

STATE OF CALIFORNIA
LEGAL DIVISION MS A260
FRANCHISE TAX BOARD
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**15-DAY NOTICE OF AMENDMENTS TO TEXT OF PROPOSED REGULATION SECTIONS
18662-0 THROUGH 18662-6, and SECTION 18662-8 IN TITLE 18 OF THE CALIFORNIA CODE
OF REGULATIONS RELATING TO NONRESIDENT AND REAL ESTATE WITHHOLDING, AND
NOTICE OF CLARIFICATION OF THE INITIAL STATEMENT OF REASONS.**

15-DAY NOTICE PUBLISHED APRIL 24, 2019

On November 16, 2018, the Franchise Tax Board ("FTB") published a Notice of Proposed Rulemaking in the California Regulatory Notice Register in accordance with section 11346.4 of the Government Code, providing notice to the public of the FTB's intention to amend portions of Title 18 of the California Code of Regulations ("18 CCR"), Sections 18662-0 through 18662-6, and Section 18662-8 ("Regulations"), relating to nonresident and real estate withholding. The Notice of Proposed Rulemaking provided the public with an opportunity to request a public hearing if the request was received by December 24, 2018. A hearing was not held because FTB did not receive a request for a hearing by December 24, 2018. The Notice of Proposed Rulemaking also provided the public with an opportunity to submit written comments on the proposed amendments to the Regulations until 5:00 p.m. on January 8, 2019.

Department staff has reviewed the proposed amended Regulations language and determined that certain additional substantive and sufficiently related changes are necessary, as identified below. Pursuant to the requirements of Government Code section 11346.8 (c), and section 44 of Title 1 of the California Code of Regulations, the FTB is hereby providing notice of the changes made to the proposed Regulations. These new changes to the proposed amended Regulations text are detailed below, and appear in double underline for new additions, and double strikeout for new deletions. Previous proposed amendments to the Regulations remain in single underline and single strikethrough. Each change to the proposed amended Regulations is followed by an explanation.

Additionally, FTB is also herein providing notice to the public of several clarifications to the text of the Initial Statement of Reasons for the proposed Regulations as set forth in the accompanying "Clarification of the Initial Statement of Reasons" document.

1. Section 18662-3(f)(1):

Exemption Certificate and Estimated Gain or Loss Certificate. If a seller/transferor seeks to qualify for no withholding under the requirements set forth in the real estate withholding exemption certificate on FTB Form 593-~~C~~, the seller/transferor must complete, sign, and submit to the real estate escrow person the withholding exemption certificate on FTB Form 593-~~C~~ prior to the close of ~~escrow~~, the real estate

~~transaction~~ the real estate transaction to claim an exemption from withholding. Failure to provide a completed and signed real estate withholding exemption certificate on FTB Form 593-G by the close of the real estate transaction will result in withholding. If the seller/transferor seeks to establish a loss or zero gain, the seller/transferor must also complete ~~and sign a withholding exemption certificate on FTB Form 593-C and a~~ the real estate withholding-computation of estimated gain or loss certificate on FTB Form 593-E. All real estate sales/transfers qualifying for an exemption from withholding are reportable to the Franchise Tax Board on FTB Form 593, which can be filed on paper or electronically (where allowable).

During the pendency of this regulation project, FTB staff determined that changing the phrase "close of the real estate transaction" to "close of escrow" would have posed a problem for qualified intermediaries, because in many transactions, the qualified intermediaries have not completed their work prior to the close of escrow—and in certain instances, they have not even begun their work until after the close of escrow. This change, reverting back to the original language of the existing regulation is necessary because requiring qualified intermediaries to submit the Form 593 prior to the close of escrow, when they ordinarily would not have even completed their work—and in certain instances, they ordinarily would not have even commenced their work—would create an undue burden on qualified intermediaries. As a result, FTB will not be changing the phrase "close of the real estate transaction" to the phrase "close of escrow," as initially proposed.

2. Section 18662-3(g)(4):

Sale of Multiple Parcels. Sales of multiple parcels within the same escrow agreement constitute one transaction for purposes of determining the withholding requirements under this regulation. Withholding is required where the ~~total~~ sale price of all properties exceeds \$100,000 even though the sale price of each separate parcel in the transaction is under \$100,000.

