

IRS Provides New Guidance Under Code Section 162(m)

August 30, 2018

In December 2017, under the Tax Cuts and Jobs Act, Congress broadened the \$1 million deduction limitation under Code Section 162(m) for a public company's top executives by, among other things, broadening the scope of "covered employees" and eliminating the performance-based compensation exception. The more restrictive Code Section 162(m) generally applies for tax years after 2017, but certain arrangements in existence on November 2, 2017, may be grandfathered. On August 21, 2018, the IRS issued new guidance on Code Section 162(m) under IRS Notice 2018-68 (the "Notice"). Notably, the Notice provides guidance with respect to the grandfathering relief (including the impact of negative discretion and what constitutes a material modification), and provides guidance on the expanded scope of who is a "covered employee" (and will remain a covered employee). The Notice leaves open for comment several issues, including, the rule which allows certain newly public companies to limit the application of Code Section 162(m) during a transition period, the application of Code Section 162(m) to foreign private issuers, and the application of the SEC disclosure rules for determining the applicable executives for a taxable year that does not end on the same date as the last completed fiscal year. The IRS anticipates that the guidance in the Notice will be incorporated into future regulations that will apply to taxable years ending on or after September 10, 2018. [View a copy of the Notice.](#)