



# Tax Reform Management Alert Series

Issue 2

## Tax Reform Bill Passes the Next Hurdle—The Senate

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*This is the second issue in a planned series of alerts for employers on selected topics on tax reform. The series of Tax Reform Management Alerts is designed to provide an in-depth analysis of executive compensation and employee benefits aspects of the tax reform proposals and how they will impact your business.*

After much last minute wrangling, Senator Mitch McConnell finally had the votes needed to pass tax reform in the Senate. Using a heavily hand-marked version, in the early hours of December 2, 2017, the Senate passed its Tax Cuts and Jobs Act (the “Senate Bill”) by the narrowest of margins with a vote of 51 to 49.

There were very few changes from the Senate Finance Committee proposal, as modified (the “Senate Proposal”), which were reported on in our last [Alert](#). As a result, the Senate Bill, as passed, still retains several significant provisions that make important changes affecting executive compensation and employee benefits generally.

### What Happens Next?

Now that both the House and Senate have passed their respective bills, both bills head to Conference to reconcile the differences. Congressional leaders have promised a reconciled bill to be on the President’s desk for signature by Christmas.

The following table updates the prior summary by providing the highlights of the Senate Bill, as passed, as compared to the current version of the House Bill.

## Executive Compensation

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
Right to Defer Stock (Private Companies)	<p>Effective for stock attributable to options exercised or RSUs settled after December 31, 2017</p> <ul style="list-style-type: none"> <li>• Right to defer income on stock received in connection with an option exercise or RSU settlement if an employee, who is not an "excluded employee,"<sup>1</sup> makes an election no later than 30 days after the first time the right to the stock is substantially vested or transferable (whichever is earlier);<sup>2</sup> right is limited and will not apply to public corporations</li> <li>• Clarifies that Section 83 does not apply to restricted stock units</li> </ul>	Same
Section 162(m) \$1 million Deductibility Limit	<p>Effective tax years beginning after 2017 with no grandfather or transition period</p> <ul style="list-style-type: none"> <li>• Eliminates the performance based compensation and commission exceptions, further limiting compensation that can be deducted</li> <li>• Includes principal financial officer as "covered employee," realigning definition with the SEC disclosure rules</li> <li>• Once an employee becomes a covered employee after 2016, he or she stays one, including if amounts are paid to a beneficiary</li> <li>• Expands subject companies to include Securities Exchange Act of 1934 §15(d) reporting companies</li> </ul>	<p>Effective tax years beginning after 2017 with limited grandfather</p> <ul style="list-style-type: none"> <li>• Same</li> <li>• Same</li> <li>• Same</li> <li>• Same</li> </ul>

1. Generally, an excluded employee is (1) the CEO, CFO (or individual acting in either capacity), (2) family member of CEO or CFO, (3) an employee who has been one of the four highest compensated officers for the corporation for any of the 10 preceding taxable years, or (4) a 1% owner of the corporation at any time during the 10 preceding taxable years.
2. If deferred, the deferred income is taxed upon the earliest of (1) the first date the qualified stock becomes transferable, including to the employer, (2) the date the employee first becomes an excluded employee, (3) the date the stock becomes readily tradeable on an established securities market, (4) the date five years after the first date the employee's right to the stock becomes transferable or is not subject to a substantial risk of forfeiture, whichever is earlier (the Senate version simply provides the date that is five years after the first date the right to the stock becomes substantially vested), or (5) the date the employee revokes the deferral election.

