

STATE OF CALIFORNIA
LEGAL DIVISION MS A260
FRANCHISE TAX BOARD
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**SECOND 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**

15-DAY NOTICE PUBLISHED JULY 3, 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 ("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. FTB staff reviewed the proposed amended Regulations language and determined that certain substantive and sufficiently related changes were necessary, and on April 24, 2019, FTB published a 15-Day Notice of Amendments to Text of Proposed Regulations.

FTB staff has reviewed the proposed amended Regulations language and again 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 CCR, 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. Previously proposed amendments to the Regulations remain in single underline and single strikethrough. Each new change to the proposed amended Regulations is followed by an explanation.

1. Section 18662-3(d)(3)(A)(2):

A Deferred Like-Kind Exchange. If the seller/transferor receives any proceeds ~~(including excess debt relief)~~ (including excess debt relief) or non-like-kind property from the sale (boot) in excess of \$1,500, withholding is required ~~withholding is required the intermediary or accommodator must withhold~~ at 3 1/3 percent of that amount, unless an election is made to use the alternative withholding calculation on Form FTB 593-E.

During the pendency of this regulation project, FTB staff determined that CCR, sections 18662-3(d)(3)(A)(1) and 18662-3(d)(3)(A)(2) had inconsistent language, even though the substantive law with respect to a simultaneous and deferred like-kind exchange is the same in the context of withholding. Accordingly, FTB staff determined that CCR section 18662-3(d)(3)(A)(2) should be revised to make the language consistent with section 18662-3(d)(3)(A)(1).

FTB staff now proposes retaining the phrase "including excess debt relief" in the subsection. This phrase was proposed to be removed in the original Notice of Proposed Rulemaking. The change is necessary as the receipt of proceeds in the context of a 1031 like-kind exchange—including excess debt relief—would trigger a withholding requirement. Specifically, Revenue and Taxation Code ("RTC") section 18662(e)(3)(D)(ii)(I) bases an intermediary's or accommodator's withholding on the amount of gain that the seller/transferor is required to recognize in a like-kind exchange. A seller/transferor is required to recognize gain under Internal Revenue Code ("IRC") section 1031(b), to which California conforms pursuant to RTC sections 18031 (California Personal Income Tax) and 24941 (California Corporation Tax) when the seller/transferor is relieved of a liability in a like-kind exchange, unless the seller/transferor also assumes an equal or greater liability as part of the like-kind exchange. (See Treas. Reg. §§ 1.1031(a)-1, 1.1031(b)-1, and 1.1031(d)-2.) As a result, the phrase "including excess debt relief" should be retained in this subsection since removing such language would be contrary to the law which requires that withholding occur when gain is recognized. In regard to liabilities, gain must be recognized when debt relief is in excess of the amount of debt assumed in a like-kind exchange.

Additionally, FTB staff now proposes retaining the phrase "withholding is required" in the subsection. This phrase was proposed to be removed in the original Notice of Proposed Rulemaking, and changed to the phrase "the intermediary or accommodator must withhold" but staff has determined that leaving the original language intact is consistent with section 18662-3(d)(3)(A)(2). This change is necessary because pursuant to RTC sections 18662(e)(3)(B) and 18662(e)(3)(D)(ii)(I), in an IRC section 1031 exchange, an intermediary or accommodator must withhold when there is gain that the seller/transferor is required to recognize. The Regulation's specific reference to the intermediary or accommodator was redundant. Removing this language in no way obviates or otherwise removes an intermediary's or an accommodator's obligation to withhold.

2. Section 18662-8(b)(1):

(1) **Payment Due Dates and Form.** Real estate withholding is due by the 20th day of the calendar month following the month escrow closes. For example, if escrow closes on January 3rd, payment is due on or before February 20th. If February 20th falls on a weekend or holiday, the payment may be remitted pursuant to FTB Form 593, Real Estate Withholding Tax Statement, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 593") and FTB Form 593-V, Payment Voucher for Real Estate Withholding, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 593-V") on the next business day without penalty. The required information specified in FTB Form 593 and FTB Form 593-V is set forth in subsection (g) and subsection (h), respectively, below.

Payment of withholding on Section 1031 like-kind exchanges is due on the 20th day of the calendar month following the month in which the exchange was completed or failed. For simultaneous exchanges, the exchange is completed in the month escrow closes. For deferred exchanges, the exchange is completed in the month the last requirement of the exchange is completed. For failed exchanges, the exchange fails in the month when the proceeds were distributed to the seller/transferor after a determination that the exchange would not meet the Internal Revenue Code section 1031 exchange requirements. ~~For Section 1031 like-kind exchanges, payment of withholding on non-like-kind property from the sale (boot) in excess of \$1,500 disbursed to the seller/transferor is due on the 20th day of the calendar month following the month in which the boot was disbursed.~~ Remittance shall be in the form and manner as the Franchise Tax Board may prescribe in FTB Form 593.

During the pendency of this regulation project, FTB staff determined that CCR, section 18662-8(b)(1) contained unnecessary and confusing proposed additional language that should be removed. Removal of the affected sentence is necessary because this subsection already sets forth the deadlines for when payment of withholding on IRC section 1031 like-kind exchanges is due. The inclusion of this sentence would be inconsistent and confusing since within the middle of the existing paragraph, the language already states that "Payment of withholding on Section 1031 like-kind exchanges is due on the 20th day of the calendar month following the month in which the exchange was completed or failed." Under the current regulations payment of withholding on IRC section 1031 like-kind exchanges is due on the 20th day of the calendar month following the month in which the exchange was completed or failed, and inclusion of the deleted sentence would create inconsistent withholding due dates. Moreover, including a withholding payment due in the middle of a like-kind exchange could potentially require a qualified intermediary to make an improper transfer of funds under Treasury Regulations section 1-1031(k)-1.

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 July 19, 2019, and should be directed to:

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All written comments received by July 19, 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.