



GMS Flash Alert

Global Compensation Edition

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United States – What One House Giveth, the Other Taketh Away

On November 9, 2017, U.S. Senate Finance Committee Chairman Orrin Hatch (R-UT) released his “Chairman’s Mark” for tax reform,¹ a detailed description of the as-yet unreleased legislative text of the *Tax Cuts and Jobs Act* (“the TCJA”). The Finance Committee’s markup is scheduled to begin today, November 13. Also on November 9, the House Ways and Means Committee approved its version of H.R. 1, the *Tax Cuts and Jobs Act*. The Ways and Means bill reflects amendments added during the markup. Full House consideration may take place later this week.²

In the weeks to come, both houses of Congress are expected to vote on their respective bills, and if both are passed, the next step would be for a reconciliation conference to develop a compromise bill acceptable to both chambers. If there are significant differences between the House and Senate bills, this could be challenging. The president has indicated his expectation that this process would be complete by the end of the year, although it may be difficult for Congress to achieve that ambitious goal.

In this newsletter, we compare employment-related tax provisions in the House and Senate committee bills that may impact incentive compensation, fringe benefits, retirement, and global mobility programs.

WHY THIS MATTERS

The House and Senate bills differ significantly in their details to accomplish similar goals. Both bills propose to limit or eliminate numerous deductions, exclusions, and credits while generally reducing tax rates, which could have varying consequences on taxpayers depending on their income levels and the extent to which they claim deductions. Similarities in the House and Senate committee bills include revisions to Internal Revenue Code section 162(m). Significant differences include the taxation of nonqualified deferred compensation. If enacted, the changes will need to be taken into account in future tax planning and will need to be considered in year-end planning currently underway.

Comparing House and Senate Tax Bills

In the tables below, we provide a side-by-side comparison of the two bills.

	House	Senate
Section 162(m) \$1 Million Deduction Limit on Public Companies	Expands scope to include CFOs in addition to CEOs and the next three highest compensated named executives. Extends application to both current and former covered employees. Public companies also include certain foreign filers and potentially large private companies and S Corps. Furthermore, the proposal repeals the performance-based compensation exemption.	Expands scope to include CFOs in addition to CEOs and the next three highest compensated named executives. Extends application to both current and former covered employees. Public companies also include certain foreign filers and potentially large private companies and S Corps. Furthermore, the proposal repeals the performance-based compensation exemption.
Nonqualified Deferred Compensation	Section 409A retained with income taxation generally upon distribution rather than vesting.	Deferred compensation (including traditional deferred compensation as well as nonqualified stock options) taxed at time-based vesting. Performance-based vesting and non-competes do not defer taxation. Further, existing vested amounts cannot be deferred from taxation beyond 2026.
Stock Option and Restricted Stock Unit Deferrals of Tax	<p>Section 83 continues to apply to compensatory stock options.</p> <p>In addition, proposed Section 83(i) provides that a “qualified employee” who receives “qualified stock” upon the exercise of an option (or settlement of a restricted stock unit) could elect to defer including the income that he or she would otherwise have been required to include for the year in which he or she receives the stock (or, if later, the first year for which the stock ceases to be “substantially nonvested”) until the earliest of</p> <p>(i) the date on which the stock first becomes transferable,</p>	Generally taxed as nonqualified deferred compensation.

	<p>(ii) the date on which he or she first becomes an "excluded employee,"</p> <p>(iii) the date on which any stock of the issuing corporation first becomes readily tradable on an established securities market,</p> <p>(iv) the date five years after the date on which the stock first ceased to be "substantially nonvested," or</p> <p>(v) the date as of which he or she revokes the deferral election.</p>	
Worker Classification	Not applicable.	<p>Proposes a worker classification safe harbor for all purposes under the Code, if certain requirements are met. Under the safe harbor</p> <ol style="list-style-type: none"> 1. the service provider is not treated as an employee, 2. the service recipient is not treated as an employer, 3. a payor is not treated as an employer, and 4. the compensation paid or received for the service is not treated as paid or received for employment.
Fringe Benefits with Limited Deductions	<p>The following fringe benefits would no longer be considered deductible (or the deduction is partly limited where noted):</p> <ul style="list-style-type: none"> • Entertainment, amusement, and recreation activities. • Membership dues with respect to any club organized for business, pleasure, recreation or other social purposes, • Any de minimis fringe that is primarily personal in nature 	<p>The following fringe benefits would no longer be considered deductible:</p> <ul style="list-style-type: none"> • Entertainment, amusement, and recreation activities as well as related facilities. • Membership dues with respect to any club organized for business, pleasure, recreation or other social purposes as well as related facilities. • 50% limitation on de minimis meals.

