

03.26.09

## FTB NOTICE 2009-02

**Subject:** Exemption from Contractual Protection Reportable Transaction Disclosure and Reporting Rules for California Enterprise Zone Hiring Credits

### PURPOSE

The purpose of this Notice is to advise taxpayers and material advisors that a transaction involving a refundable or contingent fee relating to a California Enterprise Zone Hiring Credit (EZ Hiring Credit) will not be taken into account in determining whether the transaction is a transaction with contractual protection for purposes of the reportable transaction disclosure rules under Treasury Regulation section 1.6011-4(b)(4). The Franchise Tax Board (FTB) will no longer require: (1) taxpayers to disclose a transaction with contractual protection involving EZ Hiring Credits, or (2) material advisors to report a transaction with contractual protection involving EZ Hiring Credits or maintain lists of such advisees. However, if the transaction with contractual protection involving EZ Hiring Credits falls under one of the other categories of reportable transactions required to be disclosed under Treasury Regulation section 1.6011-4(b), disclosure will be required pursuant to that other section.

### BACKGROUND

#### *Taxpayers*

Revenue and Taxation Code (RTC) section 18407 incorporates by reference Internal Revenue Code (IRC) section 6011 and the regulations thereunder. Treasury Regulation section 1.6011-4(e) requires a taxpayer that has participated in a reportable transaction to disclose the transaction in accordance with the procedures provided in Treasury Regulation section 1.6011-4.

One category of reportable transactions under Treasury Regulation section 1.6011-4(b) is a transaction with contractual protection. (Treas. Reg. § 1.6011-4(b)(4).) A transaction with contractual protection is any transaction for which the taxpayer or related party (as described in IRC sections 267(b) or 707(b)) has a right to a full or partial refund of fees paid if all or a part of the intended tax consequences from the transaction are not sustained. It also includes a transaction for which fees are contingent upon the taxpayer's realization of tax benefits from the transaction.

A taxpayer participates in a transaction with contractual protection if the taxpayer's return reflects a tax benefit from the transaction and the taxpayer has the right to the full or partial

refund of fees or the fees are contingent. (Treas. Reg. § 1.6011-4(c)(3)(i)(C).) The FTB previously addressed taxpayer reportable transaction disclosure requirements and the filing of IRS Form 8886 in FTB Notice 2007-3, dated July 31, 2007, and FTB Notice 2007-4, dated October 18, 2007.

### *Material Advisors*

RTC section 18628 conforms to IRC section 6111, except as otherwise provided. IRC section 6111 requires material advisors to file a disclosure statement setting forth information identifying and describing the transaction and any potential tax benefits expected to result from the transaction. RTC section 18628 requires a material advisor with respect to a reportable transaction to send to the FTB a duplicate of the federal disclosure statement, if applicable, or the same information required on the federal disclosure statement for California reportable transactions if the advisor satisfies any of the conditions found in RTC section 18628, subdivision (d).

A material advisor must file the disclosure statement by the last day of the month that follows the end of the calendar quarter in which the person became a material advisor with respect to the reportable transaction. (Treas. Reg. § 301.6111-3(e).) A person becomes a material advisor when (1) the person provides material aid, assistance or advice as provided under Treasury Regulation section 301.6111-3(b)(2); (2) the person directly or indirectly derives gross income in excess of the threshold amount under Treasury Regulation section 301.6111-3(b)(3); and (3) the transaction is entered into by the taxpayer. (Treas. Reg. § 301.6111-3(b)(4).) The FTB previously provided guidance on material advisor disclosure requirements in FTB Notice 2005-7.

RTC section 18648 conforms to IRC section 6112, except as otherwise provided. IRC section 6112 requires that each material advisor with respect to a reportable transaction maintain a list identifying each person to whom the advisor acted as a material advisor with respect to the reportable transaction. Under RTC section 18648, a material advisor required to maintain lists of advisees for federal purposes must also maintain that list for the FTB if the material advisor satisfies any of the conditions of RTC section 18648, subdivision (c).

### **AUTHORITY**

RTC section 18407 incorporates by reference IRC section 6011 and the regulations thereunder. The regulations are also incorporated pursuant to RTC sections 17024.5, subdivision (d), and 23051.5, subdivision (d). Treasury Regulation section 1.6011-4(b)(8)(i) provides that a transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction listed in the Treasury Regulations, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of Treasury Regulation section 1.6011-4. References to "the Commissioner" are read to mean "the FTB" pursuant to RTC section 17024.5, subdivision (h), paragraph (7), and section 23051.5, subdivision (h), paragraph (7).

## **EXEMPTION**

Pursuant to the authority granted in RTC section 17024.5, subdivision (h), paragraph (7), and section 23051.5, subdivision (h), paragraph (7), the FTB has made the determination that a transaction involving a refundable or contingent fee relating to the EZ Hiring Credit under RTC sections 17053.74 and 23622.7 shall not be taken into account in determining whether the transaction is a transaction with contractual protection under Treasury Regulation section 1.6011-4(b)(4). However, this exemption does not apply to the extent the transaction is a reportable transaction for purposes of the disclosure rules under Treasury Regulation sections 1.6011-4(b)(2), (b)(3), (b)(5), or (b)(6).

The FTB reserves the right to modify or revoke the exemption provided by this Notice if it later determines that a transaction involving a refundable or contingent fee relating to the EZ Hiring Credit is potentially abusive.

## **EFFECTIVE DATE**

The exemption provided by this Notice shall apply to all transactions in which the refundable or contingent fee relates to the EZ Hiring Credit under RTC sections 17053.74 and 23622.7, regardless of when the transaction was entered into, that otherwise would have been required to be disclosed by the taxpayer or reported by the material advisor on or after January 1, 2009.

The principal author of this notice is Craig Scott of the Franchise Tax Board, Legal Division. For further information regarding this notice, contact Mr. Scott at the Franchise Tax Board, Legal Division, P.O. Box 1720, Rancho Cordova, CA 95741-1720.