Does Our Compensation Committee Still Need to Certify Performance Goals for Code Section 162(m)?

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Under the Tax Cuts and Jobs Act of 2017 (the ?ÃÂ£***Act***?ÃÂ¥), Congress broadened the $1 million deduction limitation under Code Section 162(m) for a public company?ÃÃs top executives by, among other things, broadening the scope of who are ?ÃÂ£covered employees?ÃÂ¥ and by eliminating the performance-based compensation exception. Prior to the changes made by the Act, in order for compensation payable to a covered employee in excess of $1 million to be deductible under Code Section 162(m), the company?ÃÃs compensation committee had to certify that the performance goals were met following the end of the performance period and before any payouts were made. Any misstep would disqualify the compensation awards. Beginning in 2018, there is no particular tax benefit for companies to follow the certification procedures, as any compensation over $1 million will not be deductible if paid to a covered employee. Notwithstanding the foregoing, the Act grandfathered some incentive compensation plans, preserving the performance-based tax deduction for such awards (the ?ÃÂ£***Grandfathered Awards***?ÃÂ¥). These awards must be in writing, binding, and in effect on November 2, 2017, and not modified in any material respect following November 2, 2017. If a company has any outstanding Grandfathered Awards, the company must comply with the procedures under Code Section 162(m) that were in effect prior to the effective date of the Act. Thus, with respect to such Grandfathered Awards, the company?ÃÃs compensation committee (comprised of outside directors within the prior requirements under Code Section 162(m)) must still certify the achievement of the performance goals in order to preserve the tax-deductibility of the compensation paid under such awards. In the absence of Grandfathered Awards, companies should consider retaining some form of certification process to record the compensation committee?ÃÃs review of performance and its determination regarding the achievement of the performance goals.