 of the Revenue and Taxation Code permitting assignment of credits.

(B) If credits have been received by an assignee both via assignment under a provision of Part 11 of the Revenue and Taxation Code permitting assignment of credits (other than under Revenue and Taxation Code section 23663) and also under Revenue and Taxation Code section 23663, then for purposes of applying subparagraph (A), credits received under a provision of Part 11 of the Revenue and Taxation Code permitting assignment of credits (other than under Revenue and Taxation Code section 23663) shall be treated as being reduced before credits received via assignment under Revenue and Taxation Code section 23663.

(1) *Examples*.

Example 5: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of 2010 R & D credits. Subsequently, X discovers that it only generated $150 of 2010 R & D credits. X also discovers that Y is not an eligible assignee. X requests and is allowed adjustments pursuant to Regulations 23663-2 and 23663-3, including a determination under Regulation 23663-3(d) that Y is not an eligible assignee. Pursuant to paragraph (2), the adjustment under Regulation 23663-3 is applied first, thereby allocating credits from the X - Y assignment to X, so that X has $150 of 2010 R & D credits available for assignment before the application of Regulation 23663-2 for the X – Z assignment. As a result, Regulation 23663-2 does not apply, because X's assignment to Z is not a defective assignment as X has the $100 of 2010 R & D credits assigned to Z. Therefore, X is treated as having retained $50 of 2010 R & D credits, Y is treated as having received no 2010 R & D credits, and Z received $100 of R & D credits.

Example 6: Assume the same facts as in Example 5, except that X discovers Y is not an eligible assignee after the adjustment date in Example 5. Therefore, X requests and is allowed an adjustment pursuant to pursuant to Regulation 23663-2. Accordingly, pursuant to Regulation 23663-2, X's actual $150 of 2010 R & D credits are allocated $100 to Y and $50 to Z, with X treated as having retained no 2010 R & D credits.

Later, the FTB issues a notice of proposed assessment. As of this subsequent adjustment date, adjustments are made pursuant to Regulation 23663-3, so that, assuming the limitations of Regulation 23663-3(d) no longer apply, the $100 of 2010 R & D credits previously allocated to Y would then be allocated to X. Therefore, following these two adjustments, X would be treated as retaining $100 of 2010 R & D credits, Y is treated as having received no 2010 R & D credits, and Z is treated as having received $50 of R & D credits.

Example 7: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $150 of the 2010 R & D credits to Y and $150 of the 2010 R & D credits to Z. Y has also generated $100 of 2010 R & D credits. Subsequently, X discovers that it only generated $100 of 2010 R & D credits. As of the adjustment date, Y has claimed $100 of 2010 R & D credits in a closed year. Pursuant to paragraph (3)(A), in applying Regulation 23663-2, Y is treated as having claimed no 2010 R & D credits assigned from X in a closed year because the 2010 R & D credits that Y earned are treated as having been claimed before credits received in the assignment from X. Therefore, under Regulation 23663-2, X is treated as retaining no 2010 R & D credits, and Y and Z are both allocated $50 of 2010 R & D credits.

(d) *Effect and Timing of Adjustments*. Any credits allocated or reduced under Regulations 23663-2 through 23663-5 are treated as if they were assigned or retained by the assignor on a timely-filed original tax return as of the effective date of the adjustment, or reduced as of the effective date of the adjustment.

Example 8: X reported that it has $350 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $200 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Therefore, X retained $50 of the 2010 R & D credits. Subsequently, X discovers that it only generated $150 of R & D credits in 2010. X makes a request, joined by Y and Z, for an alternative allocation under Regulation 23663-2 to allocate X's $150 of 2010 R & D credits from X's aggregated defective assignments as follows: $50 of 2010 R & D credits to X and $100 of 2010 R & D credits to Y. The FTB allows X's request. Subsequently, the FTB issues a notice of proposed assessment which reduces X's actual 2010 R & D credits from $150 to $75. Pursuant to subsection (d), for purposes of applying 23663-2(c), the alternative allocation is treated as if it were the original assignment on the timely-filed original tax return. As a result of the prior alternative allocation, Z would now receive no 2010 R & D credits under Regulation 23663-2, so that X's $75 of 2010 R & D credits are allocated to Y. Accordingly, X is treated as having retained $0 of 2010 R & D credits, Y is treated as having received $75 of 2010 R & D credits, and Z is treated as having received $0 of R & D credits.

