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Amendments #1 and #2 to the Tax Cuts and Jobs Act

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The House Ways and Means Committee amended The Tax Cuts and Jobs Act twice within a week of its issuance. Several amendments have significant compensation implications.

Section 3801

Nonqualified Deferred Compensation (NQDC) is Eliminated

The biggest change is that proposed Section 3801 is stricken from the Act, preserving the current tax treatment of NQDC, including equity and stock options. This amendment will be applauded by corporate issuers and human resource professionals. It means that:

- Cash-based NQDC, including elective deferrals, SERPs, top hat 401(k) plans and severance, will not have to be unwound and cashed out to cover an accelerated tax event.
- The Act will not create strong incentives for companies to grant current cash and time vested stock, rather than performance conditioned awards.
- Stock options will continue as a viable alternative for companies that want to offer them.
- Complex rules under 409A continue to govern deferred compensation.

Section 3804

Stock Options

The amendment provides some relief for employees of private companies who are compensated with equity that lacks a ready public market. The amendment provides that certain employees who receive stock options or restricted stock units as compensation may elect to defer recognition of income for up to 5 years, if the corporation's stock is not publicly traded. Note that earlier taxation may apply if a liquidity event occurs, if the executive is highly compensated or under other circumstances.

Section 3805

Modification of treatment of qualified equity grants

This amendment merely clarifies that restricted stock units (RSUs) are not eligible for Section 83(b) elections. Instead, Section 83(b) elections, i.e., elections to be taxed at grant, rather than at vesting, are limited to restricted stock awards. This is consistent with current tax law.

Summary

To date, the headline is that the proposed limitation on tax deductibility of compensation of named executive officers in public companies that exceeds \$1 million remains in the House proposal. This certainly aligns with a populist agenda. We will wait and see what the Senate's tax bill contains and keep our readers updated.



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