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Senate Version of Tax Reform Proposes Compensation and Retirement Plan Changes

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On November 10, 2017, the Senate released a document entitled "Description of the Chairman's Mark of the 'Tax Cuts and Jobs Act'" prepared by the Joint Committee on Tax summarizing the proposals expected to appear in the Senate tax reform bill scheduled for mark up today, November 13, 2017. The description provides background and summaries of the proposed tax code changes expected to appear in the legislation, although the text of the bill has not been released as of Monday morning.

Compensation Issues

The description reflects that both the Code Section 162(m) change and the original Ways and Means deferred compensation changes will be in the Chairman's mark that will be the starting point for Senate Finance Committee action this week. Thus, the enactment of proposed Section 409B as part of final tax reform legislation remains a risk. The SFC has scored Section 409B as raising over $13 Billion in new revenue. Apparently, this was not insurmountable as Ways and Means removed Section 409B, but the Senate has always been more conscious of revenue neutrality.

Qualified Retirement Plan Issues

Like the House version, the Senate bill will likely leave intact pre-tax elective deferrals under section 401(k). Earlier reports suggested that tax reform may replace pre-tax deferrals with after tax Roth deferrals as a means of raising revenue to offset other cuts. But this proposal does not appear in the JCT's summary. Revisions to qualified retirement plans contemplated by the summary include:

- *Catch-up Contribution Limits for High Income Earners.* The current tax code limits 401(k) plan participants' to elect pretax or Roth after tax deferrals up to an inflation-indexed limit, set at $18,000 for 2017 and increasing to $18,500 for 2018, not to exceed total compensation. In addition, participants who have reached at least age 50 and have maxed out their elective deferral limit for the year may make additional "catch-up" contributions of pre-tax or Roth deferrals up to an additional inflation-indexed limit, set at $6,000 for 2017 and 2018. The Senate proposal would limit participants eligible to make the additional catch-up contributions to only those making less than $500,000 in the preceding year.

- *Coordinated Deferral Limits.* The Senate proposal would coordinate the tax code's deferral limits among 401(k) plans, 403(b) annuity plans, and 457(b) eligible deferred compensation plans sponsored by State and local governments. Under the current tax code, certain participants in

403(b) plans and 457(b) plans may defer greater amounts than the limits described above for 401(k) participants. The proposal would apply "a single aggregate limit to contributions for an employee in a government section 457(b) plan and elective deferrals for the same employee under a section 401(k) plan or a 403(b) plan of the same employer" and repeal the current provisions allowing for additional deferrals in excess of the applicable 401(k) plan limits under 403(b) and government sponsored 457(b) plans. If enacted, all participants in 401(k), 403(b), and governmental 457(b) plans would be subject to the same elective deferral and catch up contribution limits. Under a separate proposal, governmental 457(b) plans would also be subject to the 10% early withdrawal penalty that currently applies to 401(k) and 403(b) plan participants and individual retirement account holders who take a distribution before reaching age 59-1/2.