

**TITLE 18. FRANCHISE TAX BOARD
(Notice published October 9, 2020)**

NOTICE OF PROPOSED RULEMAKING

As required by section 11346.4 of the Government Code, the Franchise Tax Board ("FTB" or "the Board") hereby gives notice of its intention to amend California Code of Regulations, title 18 ("18 CCR"), section 23663-1, and to adopt 18 CCR, section 23663-6, relating to the assignment of credits.

PUBLIC HEARING

The Board has not scheduled a public hearing on this proposed action. However, the Board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period indicated below. The request should be submitted to the FTB officer named below. In addition, Government Code section 15702, subdivision (b) provides for consideration by the three-member Board of any proposed regulatory action if any person makes such request in writing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes **on November 23, 2020**. The Board will consider only comments received at the Board offices by that time. The Board encourages submission of comments in electronic form, rather than in paper form. Comments may be submitted by email to FTBRegulations@ftb.ca.gov.

Submit comments in paper form to:

Mira Coutinho, Tax Counsel
Legal Division MS A260
Franchise Tax Board
P.O. Box 1720
Rancho Cordova, CA 95741-1720
Fax: (916) 843-8846

AUTHORITY & REFERENCE

California Revenue and Taxation Code ("RTC") section 19503 authorizes the Board to adopt the amended regulation and to adopt the proposed regulation. The amended regulation and the proposed regulation implement and interpret provisions in RTC Section 23663.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This rulemaking action will provide taxpayers with certainty regarding how credits are

allocated, what is an eligible credit, and who is an eligible assignee, when members of a combined reporting group have been affected by corporate reorganizations and other corporate restructurings.

The purpose of the proposed amendment to 18 CCR section 23663-1 is to allow definitions set forth in that section to apply to proposed regulation 18 CCR section 23663-6.

The purpose of the proposed adoption of 18 CCR section 23663-6 is to instruct taxpayers how to determine eligible assignees when there has been a corporate reorganization or other corporate restructurings. Subsection (a) sets forth the purpose of the regulation and provides an overview of what the regulation covers. Subsection (b) clarifies the definition of an eligible credit set forth in RTC section 23663(b)(2), providing detail as to when credits are considered to have been "earned" in contrast to credits that a taxpayer received by assignment or sale. Subsection (c) provides clarification, with four illustrative examples, for who is an eligible assignee. The guidance in this subsection identifies that an eligible assignee must have been in the same combined reporting group as the entity that earned the credit when the credit was originally earned. Subsection (d) provides guidance to taxpayers for purposes of determining the identity of eligible assignees when the assignor was not the taxpayer that earned the credits. This subsection addresses situations where a putative assignor has received credits as a result of a corporate reorganization or other restructuring, and clarifies that the taxpayer that earned the credits is treated as the assignor to determine which entities are eligible assignees. Subsection (e) provides a rule, and representative example, for treatment of a resulting corporation assignee who was a part of a reorganization under IRC section 368(a)(1)(F). Subsection (f) provides the rule and a representative example for disallowance of credit assignments to entities that engaged in a reorganization or other corporation restructuring such that the amount of business assets after a merger are more than 80% of the amount of business assets of the surviving entity before the merger. Subsection (g) identifies and provides a representative example for the limitations on the allowance of credits against the assignor's tax.

Summary of Existing Laws and Regulations:

RTC section 23663 permits the assignment of credits among affiliated members of the same combined reporting group. RTC section 23663 was added by section 10 of AB 1452 (Stats. 2008, ch. 763). It is specifically operative for assignments made in taxable years beginning on or after July 1, 2008, and first permits assigned credits to be claimed against the tax of the assignee in taxable years beginning on or after January 1, 2010. The statute specifies that credits may only be assigned to an eligible assignee, which is generally defined in RTC section 23663(b)(3) as an affiliated corporation that is a member of the same combined group as the assignor in both the taxable year the credits were earned and the taxable year the credits are assigned to the assignee.

The current regulations promulgated under RTC section 23663 - 18-CCR sections 23663-1 through 23663-5 - were adopted on September 18, 2018. 18 CCR section

23663-1 contains definitions that apply to 18 CCR sections 23663-2 through 23663-5.

Effect of the Proposed Rulemaking:

The effect of the proposed regulatory action is to give taxpayers certainty as to which entities are eligible assignees when members of a combined reporting group have been affected by corporate reorganizations and other corporate restructurings.

Broad Objectives and Specific Benefits of the Proposed Rulemaking:

In addition to the benefits mentioned above in providing affected taxpayers with proper guidance regarding which taxpayers are eligible assignees in situations resulting from corporate reorganizations and corporate restructurings, the broad objective of the proposed regulatory action is to ensure that taxpayers, their representatives, and the state of California have certainty on how to identify entities that are eligible assignees for purposes of the assignment of credits pursuant to RTC section 23663. The clarity from the proposed regulatory action will reduce uncertainty for taxpayers and tax practitioners, and will facilitate tax administration for the State of California by providing rules and examples relating to proper elections to assign credits. These benefits are the result of goals developed by the FTB with input from interested parties and based on broad statutory authority.

