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Senate Finance Committee Modifies Executive Compensation Provisions in New Modified Mark of Tax Reform Bill

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In Depth

On Tuesday night, Senate Finance Committee Chairman Orrin Hatch (R-UT) released a new modified mark of the Senate version of the Tax Cuts and Jobs Act that modifies provisions related to Internal Revenue Code (Code) Sections 409A and 162(m).

The Chairman's modification adds a transition rule for the elimination of employer deductions for payments over $1 million to certain executives under Code Section 162(m). The transition rule provides that elimination of the employer deduction does not apply to payments under a written and binding contract in effect on November 2, 2017, provided that the contract was not materially modified after that date.

In addition, the Chairman's modification eliminates the provision that would have replaced Code Section 409A with a new Section 409B, which would have required payments under non-qualified deferred compensation plans to be taxed when they vested. Currently, Section 409A allows employees to defer taxation on such fully-vested payments, provided they meet other requirements under Section 409A. The proposed replacement of 409A with 409B would have had significant tax implications for those employees with non-qualified deferred compensation plans.

There is reason to be cautiously optimistic that the proposed Section 409B will not become law. The non-qualified deferred compensation changes were also removed from the House bill at the very last minute. The version of the bill that ultimately passed the House does not include a new Section 409B.

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