

	H.R. 1	Ways & Means Committee Draft (“W&M Draft”)	Senate Finance Committee Draft (“Senate Draft”)	Proskauer Comments/Observations
General	The United States House of Representatives released H.R. 1 on November 2, 2017.	The House Committee on Ways & Means released its W&M Draft on November 10, 2017 and the W&M Draft was later approved by the House of Representatives on November 16, 2017.	Shortly after the release of the W&M Draft, the Senate Finance Committee’s Chairman released his mark to the W&M Draft (the “Chairman’s Mark”). Following review and comment on the W&M Draft, the Senate approved its plan on November 16, 2017. The Senate Finance Committee released its proposed Draft of the Tax Cuts and Jobs Act on November 20, 2017.	With respect to the executive compensation provisions, the Senate Draft is substantially the same as the W&M Draft. Following the Senate’s recess, the Senate will review and vote on whether to approve the Senate Draft. If approved, the two bills will be reviewed by both houses for reconciliation prior to being presented to the President.
Nonqualified Deferred Compensation				
Taxation of Nonqualified Deferred Compensation	Under new Section 409B, effective as to deferrals for services performed on or after January 1, 2017, compensation deferred under a nonqualified deferred compensation plan will be includible in income when there is no longer a substantial risk of forfeiture. A substantial risk of forfeiture exists if a person’s rights to compensation are conditioned upon the future performance of substantial services. Stock options and stock appreciation rights would have been considered nonqualified deferred compensation.	The bill as reported by the House Committee on Ways & Means removed the new Section 409B and reinstated the current provisions under Sections 409A, 457A and 457(b).	Same as W&M Draft	Although not currently included in the Senate Draft, the Chairman’s Mark included the proposals related to a new Section 409B (which would have effectively eliminated deferred compensation). The Chairman’s Mark would have provided an extra year for current deferrals to be included in income, extending the date for inclusion from 2026 to 2027.

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	<p>An exception was included for compensation if payment of compensation is made not later than 2 ½ months after the end of the service recipient’s taxable year during which the compensation is no longer subject to a substantial risk of forfeiture.</p> <p>For deferrals made related to services performed prior to December 31, 2017, amounts will be includible in gross income on the later of: (i) the last taxable year beginning before 2026 and (ii) the taxable year in which there is no substantial risk of forfeiture.</p> <p>The original proposal also removed Section 409A, Section 457A and deferred compensation of tax-exempt organizations under Section 457(b).</p>			<p>The absence of this proposal in both bills, likely means that Congress will not amend the current rules related to nonqualified deferred compensation. This is good news for employees and employers as deferred compensation and equity arrangements can largely continue in their current form.</p>
Treatment of Qualified Equity Grants				
Election to Defer Income (New Section 83(i))	Not addressed	If qualified stock (as defined below) is transferred to a qualified employee (as defined below) who makes an election under this subsection, no amount shall be included in income in the year the qualified stock is transferable and no longer subject to a substantial risk of forfeiture (i.e. “vested”).	Substantively the same as W&M Draft	Currently, this new Section 83(i) is included both in the W&M Draft and the Senate Draft. Accordingly, this proposal is likely to appear in the final version of the bill, if passed by Congress.

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Time for Making Election	Not addressed	The election must be made no later than 30 days after the first time the employee's rights in such stock is vested. The election is made in a manner similar to the election under Section 83(b). No election under Section 83(i) may be made if (i) an election under Section 83(b) has been made, (ii) the stock is readily tradeable on an established securities market or (iii) such corporation purchased any of its outstanding stock in the calendar year preceding the calendar year in which the qualified stock first became vested (with certain exceptions for corporations who have repurchased at least 25% of qualified deferred stock, subject to a Section 83(i) election, and if the repurchase is made on a reasonable and nondiscriminatory basis).	Substantively the same as W&M Draft	Absent additional exceptions in the final bill or regulations, if a corporation wishes to offer its employees the potential deferral benefits of Section 83(i), the limitations on a corporation's ability to repurchase its outstanding stock may hinder the ability of private corporations to exercise call rights and to repurchase stock following an employee's termination of employment.
Amount of Income Inclusion	Not addressed – under current law, options are generally subject to income tax at the time of exercise, based on the excess of the fair market value at the time of exercise less the exercise price. Restricted stock units are generally subject to income tax based on the fair market value of the shares on the date they are settled/paid.	A Section 83(i) election would require the recognition of income at the end of the deferral period based on the value of the qualified stock on the date the stock is vested.		In cases where the value of the stock declines over the deferral period, individuals will be required to recognize a greater value for the stock than the value at taxation.

