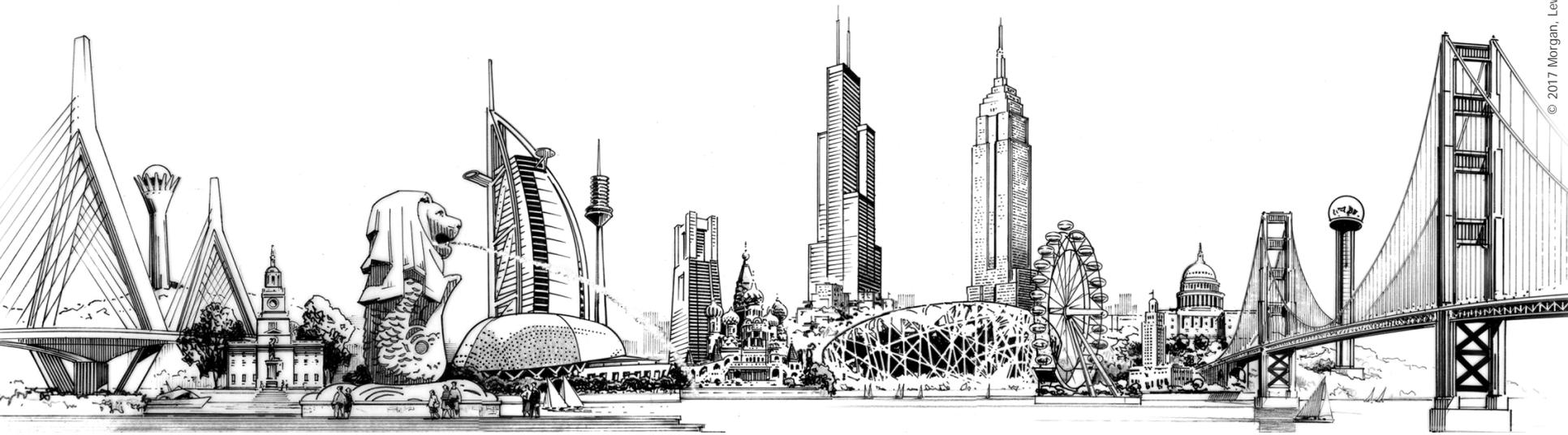


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TAX REFORM: THE DEVIL'S IN THE DETAILS (PART III)

November 10, 2017

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Tax Reform – Legislative Overview

- House Bill (H.R. 1) was released last week.
 - Significant changes in subsequent amendments.
- Senate proposal is expected this week
 - Perhaps during the dreaded period after we submit this deck and before the webinar!
- If the bill is passed through the budget reconciliation process, it only needs 51 votes in the Senate as opposed to 60.
- Total cost of House bill estimated to be \$1.5 trillion over 10 years; the bill cannot exceed this amount if it is passed through the budget reconciliation process.
- Goal is to sign this bill into law by year-end.

Tax Reform – Sections 409A and 409B

- Under original bill, Section 409A would be repealed, effective for compensation earned for services performed after December 31, 2017.
 - For amounts deferred before 2018 (including amounts grandfathered from Section 409A), current rules would remain in effect until 2025, at which point all vested and unpaid amounts would become taxable.
 - Withholdings on taxable amounts could be withdrawn in 2025.
 - Under regulations issued after enactment, distributions could be accelerated to 2025 without violating Section 409A.
- Manager's Amendment released 11/9 removes these changes.
 - May not be restored because of relatively small amount of revenue at stake (\$17B).

Tax Reform – Sections 409A and 409B (cont.)

- Section 409B would tax deferred compensation as soon as it is no longer subject to a substantial risk of forfeiture.
 - Section 409B would generally apply to equity awards, including stock options and SARs, but transfers of property under Section 83 (other than stock options) would remain exempt.
 - Special exemption for certain equity awards issued by nonpublic companies.
 - Substantial risk of forfeiture would be limited to a requirement to perform future services. No other condition would qualify.
 - Short-term deferral exception would remain in effect, subject to the same definition of “substantial risk of forfeiture.”
 - Earnings would also be subject to tax upon vesting.
- Also removed by Manager’s Amendment.