(e) *Other Rules.* For purposes of Regulations 23663-2 through 23663-5, the following other rules shall apply:

(1) For purposes of determining the order in which assignments are treated as having been made:

(A) In the case of assignments of identical credits made in the same taxable year, the assignments shall be treated as being made simultaneously.

(B) In the case of assignments made in different taxable years than the taxable year for which an adjustment is being made, a first-in, first-out rule shall apply, and assignments from earlier years shall be treated as occurring before assignments from subsequent years.

(C) In the case of multiple assignments of identical credits made in the same taxable year under both a provision of Part 11 of the Revenue and Taxation Code permitting assignment of credits (other than under Revenue and Taxation Code section 23663) and under Revenue and Taxation Code section 23663, the assignments made under such other provisions shall be treated as occurring before any assignments made under Revenue and Taxation Code section 23663.

(2) To the extent the provisions of Regulations 23663-2 through 23663-5 are applied on multiple adjustment dates, allocations and reductions based on credits claimed in closed years shall not be modified based on such closed years being open at the time the provisions of Regulations 23663-2 through 23663-5 are subsequently applied.

(3) In the case of any defective assignment for which a request is made under Regulation 23663-5(f) to allocate credits pursuant to Regulations 23663-2 through 23663-5, where one or more parties to a defective assignment does not join the request, the adjustments made under Regulations 23663-2 through 23663-5 shall not include the aggregate amount of identical credits from all defective assignments assigned to any parties to the defective assignment who do not join in the request, except to the extent the provisions of Regulations 23663-2 through 23663-5 have already allocated such identical credits to the assignor or assignees who do join the request.

(4) In any case where an assignor has requested an adjustment to a defective assignment under either Regulation 23663-2 or 23663-3 and the FTB has allowed such request, then no further request shall be made with respect to the same defective assignment.

(5) Pursuant to a written request by the FTB, any parties to a defective assignment shall provide within 45 days of the request all requested copies of tax returns and amended tax returns that demonstrate whether such party has claimed credits which were the subject of a defective assignment in any taxable year, including any closed year. If a party to a defective assignment does not provide such copies within 45 days, then it shall be conclusively presumed that such party has claimed all credits listed as assigned to that assignee in the original defective assignment in closed years.

(6) In the case of multiple assignors making separate defective assignments to one or more assignees, for purposes of applying the rules of Regulations 23663-2 through 23663-5, the credits claimed in closed years by such assignee shall be allocated to the assignors pro rata based on the amount of credits assigned on the original defective assignments.

(7) Any adjustments of a credit under the rules of Regulations 23663-2 through 23663-5 shall not be treated as a recapture of such credit under any specific credit provision of Part 11 of the Revenue and Taxation Code.

(8) *Examples*.

Example 9: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y. On its original tax return for the 2011 taxable year, X elects to assign $100 of the 2010 R & D credits to Z. Subsequently, X discovers that it only generated $120 of 2010 R & D credits. While the assignments to X and Y deal with the same type of identical credit, they are not aggregated pursuant to Regulation 23663-2(b). Under paragraph (1)(B), because the 2010 assignment to Y was made in an earlier year than the 2011 assignment to Z, the assignment to Y is treated as having occurred before the assignment to Z. Therefore, the assignment of $100 of 2010 R & D credits to Y is a valid assignment because X has the $100 of 2010 R & D credits being assigned. But, the 2011 assignment to Z is a defective assignment because X only has $20 of 2010 R & D credits ($120 available in 2010 less the $100 assigned to Y = $20) available for assignment in 2011.