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Income Inclusion Timing	Not addressed	If an election is made, income will be includible in the taxable year of the employee on the earliest of: (i) when the qualified stock becomes transferable, (ii) when the employee becomes an excluded employee (as defined below), (iii) when the stock becomes readily tradeable on an established securities market, (iv) 5 years after the stock is vested and (v) when the employee revokes the election.	Substantively the same as W&M Draft	
Qualified Stock	Not addressed	With respect to a qualified employee, stock in a corporation that is the employer of the employee if the stock was acquired in connection with the (i) exercise of a stock option or (ii) settlement of a restricted stock unit. The stock must have been received in connection with the employee's performance of services and during a calendar year in which the corporation was an eligible corporation (as defined below).	Substantively the same as W&M Draft	

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Eligible Corporation	Not addressed	A corporation that has: (i) no stock readily tradeable on an established securities market and (ii) a written plan under which, in a calendar year, not less than 80% of all employees are granted stock options or restricted stock units with the same rights and privileges to receive qualified stock.	Substantively the same as W&M Draft	
Qualified/Excluded Employee	Not addressed	A qualified employee is an employee who is not an excluded employee and who agrees, in the election, to meet the withholding requirements set forth by the Secretary. An excluded employee is an individual who: (i) is a 1% owner at any time during the 10 preceding calendar years; (ii) is or has been, the chief executive officer, chief financial officer or is related to such person (using the rules under Section 318(a)(1)) or (iii) has been for any of the 10 preceding taxable years one of the 4 highest compensated officers of such corporation (determined according to the executive compensation disclosure rules under the Securities Exchange Act of 1934).	Substantively the same as W&M Draft	

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Employer Provided Notice	Not addressed	<p>A corporation transferring qualified stock to a qualified employee is required to provide the employee with notice at the time the stock would have been includible in income. The notice should include: (i) certification that the stock is qualified stock, (ii) notification to the employee that the employee can make a Section 83(i) election, (iii) notification that if the employee chooses to make an election the amount of income that will be recognized at the end of the deferral period will be based on the value of the stock at the time it is vested and (iv) that the income will be subject to withholding.</p> <p>Employers failing to provide such notice may be subject to a fine of \$100 for each failure to provide such notice, up to \$50,000 per calendar year.</p>	Substantively the same as W&M Draft	

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Withholding		At the end of the deferral period, the income will be subject to withholding by the employer. The employer will be required to withhold income taxes from the employee calculated using the maximum tax rate then in effect under Section 1. A Section 83(i) election does not affect the timing for withholding for Social Security and Medicare taxes, which will be due when the stock is vested.	Substantively the same as W&M Draft	
Coordination with Other Deferred Compensation Rules	Not addressed	If an election is made under Section 83(i), such stock will no longer be qualified under Sections 422 or 423, related to statutory stock options. Additionally, qualified stock elections are excluded as nonqualified deferred compensation under Section 409A.	Substantively the same as W&M Draft	The Senate Draft clarified that plans qualified under Section 423 will not lose their qualified status solely by allowing qualified employees to make a Section 83(i) election.
Effective Date	Not addressed	Stock options exercised or restricted stock units settled after December 31, 2017. The Secretary may provide certain transition relief for the corporate requirements included in the proposal.	Substantively the same as W&M Draft	If enacted, the requirements under Section 83(i) would apply to then outstanding options and restricted stock units. Accordingly, private corporations may need to be prepared to issue notices to employees as early as January 1, 2017.