	<p>and involving property or services that are not directly related to the taxpayer's trade or business.</p> <ul style="list-style-type: none"> • Moving expenses (except for active duty military on orders). • Qualified transportation facilities. • On premises athletic facility. • Tax preparation expenses. 	<ul style="list-style-type: none"> • Qualified transportation fringe (except for safety)
Fringe Benefits That are Taxable	<p>The following fringe benefits would be taxable income:</p> <ul style="list-style-type: none"> • Employer-provided education assistance under section 127 and Employer-provided education assistance for tax exempt educational organizations under section 117(d). • Employee achievement awards. • Moving expense reimbursements (except for the Armed Forces). • Adoption assistance. • The exclusion for housing provided for the convenience of the employer or for employees of educational institutions would be capped at \$50,000. This reduced limit would also be phased out by 50% of the employee's compensation that exceeds a threshold (\$120,000 in 2017 adjusted for inflation). • Employer contributions to Archer Medical Savings Accounts (MSAs). 	<p>The following fringe benefits would be taxable income:</p> <ul style="list-style-type: none"> • Bicycle commuting reimbursements • Moving expense reimbursements • Tax preparation services
Alternative Minimum Tax (AMT) Boost to Incentive Stock Options	<p>Repeal of individual AMT enhances the benefit of incentive stock options for many taxpayers.</p>	<p>Repeal of individual AMT enhances the benefit of incentive stock options for many taxpayers.</p>

Retirement Savings	<p>The minimum age for in-service distributions from a tax-qualified plan (such as a defined benefit pension plan, a money purchase pension plan or a profit-sharing plan) or from a governmental 457(b) plan would be reduced from age 62 to age 59½.</p> <p>Less restricted rules regarding hardship distributions.</p> <p>Extension of plan loan offset rollover periods.</p> <p>Less restrictive nondiscrimination rules for frozen plans.</p>	<p>A single aggregate limit to contributions for an employee in a section 457(b) plan, and section 401(k) plan, or section 403(b) plan of the same related group of companies.</p> <p>Applies the 10% early withdrawal tax to governmental section 457(b) plans.</p> <p>Eliminates catch-up contribution for a year if the employee receives wages of \$500,000 or more for the preceding year.</p>
Excise Tax on Tax-Exempt Compensation	<p>An annual 20-percent excise tax on the total taxable compensation provided by a tax-exempt organization to one of its five highest compensated employees, to the extent that the total exceeds \$1 million. This would include any employee who was one of the five highest paid employees in any previous year after 2016. The employer would be liable to pay the tax. All related organizations would be aggregated for the purpose of determining whether the \$1 million threshold is exceeded.</p> <p>In addition, the 20 percent excise tax separately would apply to any “excess parachute payment” with rules similar to section 280G.</p>	<p>An annual 20-percent excise tax on the total taxable compensation provided by a tax-exempt organization to one of its five highest compensated employees, to the extent that the total exceeds \$1 million. This would include any employee who was one of the five highest paid employees in any previous year after 2016. The employer would be liable to pay the tax. All related organizations would be aggregated for the purpose of determining whether the \$1 million threshold is exceeded.</p> <p>In addition, the 20-percent excise tax separately would apply to any “excess parachute payment” with rules similar to section 280G.</p>

KPMG NOTE

If enacted, provisions in the House and Senate versions of the TCJA would represent the most comprehensive reform to the U.S. tax code in over 30 years and would have a dramatic impact on common compensation arrangements.

The proposed changes to compensation arrangements and deductions would cause a reevaluation of compensation arrangements. Therefore, employers should be prepared to review their deferred compensation and other benefit arrangements in light of these proposed changes.

To better understand how the proposals may impact existing arrangements and provide a forward thinking holistic approach to benchmarking, compensation and benefits design, and the tax considerations to remain competitive in the marketplace, please contact your local KPMG GMS professional or other qualified tax professional.

FOOTNOTES:

- 1 For the Chairman's mark of the *Tax Cuts and Jobs Act*, [click here](#).
- 2 For H.R. 1, Tax Cuts and Jobs Act, [click here](#).

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