During review of the proposed amended Regulations text, FTB staff discovered a necessary change to this subsection to ensure consistency with 18 CCR Section 18662-3, subsections (d)(1)(B) and (g), wherein the term "total sales price" was proposed to be changed to "sales price." As explained in greater detail in the Initial Statement of Reasons, changing the phrase "total sales price" to "sales price" is necessary to conform both with Revenue and Taxation Code ("RTC") Section 18662, subdivision (e)(3)(A), and to be consistent with the term used in the applicable federal forms. The corresponding term that is used to denote the "sales price" in the federal Form 1099-S, Proceeds from Real Estate Transactions, as well as in Treasury Regulations Section 1.6045-4, is "gross proceeds"—not "Total sales price," and the Instructions to the Form 1099-S state that "gross proceeds" from a real estate transaction is generally the "sales price"—not "Total sales price." Thus, this change clarifies that the threshold amount pertains to the "sales price"—which is the same as the "gross proceeds" in the corresponding federal Form 1099-S.

3. Section 18662-4(i)(11)-(15):

~~(11) Amounts withheld by another entity and being distributed to payees under this FTB Form 592.~~

(121) Total of prior payments not previously distributed on a prior FTB Form 592, plus amounts withheld by another entity and being distributed under this FTB Form 592 (combined).

(132) Total amount being submitted on FTB Form 592.

(143) The name and dated signature of the withholding agent, and telephone number.

(154) The name, PTIN number, address, telephone number, and dated signature of the preparer.

(165) Payee information, which includes the business or individual name (not both), business identification number (SSN or ITIN, FEIN, California corporation number, or California Secretary of State SOS file number), contact name at the business, a check box indicating whether the amount submitted constitutes backup withholding, address, total amount of income, and amount of tax withheld. Multiple payees may be submitted on one form.

During review of the proposed amended Regulations text, FTB staff discovered a necessary change because existing regulations at 18 CCR Section 18662-4, subsection (i)(11), requesting the "Amounts withheld by another entity and being distributed to payees under this FTB Form 592", applies only to pass through entities (PTEs), which no longer will file FTB Form 592, Resident and Nonresident Withholding Statement. Rather, PTEs will instead file newly-created FTB Form 592-PTE, Pass-Through Entity Resident and Nonresident Annual Withholding Return. Accordingly, the information being sought by the existing regulations at 18 CCR Section 18662-4, subsection (i)(11) would not apply to non-PTEs, and should therefore be removed. As a result of the removal of 18 CCR Section 18662-4, subsection (i)(11), 18 CCR Section 18662-4, subsections (i)(12) through (i)(16) have been renumbered as 18 CCR Section 18662-4, subsections (i)(11) through (i)(15), respectively.

4. Section 18662-4(j)(8)-(15):

~~(8) Total backup amount of tax withholding from all payees listed by withholding agent.~~

~~(9) Total amount of tax withholding and backup withholding (combined).~~

~~(109) Total of prior payments made to the Franchise Tax Board but not previously distributed to the payees on a prior FTB Form 592-PTE.~~

~~(110) Amounts withheld by another entity and being distributed to partners or members under this FTB Form 592-PTE.~~

~~(124)~~ Total of prior payments not previously distributed on a prior FTB Form 592-PTE, plus amounts withheld by another entity and being distributed under this FTB Form 592-PTE (combined).

~~(132)~~ Total amount being submitted on FTB Form 592-PTE.

~~(143)~~ The name and dated signature of the withholding agent.

~~(154)~~ The name, PTIN number, address, telephone number, and dated signature of the preparer.

~~(165)~~ Payee information, which includes the business or individual name (not both), identification number (SSN or ITIN, FEIN, California corporation number, or SOS file number), a check box indicating whether the amount submitted constitutes backup withholding, address, total amount of income, and amount of tax withheld. Multiple payees may be submitted on one form.