Tax Reform – Sections 409A and 409B (cont.)

- Key Questions
 - How will the Senate proposal address this issue?
 - How should companies administer 2018 deferral elections?
 - Can distribution schedules be changed for amounts subject to Section 409A to spread the tax hit over multiple years?
 - To what extent will the new rules apply to multiyear equity awards granted before 1.1.18?
 - Will we see more secular trusts?
 - Will options be treated as noncash compensation under Announcement 85-113?
 - How will underwater options be taxed?
 - Will the state tax blocker in 4 U.S.C. § 114 apply to accelerated payouts of deferred compensation subject to Section 409A?

Tax Reform – Section 162(m)

- Eliminates the performance-pay exception.
- CFO again becomes a covered employee.
- Once a covered employee, always a covered employee.
- Tax-exempt employees will be subject to Section 162(m) through a 20% excise tax.
- Effective 1.1.18, so companies may push to accelerate performance plan deductions into 2017 and/or encourage exercise of stock options.
- Key Questions
 - How will companies change the structure of performance pay (timing, subjective targets, positive discretion, etc.)?
 - How will the new rules apply to multiyear awards like LTIPs?

Tax Reform – Fringe Benefits

- Eliminates tax preferences for many fringe benefits, including (but not limited to):
 - No deduction for entertainment activities (including business entertainment).
 - May affect corporate aircraft.
 - No deduction for transportation fringe benefits.
 - Including transit passes, pool cars and parking.
 - No deduction/exclusion for moving expenses.
 - No exclusion for qualified tuition or educational assistance.
 - No exclusion for adoption assistance benefits.
 - No exclusion for employee achievement awards.
- Original bill eliminated Dependent Care FSAs, but Brady Amendment delays repeal to December 31, 2022.

Tax Reform – Qualified Plans

- 401(k) Plan contribution limits remain the same – for now.
- New distribution options
 - DB plans and state and local DC plans may offer in-service distributions at age 59½.
 - Hardship withdrawals from DC plans would no longer trigger a six-month suspension from making contributions.
 - DC plan participants who terminate could roll over loan balances to an IRA until the due date for their tax return for the year of termination.
- Expanded cross-testing for DB and DC plans.
 - This would facilitate non-discrimination testing for DB plans that are frozen to new participants.

Tax Reform – Possible Legislative Fixes

- Drop these provisions!
- Add grandfather protection for agreements in place as of November 2, 2017.
 - Or, at minimum, protect agreements that vested before 2018.
- Transition rules permitting payout before 2025 of amounts subject to Section 409A.
- Modify the state tax blocker (through an amendment to Section 409B) to cover past and/or future deferred compensation payments.
- Block taxation of options vesting on more than the spread (i.e., no Black Scholes method).
- Adopt withholding transition rules for all executive compensation, stock options, and cash reimbursements for fringe benefits until later in 2018 (similar to rules for noncash fringes under Section 3501(b)).
- Suspend penalties for failing to withhold and/or timely deposit in 2018.

Biography



Mary B. "Handy" Hevener helps US and multinational enterprises minimize corporate payroll taxes and maximize benefits-related tax deductions. She focuses her practice on the tax treatment of employee and independent contractor benefits outside qualified retirement plans, including stock options and other stock-based compensation; executive income deferrals; golden parachutes; and fringe benefits that range from health and life insurance, to employee loans, cars, planes, and prizes.

