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## UPDATE: Latest Senate Markup of the "Tax Cuts and Jobs Act" Strikes Provisions that Would Have Drastically Changed Nonqualified Deferred Compensation Arrangements, While Retaining Revisions to 162(m) Limits on Executive Pay



**J. MARC FOSSE**

The November 14, 2017, markup of the Tax Cuts and Jobs Act (the "Act") released by the Chairman of the Senate Finance Committee deletes section III.H.1 of the November 9th Senate proposal. That section would have replaced section 409A of the Internal Revenue Code (the "Code") with Code section 409B. Adoption of Code section 409B would have literally been the end of elective nonqualified deferred compensation plans. The new Code section also would have made nonstatutory stock options taxable at vesting instead of at exercise, which would have severely impeded the usefulness of stock options as long-term incentive compensation. In addition, the prior Senate proposal would have deleted Code sections 457(b) and (f) with respect to compensation earned after December 31, 2017. Nonprofit entities will be pleased that they can still offer 457(b) plans to their executives. It appears support for overhauling the rules relating to nonqualified deferred compensation is losing steam. Hopefully, we will not see these proposals again, and employers can proceed with regular annual stock option grants and open enrollment deferral elections under their nonqualified deferred compensation plans without worrying that those programs will no longer be viable in the new year.

At the same time, the latest markup of the Act by the Senate did not remove the provisions changing Code section 162(m). Those changes delete the exception for performance-based and commission-based compensation from the \$1,000,000 compensation deduction limitation for top executives at public companies, and impose a 20% penalty on income paid to top executives at non-profit entities. In contrast, these provisions have been struck from the House bill. If these provisions are adopted solely in the Senate bill, then the Senate and the House

would need to negotiate whether the revisions to Code section 162(m) would be included in the final bill sent to the President. For a full discussion of the Senate proposals regarding nonqualified deferred compensation, stock options and Code section 162(m), please see our [Special Alert](#) sent November 13, 2017.

We will continue to monitor developments regarding the Act and advise you of any important updates that may impact executive compensation programs.

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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