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
New Tax on Excess Compensation Paid by Not-for-Profits	<p>Beginning 2018, a new tax is imposed on excess compensation paid by a tax exempt employer:</p> <ul style="list-style-type: none"> <li>• Tax equals 20% of compensation paid to a covered employee over \$1,000,000, plus excess parachute payments</li> <li>• The employer is liable for the tax</li> <li>• Covered employees are the 5 highest compensated employees; once an employee becomes a covered employee after 2016, he or she stays one</li> <li>• Excess parachute payments are payments contingent on termination of employment that exceed 3 times the employee's average annualized base compensation (a change in control is not required for this purpose)</li> </ul>	Same, except compensation is treated as paid, and therefore subject to the excise tax, when no longer subject to a substantial risk of forfeiture
<b>Fringe Benefits</b>		
Repeal of Deduction for Common Executive Perks	Eliminate employer deduction for entertainment expenses, membership dues and other common perquisites, unless the individual pays tax on these benefits, effective for expenses incurred after 2017	More limited changes to current law
Employer-Provided Housing	Beginning in 2018, the exclusion for housing under IRC 119 will be limited to \$50,000 (\$25,000 for a married individual filing a joint return) and will phase out for highly compensated individuals	No change to current law
Moving Expenses	Eliminate employer deduction for moving expenses incurred after 2017 and the exclusion from income for qualifying moving expense reimbursements made after 2017	Same, except deduction and exclusion will remain for certain members of the armed forces on active duty ( <i>provision sunsets after 2025</i> )

## Welfare

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
Individual Mandate	No change to current law	Reduces penalty for individual mandate to \$0, beginning in 2019
Medical expense deduction (individuals may deduct unreimbursed medical expenses that exceed 10% of AGI)	Repeals deduction entirely	No change to current law

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
Archer Medicals Savings Accounts (MSAs)	Eliminates deduction for contributions to Archer MSAs but permits rollover to Health Savings Accounts (HSAs)	No change to current law
Qualified Transportation Fringe Benefit	Eliminates deductions for transportation fringe benefit	Eliminates deductions for transportation fringe benefit.
Qualified Bicycle Reimbursement	No change to current law	Repeals qualified bicycle exclusion ( <i>provision sunsets after 2025</i> )
Dependent Care Assistance Programs	Exclusion repealed beginning in 2023	No change to current law
Adoption Assistance Program	Exclusion repealed beginning in 2018	No change to current law
Educational Assistance	Repeals tax exclusion under Code Section 127 (but not under Code Section 132(d)) for certain employer reimbursements of education-related expenses	No change to current law

## Retirement

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
Hardship Withdrawals	<ul style="list-style-type: none"> <li>Deletes the six month suspension requirement for elective deferrals following a hardship distribution</li> <li>Increases the plan assets from which a participant can take a hardship distribution to include earnings and employer QNEC and QMAC contributions in addition to employee contributions</li> <li>Provides that a participant can take a hardship before requesting a loan from the plan</li> </ul>	<ul style="list-style-type: none"> <li>No change to current law</li> <li>Same</li> <li>Same</li> </ul>
Deferral Limits	No change to current law	<ul style="list-style-type: none"> <li>Senate Proposal combined governmental 457(b) deferrals of the same employer with 401(k) or 403(b) deferrals for purposes of annual limit</li> <li>Senate Bill deleted provision; no change to current law as a result</li> </ul>

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED
415 Contribution Limits	No change to current law	<ul style="list-style-type: none"> <li>Senate Proposal reduced the maximum aggregate contributions for individuals that are eligible for more than one plan (401(k), 403(b) and/or governmental 457(b)) of the same employer</li> <li>Senate Bill deleted provision; no change to current law as a result</li> </ul>
Loans	Following a plan termination or separation from service, allows participants to rollover a qualified plan loan offset amount to an eligible retirement plan by the due date (including extensions) of the participant's federal income tax return for the year in which the offset occurs, thereby avoiding taxation on the offset amount	Same
Post-termination contributions	No change to current law	<ul style="list-style-type: none"> <li>Senate Proposal eliminated special rule allowing employer contributions to governmental 403(b) plans for up to five years after termination of employment</li> <li>Senate Bill deleted provision; no change to current law as a result</li> </ul>
Catch-Ups Contributions	No change to current law	Eliminates special 403(b) and governmental 457(b) catch-up contributions; retains the general catch-up limit
In-Service Distributions	Age for in-service distributions from governmental plans lowered to earlier of normal retirement date or age 59 ½	No change to current law
Frozen DB Plans	Frozen pension plans allowed to protect grandfathered benefits as long as grandfathered group not modified in a discriminatory manner after plan is closed to new hires	No change to current law

Seyfarth Shaw will continue to monitor Congressional and regulatory efforts and will alert clients as new developments occur.

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