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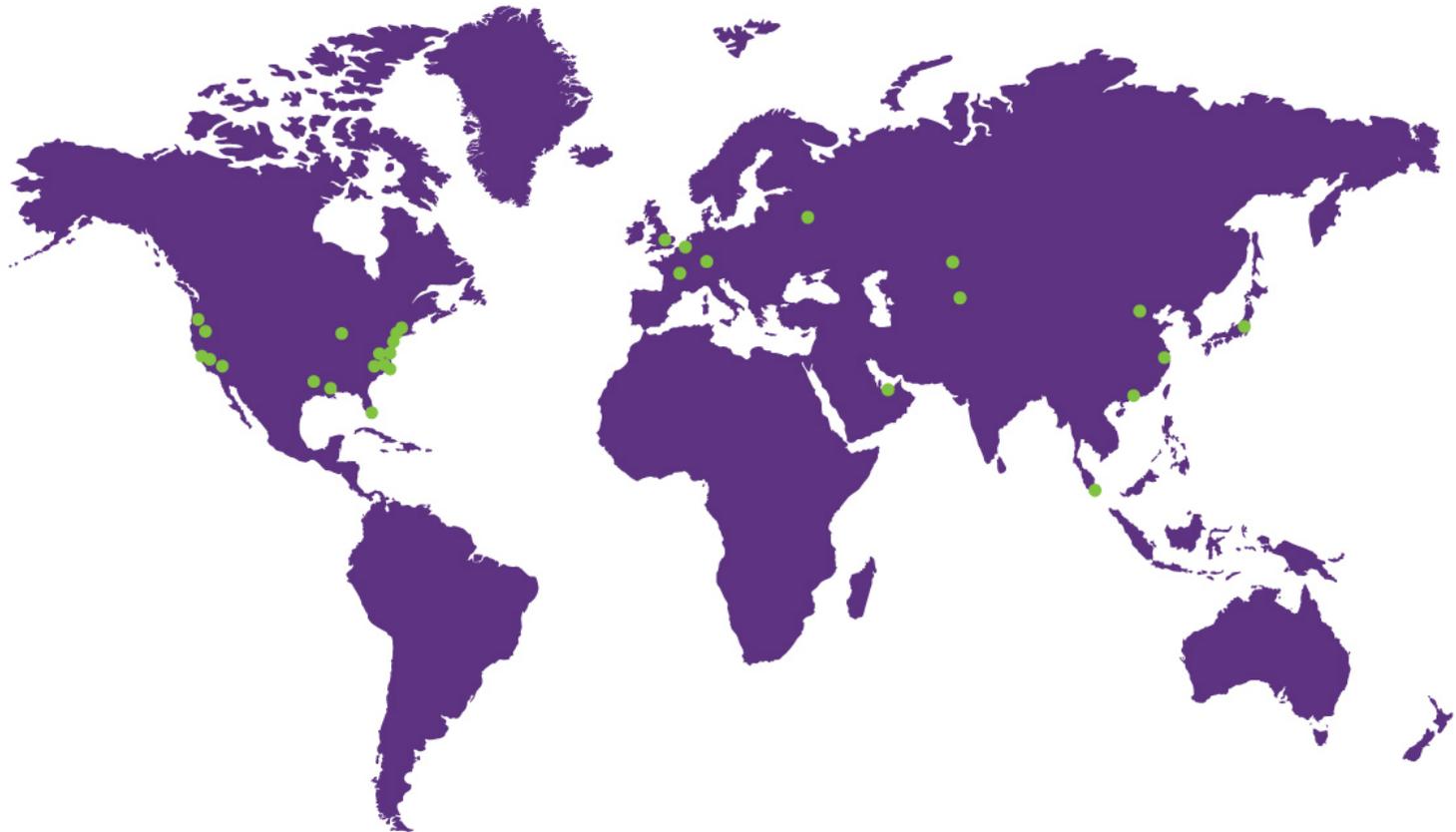
Alexander L. Reid advises tax-exempt organizations in planning, structuring, and transactional matters. He also represents taxpayers under audit, and helps organizations improve their governance and enhance their tax compliance. Alexander counsels taxpayers seeking administrative guidance from the Internal Revenue Service (IRS) and US Department of the Treasury, as well as on legislative matters with the US Congress. His tax-exempt clients include charities, foundations, colleges and universities, museums, and other nonprofit organizations.

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