

INSIGHTS

## IRS Guidance on the Application of Tax Reform Amendments to Code Section 162(m)

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On August 21<sup>st</sup>, the IRS issued **Notice 2018-68** which provides initial guidance regarding amendments to Section 162(m) of the Internal Revenue Code (“Section 162(m)”) as provided by the 2017 Tax Cuts and Jobs Act passed in late 2017.

First impressions from **Notice 2018-68**:

- Covered Employees – For purposes of the \$1 million compensation deduction limit under Section 162(m), the CFO is expressly included as a Covered Employee and any individual who is a Covered Employee at any time beginning on or after January 1, 2017 is a Covered Employee for life, i.e., even after such individual’s employment is terminated, so that payments received after employment termination need to be evaluated under Section 162(m).
- Any “written binding contract” in effect on November 2, 2017 between an employer and a Covered Employee is grandfathered from the amendments made to Section 162(m) under the 2017 Tax Cuts and Jobs Act, unless the agreement is renewed or materially modified.
  - Renewed – Any agreement which is automatically renewed unless the employer or Covered Employee gives prior notice of non-renewal is no longer grandfathered on the date of such auto-renewal.
  - Material Modification – An agreement is materially modified upon (i) an amendment increasing the amount of compensation payable under the agreement, (ii) an acceleration of a payment without discounting the payment to account for the time value of money, or (iii) a deferral of payment where the amount paid at the deferral date exceeds the original amount deferred, unless such increase is due to a reasonable rate of interest or an actual rate of return based on a predetermined actual investment, whether or not assets associated with the deferred amount are actually invested therein. A material modification does not include a supplemental payment that is no more than a reasonable cost-of-living increase over a prior payment made under a written binding contract (although the supplemental payment will be subject to the Section 162(m) deduction limit).

- Written Binding Contract – It appears from an example in the Notice that agreements, plans, or plans related to agreements which allow negative discretion to reduce the payment of compensation to \$0 are not binding written contracts and are not agreements which are grandfathered.

Written comments may be submitted through November 9, 2018. It is anticipated that comments will definitely be filed regarding the negative discretion and binding contract issue. The Treasury Department and IRS anticipate that the guidance provided in **Notice 2018-68** will be incorporated into future regulations with respect to issues addressed in the Notice and will apply to any tax year ending on or after September 10, 2018.