



Tax Reform Management Alert Series

Issue 4

Senate and House Reconcile their Versions of Tax Reform

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This is the 4th issue in a planned series of alerts designed to provide an in-depth analysis on topics related to tax reform. This Tax Reform Management Alert issue focuses on executive compensation and employee benefits aspects of the tax reform proposals and how they will impact your business.

On Wednesday, December 20, 2017, Congress passed The Tax Cuts and Jobs Act (Bill). The Senate passed the Bill by a 51 to 48 vote along party lines at about 1 a.m. Wednesday. The House passed the Bill by a vote of 224 to 201 later in the day on Wednesday. (The House had to re-vote due to a technical snafu with their first vote.)

What Happens Next?

President Trump is expected to sign the Bill although, as of the time and date of this Alert, his schedule for doing so is unclear. While the Bill will almost certainly become law and will dramatically reshape the business and individual tax landscape in the United States, the vast majority of the individual tax changes expire in 10 years; however, the corporate rate reduction is permanent. As noted above, the Bill was passed along party lines and, as a result, expect to see efforts to change the law as soon as politics permit it.

As we've previously reported, the Bill's impact on employee benefits and executive compensation were greatly diminished as the Bill wound its way through Congress (see our previous alerts, [Issue #1](#), [Issue #2](#) and [Issue #3](#)). Nonetheless, the Bill does make some important and material changes in this area. The following table updates our prior summaries by providing the highlights of the final Bill, as compared to the earlier versions of the House Bill and Senate Bill.

Executive Compensation

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED	RECONCILED BILL
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"> 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,"¹ 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);² right is limited and will not apply to public corporations Clarifies that Section 83 does not apply to restricted stock units 	Same	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"> Eliminates the performance based compensation and commission exceptions, further limiting compensation that can be deducted Includes principal financial officer as "covered employee," realigning definition with the SEC disclosure rules Once an employee becomes a covered employee after 2016, he or she stays one, including if amounts are paid to a beneficiary Expands subject companies to include Securities Exchange Act of 1934 §15(d) reporting companies 	<p>Effective tax years beginning after 2017 with limited grandfather</p> <ul style="list-style-type: none"> Same Same Same Same 	<p>Effective tax years beginning after 2017 with limited grandfather</p> <ul style="list-style-type: none"> Same Same Same Same

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	RECONCILED BILL
<p>New Tax on Excess Compensation Paid by Not-for-Profits</p>	<p>Beginning 2018, a new tax is imposed on excess compensation paid by a tax exempt employer:</p> <ul style="list-style-type: none"> • Tax equals 20% of compensation paid to a covered employee over \$1,000,000, plus excess parachute payments • The employer is liable for the tax • Covered employees are the 5 highest compensated employees; once an employee becomes a covered employee after 2016, he or she stays one • 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) 	<p>Same, except compensation is treated as paid, and therefore subject to the excise tax, when no longer subject to a substantial risk of forfeiture</p>	<p>Adopts Senate version, except:</p> <ul style="list-style-type: none"> • the excise tax is increased to 21% • the excise tax will not apply to any excess compensation or parachute payments paid to a licensed medical professional (including a doctor, nurse or veterinarian) directly related to the performance of medical or veterinarian services, and • payments made to an individual who is considered non-highly compensated for purposes of tax-qualified retirement plans will not be subject to excise tax for the payment of excess parachute payments.

Fringe Benefits			
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	Adopts Senate version. No employer deduction is allowed for expenses paid or incurred after 2017 with respect to (1) an activity generally considered to be entertainment, amusement or recreation, (2) membership dues with respect to any club organized for business, pleasure, recreation or other social purposes, or (3) a facility or portion thereof used in connection with any of the above items. Employers may still generally deduct 50 percent of food and beverage expenses associated with operating their trade or business (e.g., meals consumed by employees on work travel).
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	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>)	Adopts Senate version

Welfare

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED	RECONCILED BILL
Individual Mandate	No change to current law	Reduces penalty for individual mandate to \$0, beginning in 2019	Adopts Senate version
Medical expense deduction (individuals may deduct unreimbursed medical expenses that exceed 10% of AGI)	Repeals deduction entirely	The medical expense deduction would be retained, but in the following amounts: <ul style="list-style-type: none"> 7.5% for 2017 and 2018 10% for subsequent years. 	Adopts Senate version
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	No change to current law.
Qualified Transportation Fringe Benefit	Eliminates deductions for transportation fringe benefit	Eliminates deductions for transportation fringe benefit.	Adopts Senate version, effective for amounts paid or incurred after 2017
Qualified Bicycle Reimbursement	No change to current law	Repeals qualified bicycle exclusion (<i>provision sunsets after 2025</i>)	Adopts Senate version
Dependent Care Assistance Programs	Exclusion repealed beginning in 2023	No change to current law	No change to current law.
Adoption Assistance Program	Exclusion repealed beginning in 2018	No change to current law	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	No change to current law.

Retirement

ISSUE	HOUSE BILL, AS PASSED	SENATE BILL, AS PASSED	RECONCILED BILL
Hardship Withdrawals	<ul style="list-style-type: none"> Deletes the six month suspension requirement for elective deferrals following a hardship distribution 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 Provides that a participant can take a hardship before requesting a loan from the plan 	<ul style="list-style-type: none"> No change to current law Same Same 	<ul style="list-style-type: none"> No change to current law No change to current law No change to current law

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 , except substitutes "severance from employment" for "separation from service"	Adopts Senate version
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	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	No change to current law
Disaster Relief	No change to current law	Provides relief for certain retirement plan (and IRA) distributions taken on or after 1/1/16 and before 1/1/18, by individuals residing in a presidentially declared disaster area who have suffered economic loss by reason of the disaster	Adopts Senate version

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

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