Consistency and Compatibility with Existing State Regulations

During the process of developing this regulation, the FTB, pursuant to Government Code Section 11346.5, subdivision (a)(3)(D), conducted a search of any similar state regulations and has concluded that this regulation is neither inconsistent nor incompatible with any existing state regulations.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

Mandate on local agencies and school districts: *None.*

Fiscal Impact Disclosures

Cost to any local agency or school district which must be reimbursed under Part 7, commencing with Government Code section 17500, of Division 4: *None.*

Other non-discretionary cost or savings imposed upon local agencies: *None.*

Cost or savings to any state agency: *By providing clarity and reducing the need for audits and minimizing the likelihood of disputes between the department and taxpayers in the future, this regulatory action may save administrative costs for the Board. Because the number of taxpayers in merger, acquisition, or other reorganization situations who assign credits are few in number, any cost savings is minor. Legal and Audit divisions at FTB estimate that an average of 10 attorney hours and about 100 auditor hours were spent in 2016 and 2017 discussing this issue with taxpayers and taxpayer representatives. Based on an average attorney wage and audit staff wage we*

estimate the impact at about \$5,000 per year. At a cost-benefit ratio of 3:1, additional savings of about \$15,000 would be generated and redirected to other tax related uses. Aside from this minor cost savings the FTB does not anticipate any additional costs or savings from the proposed amended or proposed adopted regulations.

Cost or savings in federal funding to the state: *None.*

Significant effect on housing costs: *None.*

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: *The proposed regulatory action is directed towards a small subset of California businesses—those who assign credits to members of the same combined reporting group and have been in certain situations resulting from corporate reorganizations or restructuring. The Board concludes that the adverse economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant. This regulatory action preemptively provides guidance regarding who is a valid assignee thereby preventing the likelihood of an invalid assignment between a company and an assignee who is a member of the same combined reporting group. This action does not affect the business climate in the state and the ability of businesses to compete within or outside California. Therefore, these regulations would not result in a statewide adverse economic impact on the states' businesses.*

Potential cost impact to directly affected private person or business: *The Board is not aware of any cost impacts that a representative private person or business would incur in compliance with the proposed regulatory action. This regulatory action would provide guidance regarding the eligibility of assignees who are in the same combined reporting group that are impacted by corporate reorganizations or restructurings. It does not impact private persons because its purpose is to address a gap in California Corporate Tax Law by specifying which taxpayers are eligible assignees in situations resulting from corporate reorganizations or restructurings. The proposed regulatory action will have no impact on a private person, and since it is informative in substance and does not change the law pertaining to the assigning of credits by businesses in reorganization situations, it would not result in additional compliance costs to a businesses.*

Effect on small business:

The Board has determined that the proposed regulatory action would not affect small businesses. The proposed amended regulation and adopted regulation are meant to provide guidance to taxpayers who have some uncertainty regarding which entities are eligible to receive assigned credits, before they are determined to be invalid assignments. This regulatory action impacts assignors and assignees in the same combined reporting group. The assignees are affiliated members of the same combined reporting group and not independent small businesses. This regulatory action therefore, would not affect independent small businesses.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code section 11346.3(b), the Board has made the following assessments regarding the proposed regulatory action:

The proposed regulatory action would not affect the creation of California jobs, the creation of new businesses and the expansion of existing California businesses. The Board does not anticipate any elimination of jobs or elimination of existing businesses within California as a result of the proposed regulations. The proposed regulatory action provides guidance to taxpayers and tax practitioners as to which members of the combined reporting group are eligible assignees, and does not have any direct impact on the health and welfare of California residents, worker safety and the state's environment.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulatory action during the written comment period or if a hearing is requested at the scheduled hearing.

CONTACT PERSONS

Inquiries concerning the proposed regulatory action may be directed to:

Mira Coutinho, Tax Counsel
Legal Division MS A260
Franchise Tax Board
P.O. Box 1720
Rancho Cordova, CA 95741-1720
Telephone: (916) 845-7612
Email: FTBRegulations@ftb.ca.gov

The backup contact person for these inquiries is:

Christy Keith
Legal Division MS A260
Franchise Tax Board
P.O. Box 1720
Rancho Cordova, CA 95741-1720
Telephone: (916) 845-6080

Email: FTBRegulations@ftb.ca.gov

Please direct requests for copies of the proposed text (the "express terms") of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Keith at the above address or send the request by email to FTBRegulations@ftb.ca.gov.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, and the Initial Statement of Reasons. Copies can be obtained on the Franchise Tax Board's [website](#) or by contacting Ms. Keith at the address, phone number or email address listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, after the close of the comment period, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes substantive modifications sufficiently related to the proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulations as revised. Copies of the modifications will be published on the Board's website at ftb.ca.gov and mailed to anyone who submitted written comments to the Board, and to anyone who has expressed an interest in receiving the modification information. Please send requests for copies of any modified regulations to the attention of Ms. Keith at the address, phone number or email address indicated above. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons will be published on the Board's [website](#) and may also be obtained by contacting Ms. Keith at the above address, phone number or email address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our [website](#).