Example 10: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. In 2016, X discovers that it only had $140 of 2010 R & D credits, and requests and is allowed to apply the default rules of Regulation 23663-2. Y has claimed $100 of the 2010 R & D credits in 2010, which is a closed year for Y as of the adjustment date. Under Regulation 23663-2, X's actual $140 of 2010 R & D credits are allocated $100 to Y and $40 to Z. Subsequently, in 2017 under Revenue and Taxation Code section 19058, the FTB issues a notice of proposed assessment for the 2010 taxable year which reduces X's 2010 R & D credits to $80. As of this subsequent adjustment date, the 2010 taxable year is no longer a closed year for Y. However, pursuant to paragraph (2), the 2016 adjustment is not later changed if a closed year subsequently opens. In addition, under subsection (d), the adjustment in 2016 is treated as if made on an original tax return. Therefore, as of the second adjustment date, all $80 of 2010 R & D credits are allocated to Y and no 2010 R & D credits are allocated to Z because under paragraph (2) the allocation of $100 of 2010 R & D credits to Y based on credits claimed in a closed year is not modified as of a subsequent adjustment.

Example 11: X reported that it has $200 of 2010 R & D credits. On its original tax return for the 2010 taxable year, X elects to assign $100 of the 2010 R & D credits to Y and $100 of the 2010 R & D credits to Z. Subsequently, X discovers that it only had

$120 of 2010 R & D credits. X, joined by Y, requests application of the default rules under Regulation 23663-2. Pursuant to paragraph (3), $20 of 2010 R & D credits are available for allocation under Regulation 23663-2. Therefore, X is treated as retaining no 2010 R & D credits, Y is treated as receiving $10 of 2010 R & D credits, and Z is treated as receiving $10 of 2010 R & D credits. The other $100 of 2010 R & D credits are not allocated to Z, but instead, as of an adjustment date, such $100 of 2010 R & D credits would be allocated among X, Y and Z pursuant to Regulation 23663-2.

Example 12: On its original tax return for the 2010 taxable year, X elects to assign 2010 R & D credits to Y and Z. Subsequently, X discovers that it had less credits than it assigned. X requests and is allowed application of the default rules under Regulation 23663-2. After the adjustment date, X, joined by Y and Z, requests an alternative allocation under Regulation 23663-2. Under these facts, the FTB would reject the alternative allocation request because, pursuant to paragraph (4), X may only request the application of Regulations 23663-2 or 23663-3 once per defective assignment.

(f) *Form and Manner for Requests for Correction of an Error or Alternative Allocation.*

(1) Any requests made under Regulations 23663-2 through Regulation 23663-4 shall contain all of the following information:

(A) The applicable regulation and applicable subsection of that regulation under which the request is made (Regulation 23663-2(c), Regulation 23663-2(d), Regulation 23663-3(b), Regulation 23663-3(c), Regulation 23663-3(d), or Regulation 23663-4).

(B) The name, FEIN, signature, date, and telephone number of the assignor.

(C) The name, FEIN, signature, date, and telephone number of the assignee, and, if there are multiple potential assignees, then the name, FEIN, signature, date, and telephone number of each potential assignee.

(D) The name, FEIN, signature, date, and telephone number of each party to the defective assignment joining the request.

(E) A summary of the defective assignment including:

(i) The type and amount of identical credits assigned in the defective assignment.
(ii) The amount of identical credits listed as retained by the assignor on the defective assignment.

(F) The reason that the assignment was a defective assignment.

(G) The amount and taxable year in which the assignor or any assignees have claimed credits which were assigned in the defective assignment.

(H) For the same type of identical credit which is the subject of the defective assignment, the amount of the assignor's actual identical credits available for assignment as of the taxable year of the assignment.

(I) A summary of all subsequent assignments of the same type of identical credit, including:

(i) The amount of identical credits assigned in the assignment.
(ii) The amount of identical credits listed as retained by the assignor in the assignment.
(iii) The name and FEIN of the assignee in the assignment.

(J) A copy of the original Form 3544 (or successor form) which contained the defective assignment for which a request is being made.

(K) Copies of all Forms 3544A (or successor form) relating to the defective assignment.

(L) A copy of the assignor's tax return for the year of the defective assignment.

(M) A copy of the assignor's tax returns in which the type of identical credit type assigned in the defective assignment was claimed.

