



# GMS Flash Alert

## Global Compensation Edition

2017-169 | November 17, 2017



# United States - Update on Tax Cuts and Jobs Act

On November 16, 2017, the U.S. House of Representatives passed H.R. 1, the "Tax Cuts and Jobs Act."<sup>1</sup> Later that same day, the U.S. Senate Finance Committee approved tax reform legislation that included various modifications made to the Committee Chairman's original draft legislation made through the Committee's markup process.<sup>2</sup>

In this newsletter, we compare employment-related tax provisions in the House and Senate bills that may impact incentive compensation, fringe benefits, retirement, and global mobility programs. (For prior coverage, see [GMS Flash Alert 2017-166](#) (November 13, 2017)).

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## WHY THIS MATTERS

The House and Senate bills have some differences in their details to accomplish similar goals. However, both bills propose to limit or eliminate numerous deductions, exclusions, and credits while generally reducing tax rates. Similarities include revisions to Internal Revenue Code section 162(m), a new election to defer compensation on certain stock options, and fringe benefit-related deduction limitations. If enacted, changes will need to be taken into account in future tax planning and will need to be considered in year-end planning currently underway.

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## House versus Senate comparison chart

	House	Senate
<b>Section 162(m) \$1 Million Deduction Limit on Public Companies</b>	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. A transition period provides that section 162(m) expansion would not apply to compensation under a written, binding contract in effect on November 2, 2017.
<b>Nonqualified Deferred Compensation</b>	Section 409A retained with income taxation generally upon distribution rather than vesting.	Section 409A retained with income taxation generally upon distribution rather than vesting.
<b>Stock Option and Restricted Stock Unit Deferrals of Tax</b>	<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> <ul style="list-style-type: none"> <li>(i) the date on which the stock first becomes transferable,</li> <li>(ii) the date on which he or she first becomes an “excluded employee,”</li> </ul>	<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> <ul style="list-style-type: none"> <li>(i) the date on which the stock first becomes transferable,</li> <li>(ii) the date on which he or she first becomes an “excluded employee,”</li> </ul>

	<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>	<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> <p>Election would be available qualified stock on statutory options, but such options would no longer be treated as statutory options.</p> <p>Income tax withholding would be required at highest individual rate. However, election would not change timing of FICA/FUTA withholding.</p> <p>Form W-2 would have new reporting requirements related to deferral election.</p>
<b>Worker Classification</b>	No provision included.	No provision included in Chairman's modified mark.
<b>Fringe Benefits with Limited Deductions</b>	<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"> <li>• Entertainment, amusement, and recreation activities.</li> <li>• Membership dues with respect to any club organized for business, pleasure, recreation or other social purposes,</li> <li>• Any de minimis fringe benefit that is primarily personal in nature and involving property or services that are not directly related to the taxpayer's trade or business.</li> </ul>	<p>The following fringe benefits would no longer be considered deductible:</p> <ul style="list-style-type: none"> <li>• Entertainment, amusement, and recreation activities as well as related facilities.</li> <li>• Membership dues with respect to any club organized for business, pleasure, recreation or other social purposes as well as related facilities.</li> <li>• Meals provided for the convenience of the employer or through an employer-operated eating facility that qualified as a de minimis fringe benefit. This provision would</li> </ul>

	<ul style="list-style-type: none"> <li>• Moving expenses (except for active duty military on orders).</li> <li>• Qualified transportation facilities.</li> <li>• On premises athletic facility.</li> <li>• Tax preparation expenses.</li> </ul>	<p>not be effective until after 2025.</p> <ul style="list-style-type: none"> <li>• Qualified transportation fringe benefit (except for safety).</li> </ul>
<b>Fringe Benefits That are Taxable</b>	<p>The following fringe benefits would be taxable income:</p> <ul style="list-style-type: none"> <li>• Employer-provided education assistance under section 127 and employer-provided education assistance for tax exempt educational organizations under section 117(d).</li> <li>• Employee achievement awards.</li> <li>• Moving expense reimbursements (except for the Armed Forces).</li> <li>• Adoption assistance.</li> <li>• 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).</li> <li>• Employer contributions to Archer Medical Savings Accounts (MSAs).</li> </ul>	<p>The following fringe benefits would be taxable income:</p> <ul style="list-style-type: none"> <li>• Bicycle commuting reimbursements</li> <li>• Moving expense reimbursements</li> <li>• Tax preparation services.</li> </ul>
<b>Alternative Minimum Tax (AMT) Boost to Incentive Stock Options</b>	<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. Repeal is temporary and expires after December 31, 2025.</p>
<b>Retirement Savings</b>	<p>The minimum age for in-service distributions from a tax-qualified plan (such as a defined benefit pension plan, a money purchase</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</p>

	<p>pension plan or a profit-sharing plan) or from a governmental 457(b) plan would be reduced from age 62 to age 59½.</p> <ul style="list-style-type: none"> <li>- Less restrictive rules regarding hardship distributions.</li> <li>- Extension of plan loan offset rollover periods.</li> <li>- Less restrictive nondiscrimination rules for frozen plans.</li> </ul>	<p>of the same related group of companies.</p> <ul style="list-style-type: none"> <li>- Extension of plan loan offset rollover periods.</li> </ul>
<b>Excise Tax on Tax-Exempt Compensation</b>	<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>

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## KPMG NOTE

If enacted, provisions with the House and Senate versions of the *Tax Cuts and Jobs Act* 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 re-evaluation of compensation arrangements. Employers should be prepared to review their deferred compensation and other benefit arrangements in light of these proposed changes.

Employers need to consider how the proposals may impact existing arrangements and should seek advice from their qualified tax advisers about a forward-thinking holistic approach to benchmarking, compensation and benefits design, and the tax considerations to remain competitive in the marketplace.

## FOOTNOTES:

1 For discussion and analysis of the House bill, see the following issues of *GMS Flash Alert*: [2017-157](#) (November 2, 2017), [2017-161](#) (November 7, 2017), and [2017-162](#) (November 9, 2017).

2 See the text of the [Chairman's Modified Mark](#), the [Manager's Amendment](#), and the original [Chairman's Mark](#).

For discussion of the Chairman's mark, see the following issues of *GMS Flash Alert*: [2017-164](#) (November 10, 2017) and [2017-165](#) (November 13, 2017).

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