18 CCR Section 18662-4, subsection (j) of the proposed Regulations identifies the information to be contained on the newly created Form 592-PTE. Because Form 592-PTE is mirrored after current Form 592—and because there are no exceptions with respect to backup withholding when applied to partnerships (as explained in more detail below), the fields with respect to "backup withholding" should be the same for each form. As currently drafted, 18 CCR Section 18662-4, subsection (j) doesn't take into account the possibility of any backup withholding. For background, RTC Section 18664 (FTB's backup withholding statute) is modeled after Internal Revenue Code (IRC) section 3406, and IRC Section 3406, in turn, provides for withholding exceptions to certain payees, including corporations, as set forth in IRC Section 6049, subdivision (b)(4). However, neither the IRC, nor the Treasury Regulations promulgated thereunder, provide any exceptions for partnerships. Thus, while it is unlikely that a PTE would have backup withholding, the law does not prohibit imposing backup withholding on said PTEs. As such, Form 592-PTE is being modified to include the same fields with respect to backup withholding as current Form 592. As a result of the addition of 18 CCR Section 18662-4, subsection (j)(9), 18 CCR Sections 18662-4, subsections (j)(9) through (j)(15) have been renumbered as 18 CCR Section 18662-4, subsections (j)(10) through (j)(16), respectively.

5. Section 18662-4(k)(8)-(20):

~~(7)(8)~~ Total tax amount withheld from all payees listed by withholding agent, excluding backup withholding-excluding backup withholding.

~~(9)~~ Total backup withholding from all payees listed by withholding agent. (8)
Total backup withholding from all payees listed by withholding agent.

~~(9)10~~ Total amount of tax withholding and backup withholding (combined) and backup withholding (combined).

(~~110~~) Amount withheld by another entity and being allocated to partners or members under this FTB Form 592-F.

(~~124~~) Total of prior payments of foreign partners' or member's withholding for the taxable year.

(~~132~~) Total amount of foreign partner or member credit carried over from the prior withholding year.

(~~143~~) Total of the following: (1) amount withheld by another entity and being allocated to partners or members under this FTB Form 592-F; (2) total of prior payments of foreign partners' or member's withholding for the taxable year; and (3) total amount of foreign partner or member credit carried over from the prior withholding year.

(~~154~~) Total amount being submitted on FTB Form 592-F; submit withholding amount along with Form 592-A.

(~~165~~) Overpayment amount (if applicable).

(~~176~~) Credit to be applied to next year's FTB Form 592-F (if applicable).

(~~187~~) Refund amount (if applicable).

(~~198~~) Payee information, which includes the business or individual name (not both), ~~business~~ identification number (SSN or ITIN, FEIN, California corporation number, or ~~California Secretary of State~~ SOS file number), a check box indicating whether the amount submitted constitutes backup withholding, ~~contact name at the business, a check box indicating whether the amount submitted constitutes backup withholding,~~ address, total amount of income, and amount of tax withheld. Multiple payees may be submitted on one form.

(~~2049~~) The name and dated signature of the withholding agent.

(~~210~~) The name, PTIN number, address, telephone number and dated signature of the preparer.

18 CCR Section 18662-4, subsection (k) of the proposed Regulations applies to the Form 592-F, which is mirrored after current Form 592. Because Form 592-F is mirrored after current Form 592 and because there are no exceptions with respect to backup withholding when applied to partnerships (as explained herein), the fields with respect to "backup withholding" should be the same for each form. As currently drafted, 18 CCR Section 18662-4, subsection (k) does not take into account the possibility of any backup withholding. For background, RTC Section 18664 (FTB's backup withholding statute) is modeled after IRC

Section 3406, and IRC Section 3406, in turn, provides for exceptions to certain payees, including corporations, as set forth in IRC Section 6049, subdivision (b)(4). However, neither the IRC, nor the Treasury Regulations promulgated thereunder, provide any exceptions for partnerships, including foreign partners. Thus, while it is unlikely that a PTE (or its foreign partners) would have backup withholding, the law does not prohibit imposing backup withholding on said PTEs/foreign partners. As such, Form 592-F is being modified to include the same fields with respect to backup withholding as current Form 592. As a result of the addition of 18 CCR Section 18662-4, subsection (k)(9), prior 18 CCR Section 18662-4, subsections (k)(9) through (k)(20) have been renumbered as 18 CCR Section 18662-4, subsections (k)(10) through (k)(21), respectively. Consistent with these changes, the text of the proposed amended 18 CCR 18662-4, subsection (k)(19) has now been modified to include the field containing "a check box indicating whether the amount submitted constitutes backup withholding" so that the form is consistent with the proposed amended regulations text at 18 CCR Section 18662-4, subsection (j).