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Modification of Limitation on Excessive Employee Remuneration				
Commission and Performance-Based Compensation (Amendments to Sections 162(m)(2)-(4))	Exceptions to the \$1m compensation limitation for commissions and performance-based compensation are deleted.	Same as H.R. 1	Substantively the same as H.R. 1	Currently, the revisions to Section 162(m) are included both in the W&M Draft and the Senate Draft. Accordingly, this proposal is likely to appear in the final version of the bill, if passed by Congress.
Applicable Employers	Includes any corporation that is an issuer: (i) of securities as required to be registered under Section 12 of the Securities Exchange Act of 1934 and (ii) that is required to file reports under Section 15(d) of the Securities Exchange Act.	Same as H.R. 1	Substantively the same as H.R. 1	The proposals provide for an expanded definition of Applicable Employer from current law, which only includes corporations registered under Section 12 of the Securities Exchange Act. Under both bills the definition of Applicable Employers would also cover corporations who have publicly traded debt instruments.
Covered Employees	Includes: (i) the principal executive officer ("PEO") at any time during the taxable year, (ii) the principal financial officer ("PFO") at any time during the taxable year, (iii) the three most highly compensated executives (other than the PEO and PFO) and (iv) any employee who was a covered employee for any preceding taxable year beginning after December 31, 2016.	Same as H.R. 1	Substantively the same as H.R. 1	All the proposals provide for an expanded definition of Covered Employees from current law to include the PFO and any covered employees from preceding taxable years.

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Effective Date	Applies to taxable years beginning after December 31, 2017.	Same as H.R. 1	The Senate Draft provides transition relief for written binding contracts in effect on November 2, 2017, which are not materially modified following that date.	In order to take advantage of the transition relief, the Senate Finance Committee Chairman's Mark also required that the compensation no longer be subject to a substantial risk of forfeiture on or before December 31, 2016. The Senate Draft is a relaxation of the original Senate proposal.
Excise Tax on Excess Tax-Exempt Organization Executive Compensation				
Excise Tax (New Section 4960)	Imposes a 20% excise tax on: (i) remuneration (e.g., wages as defined in Section 3401(a)) paid by an applicable tax-exempt organization to a covered employee in excess of \$1m and (ii) any excess parachute payments paid by such organizations to covered employees.	Same as H.R. 1	Substantively the same as H.R. 1	Currently, this new Section 4960 is included both in the W&M Draft and the Senate Draft. Accordingly, this proposal is likely to appear in the final version of the bill, if passed by Congress.
Applicable Tax-Exempt Organization	An applicable tax-exempt organization is any organization that: (i) is exempt from tax under Section 501(a), (ii) is a farmers' cooperative organization described in Section 521(b)(1), (iii) has income excluded from taxation under Section 115(1) or (iv) is a political organization described in Section 527(e)(1).	Same as H.R. 1	Substantively the same as H.R. 1	

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Covered Employee	A covered employee is an employee (or former employee) of an applicable tax-exempt organization who: (i) is one of the 5 highest compensated employees of the organization for the taxable year or (ii) was a covered employee for any preceding taxable year beginning after December 31, 2016.	Same as H.R. 1	Substantively the same as H.R. 1	
Excess Parachute Payment	The excess of any parachute payment over the portion of the base amount allocated to such payment.	Same as H.R. 1	Substantively the same as H.R. 1	
Parachute Payment	Any payment in the nature of compensation to a covered employee if: (i) such payment is contingent on such employee's separation from employment and (ii) the aggregate present value of the payments equals or exceeds an amount equal to 3 times the base amount. An individual's base amount is determined in the same way as provided in Section 280G(b)(3).	Same as H.R. 1	Substantively the same as H.R. 1	
Liability for Tax	Employer paid tax (if services are provided to multiple related organizations, the organizations will each pay a pro-rata portion of the excise tax).	Same as H.R. 1	Substantively the same as H.R. 1	
Effective Date	Applies to taxable years beginning after December 31, 2017.	Same as H.R. 1	Substantively the same as H.R. 1	