

November 10, 2017

More from the House: Deferred Compensation Rules May Remain Intact Under the House Bill

By Christine M. Kong

House Republicans have introduced another amendment to the Tax Cuts and Jobs Act that was released on November 2 (the “House Bill”). The second amendment, released on November 9 (Amendment #2), essentially leaves intact the existing rules applicable to the nonqualified deferred compensation plans sponsored by for-profit and tax-exempt non-governmental employers. This alert summarizes key aspects of the amendment that affect deferred compensation.

Our prior alert summarizing the House Bill’s proposed changes to executive compensation is [available here](#).

We should also note that the Senate has outlined its own proposed version of the tax legislation, which differs significantly from the House Bill. A summary of the proposed Senate bill can be found in the [Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act”](#) dated November 9, which is scheduled for mark-up on November 13.

Deferred Compensation of For-Profit Employers

How does this new amendment to the House Bill affect the deferred compensation arrangements of for-profit entities?

This second amendment leaves in place the existing rules of Section 409A of the Internal Revenue Code of 1986 (the “Code”) and deletes the originally proposed addition of a new Section 409B to the Code. As initially proposed, Section 409B would have provided for taxing nonqualified deferred compensation upon vesting.

What about equity compensation, such as equity units, stock appreciation rights and stock options?

The amendment leaves in place the existing rules of Section 409A applicable to equity units, stock appreciation rights and stock options. Under the House Bill as initially proposed, equity compensation and equity-based compensation such as stock options, stock appreciation rights, restricted stock units and performance stock units would have been considered deferred compensation and, presumably, would have been taxed upon vesting.

The amendment also clarifies that restricted stock units are not subject to Section 83 of the Code (i.e., an 83(b) election cannot be made with respect to restricted stock units).

Are there any other equity compensation changes?

The House Bill, as amended, adds a new Section 83(i) to the Code to provide a deferral feature for certain equity awards. Under Section 83(i), certain employees who receive stock options or restricted stock units as compensation for their services and who later receive stock upon exercise of the option or upon settlement of the restricted stock unit may elect to defer the recognition of income for up to five years, if the corporation’s stock is not publicly traded and certain other requirements are met. The amendment clarifies that a Section 83(i) deferral arrangement would not be treated as nonqualified deferred compensation solely because of the employee’s deferral election or the ability to make an election under Section 83(i).

Deferred Compensation of Tax-Exempt Employers

How does this amendment to the House Bill affect the deferred compensation plans of tax-exempt non-governmental employers?

Nonqualified deferred compensation arrangements sponsored by tax-exempt non-governmental employers are currently governed by Sections 457(b) and 457(f) of the Code and Section 409A in the case of a 457(f) plan. The amendment leaves these rules in place. As initially proposed, the House Bill would have eliminated the application of Sections 457(b), 457(f) and 409A to deferred compensation that was attributable to services performed after December 31, 2017.

If you have any questions regarding the proposed legislation or the matters discussed in this alert, contact any member of our [Employee Benefits and Executive Compensation Group](#).

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