6. Section 18662-8(d)(2)(A):

Information Return and Payee Statement Penalties. Revenue and Taxation Code section 19183 incorporates federal information return and payee statement penalties by reference. FTB Form 592, FTB Form 592-PTE, FTB Form 592-F, and FTB Form 593 ~~and FTB Form 592-B~~ are information returns, FTB Form 592-B is a payee statement. ~~and~~ Failure to file ~~those~~ these returns and statement may subject the withholding agent or remitter to information return and/or payee statement penalties as specified in Regulation sections 18662-0 through 18662-8.

18 CCR Section 18662-8, subsection (d)(2)(A) of the proposed Regulations identifies withholding penalties. Currently, the Regulations state that RTC Section 19183 incorporates the federal *information return penalty* by reference, but there is no mention with respect to the payee statement penalty, which is *also* directly referenced in RTC Section 19183, subdivision (b)(1) (which incorporates IRC Section 6722 relating to the payee statement penalty.) (Emphasis added). While staff had already proposed amending this subsection of the Regulations to include the fact that RTC Section 19183 also incorporates the federal payee statement penalty, staff now believes an additional change is necessary to ensure that the withholding agent may be subject to the California payee statement penalty. Without this change, the Regulations would be ambiguous as the Regulations' text does not clearly denote whether the withholding agent would be subject to the payee statement penalty. Moreover, this additional change also makes the Regulations consistent with RTC Section 19183, subdivision (b)(1), which states that a "penalty shall be imposed for failure to furnish correct payee statement as required. . . ." Consistent with this proposed change to the amended Regulations, the header text for this subsection is being modified to add "and Payee Statement" in order to make it clear that the subsection pertains to both the Information Return Penalty and the Payee Statement Penalty.

7. Section 18662-8(d)(2)(D)(2):

Real Estate Information Returns and False Exemption Certificates. The ~~withholding~~

~~agent remitter~~ may be subject to a ~~\$5~~\$100 penalty if the withholding agent does not provide the sellers/transferors with correct copies of FTB Form 593 by the due date. If the noncompliance is due to an intentional disregard of the requirements set forth in Regulation sections 18662-0 through 18662-8, the penalty increases to the greater of ~~\$10~~\$250 or 10 percent of the required withholding. The penalty is for each FTB Form 593 that is not furnished. FTB Form 593 is considered correct when all applicable fields are completed, the information is correct, and the correct version of the form is used. The Franchise Tax Board will make available on its website at www.ftb.ca.gov and will designate the proper version of FTB Form 593 for each year. The pre-printed year on FTB Form 593 must match the year the transaction occurred. For sales, this is the year escrow closed. For installment payments, this is the year of the installment payment. For exchanges, this is the year the last requirement of the exchange was completed or when it was determined that the exchange would not meet the Internal Revenue Code section 1031 requirements and any cash or cash equivalent was distributed to the seller/transferor. If the seller/transferor knowingly ~~certifies to execute a false exemption on FTB Form 593-C, Real Estate Withholding Certificate, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 593-C"),~~ the seller/transferor may be subject to a penalty of the greater of \$1,000 or 20 percent of the required withholding. ~~The required information specified in FTB Form 593-C is set forth in subsection (n), below.~~

18 CCR Section 18662-8, subsection (d)(2)(D)(2) has been revised to increase the penalty from \$50 to \$100 when the withholding agent does not provide the seller/transferor with correct copies of FTB Form 593 by the due date, and to increase the penalty from \$100 to \$250 or 10 percent of the required withholding for noncompliance that is due to an intentional disregard of the requirements of the Withholding Regulations. This revision makes the penalty amounts contained in the Withholding Regulations consistent with the current amount being imposed as required by RTC Section 19183 (effective for information returns required to be filed on or after January 1, 2016.) Without this change, the penalty amounts set forth in the Withholding Regulations would be out of compliance with the applicable provisions of the RTC and withholding agents could be confused as to the amount of the various penalties.

These substantive and sufficiently related changes are being made available to the public for the 15-day period required by Government Code section 11346.8(c) and section 44 of Title 1 of the California Code of Regulations.

A copy of these proposed amendments is being sent to all individuals who requested notification of such changes, and will be available to other persons upon request.

All written comments concerning this notice must be submitted to FTB no later than 5:00 p.m. on May 9, 2019, and should be directed to:

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All written comments received by May 9, 2019, which pertain to the indicated changes will be reviewed and responded to by FTB's staff as part of the compilation of the rulemaking file. Please limit your comments to the proposed substantive modifications to the text.