(N) A copy of the assignor's most recently filed tax return.

(O) A copy of the tax returns for the year of the defective assignment for each assignee and each party to the defective assignment joining the request.

(P) A copy of tax returns in which the type of identical credit assigned in the defective assignment was claimed for each assignee and each party to the defective assignment joining the request.

(Q) A copy of the most recently filed tax return for each assignee and each party to the defective assignment joining the request.

(R) All correspondence that the assignor, assignee, and parties to the defective assignment joining the request have received from the FTB regarding the taxable year of the defective assignment or any taxable year in which the assignor, assignee or parties to the defective assignment joining the request have claimed credits which were the subject of the defective assignment.

(S) Amended tax returns reflecting the requested allocation for the assignor and all parties to the defective assignment joining the request for the taxable year in which the defective assignment was made and all subsequent taxable years that would be affected by the request.

(T) Necessary waivers of the statute of limitations on assessment from all parties to the defective assignment joining the request for the taxable year of the defective assignment and all other taxable years in which any credits which were the subject of the defective assignment were claimed which are not closed years.

(2) In addition to the information required under paragraph (1), any requests for default allocations under Regulations 23663-2(c), 23663-3(b), or 23663-3(c) shall also include:

(A) The requested amount of credits to be allocated to the assignor under the regulation.

(B) The requested amount of credits to be allocated to the assignee under the regulation, or for allocations involving aggregated eligible assignees, the amount to be allocated to each eligible assignee.

(C) The calculations to be made under Regulations 23663-2(c), 23663-3(b), or 23663-3(c) which demonstrate the requested allocation.

(3) In addition to the information required under paragraph (1), any requests for an alternative allocation under Regulation 23663-2(d) shall also include:

(A) The requested amount of credits to be allocated to the assignor under the regulation.

(B) The requested amount of credits to be allocated to the assignee under the regulation, or for allocations involving aggregated eligible assignees, the amount to be allocated to each assignee.

(C) A summary of any actual or deemed requests under the subsection in other taxable years.

(D) The calculations to be made under Regulation 23663-2(d) which demonstrate the requested allocation.

(4) In addition to the information required under paragraph (1), any requests for the correction of an error under Regulation 23663-4 shall also include:

(A) The requested corrected amount of credits to be allocated to the assignor under the regulation.

(B) The requested corrected amount of credits to be allocated to the assignee under the regulation.

(C) A summary of any actual or deemed requests under the regulation in other taxable years.

(D) The calculations to be made under Regulation 23663-4 which demonstrate the requested correction.

(E) Documentation required under Regulation 23663-4(b)(3).

(F) Documentation required under Regulation 23663-4(b)(4).

(5) In the case of any request under this subsection that is incomplete, and therefore invalid, but in the sole discretion of the Franchise Tax Board contains substantially all of the information specified in this subsection, the FTB may allow the assignor 30 additional days to provide the missing information to complete the invalid request. If the assignor provides all missing information to the FTB within 30 days of the date the FTB mailed notice to the assignor of additional time to provide missing information, and the request is subsequently granted, the adjustment date shall be the date that the assignor's original request was received by the FTB.

(g) *Miscellaneous*.

(1) *Disclosure*. In adjusting credits under Regulations 23663-2 through 23663-5, an audit, protest, and claim for refund are all considered administrative proceedings regarding tax administration within the meaning of Revenue and Taxation Code section 19545.

(2) *Math Error*. To the extent an assignor or an assignee claims credits in a manner inconsistent with the provisions of Regulations 23663-2 through 23663-5, the provisions of Revenue and Taxation Code section 19051 shall apply and the amount of credit claimed shall be treated as a math error adjustment.

(3) *Examples in Regulations*. Unless otherwise provided, assume that all entities in the examples in Regulations 23663-2 though 23663-5 are affiliated corporations for all taxable years relevant to the examples and, unless otherwise specifically stated, meet all of the other conditions and requirements of Revenue and Taxation Code section 23663 and Regulations 23663-2 through 23663-5.

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 23663, Revenue and Taxation Code.