Tax reform for tax-exempt organizations and donors

Congress has passed the conference agreement for tax reform.

Background

On Friday, December 15, the conference committee approved the report of its agreement on H.R. 1, the tax reform bill. The conference report is a compromise bill, blending elements of both the previously passed House and Senate versions of the bill. The House on December 19 passed the conference report. The Senate then passed a modified version of the bill to strike three provisions that violated Senate rules, including the "tuition-paying" requirement in determining whether a private college or university is subject to the excise tax on its endowment. Today, the House passed H.R. 1, as revised by the Senate.

Provisions for tax-exempt organizations

A number of provisions in H.R. 1 would affect tax-exempt organizations and their donors, including:

- Impose a 1.4% excise tax on the investment income of certain private colleges and universities
- Impose an entity-level tax on excess compensation
- Compute unrelated business taxable income ("UBTI") separately for each unrelated trade or business
- Include the value of certain fringe benefits that are non-deductible under section 274 as UBTI

The charts below identify certain provisions and highlight differences among the House bill, Senate bill, and H.R. 1 (the conference report), as modified on December 20, 2017.

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Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Exempt organizations The proposals contain numerous provisions that specifically apply to tax-exempt organizations, including certain governmental entities.			
Impose a 1.4% excise tax on the investment income of certain private colleges and universities *(new section 4968)* The provision would impose an excise tax on the non-exempt use assets of private colleges and universities with large endowments (including those held by related organizations) and at least 500 full-time equivalent students.	✓ *(section 5103)* – Endowments of $250,000 or more per student	✓ *(section 13701)* – Endowments of $500,000 or more per tuition-paying student – Clarification of related organizations	✓ *(section 13701)* Modifies Senate bill – Eliminates “tuition-paying” – Requires more than 50% of students be located in the United States
Impose an entity-level excise tax on excess compensation *(new section 4960)* The provision would impose an excise tax on compensation in excess of $1 million (and “excess parachute payments”) paid by certain exempt organizations (including related organizations) to the top-5 highest compensated employees.	✓ *(section 3802)*	✓ *(section 13602)* – Remuneration treated as paid when there is no substantial risk of forfeiture – Includes as compensation amounts required to be included in income under section 457	✓ *(section 13602)* Modifies Senate bill – Excise tax rate set to corporate rate – Excludes remuneration paid to a licensed medical professional that is directly related to the performance of medical or veterinary services
Compute UBTI separately for each unrelated trade or business *(new section 512(a)(6))* The provision would allow an NOL deduction only with respect to a trade or business from which the loss arose. A transition rule would permit an NOL arising from a taxable year beginning before January 1, 2018 to be carried forward and not be subject to this provision.	✗	✓ *(section 13702)*	✓ *(section 13702)*
Include the value of certain fringe benefits that are non-deductible under section 274 as UBTI *(new section 512(a)(7))* The provision would increase UBTI by amounts paid or incurred after December 31, 2017 for qualified transportation fringe benefits or any parking facility used in connection with qualified parking.	✓ *(section 3308)*	✗	✓ *(section 13703)*

Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Tax-exempt (and related) organizations as businesses The current tax reform proposals include a number of provisions that would affect tax-exempt organizations that engage in unrelated trades or businesses or that have related taxable entities. Of particular interest may be the corporate rate reduction, repeal of the corporate AMT, the elimination of numerous business deductions and tax credits, and increased expensing.			
Replace graduated corporate income tax rates with a flat rate *(section 11(b))* The proposal would eliminate the graduated corporate tax rates and replace them with a single flat rate.	✓ *(section 3001)* – Rate: 20% – Effective: tax years beginning after 12/31/17	✓ *(section 13001)* – Rate: 20% – Effective: tax years beginning after 12/31/18	✓ *(section 13001)* – Rate: 21% – Effective: tax years beginning after 12/31/17
Repeal of corporate AMT *(sections 55-59)*	✓ *(section 2001)*	✗	✓ *(section 12001)*
Eliminate deduction for entertainment expenses and certain fringe benefits *(section 274)* The proposal generally would repeal the present-law exception to the deduction disallowance for entertainment, amusement, or recreation that is directly related to (or, in certain cases, associated with) the active conduct of the taxpayer's trade or business (and the related rule applying a 50% limit to such deductions).	✓ *(section 3307)* The House bill would disallow the following deductions: – De minimis fringes (primarily personal) – Qualified transportation fringes – On-premises athletic facilities – Entertainment expenses of a tax-exempt entity	✓ *(section 13304)* The Senate bill would disallow the following deductions: – Qualified transportation fringes – Commuting expenses (safety exception) – Food and beverages provided for the convenience of the employer (after 12/31/25) and 50% deductible from 1/1/18-12/31/25	✓ *(section 13304)* Follows Senate bill

Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Tax-exempt organizations as employers The tax reform proposals also affect compensation paid by tax-exempt organizations to their employees. In addition to provisions affecting retirement plans and deferred compensation, the proposals would modify compensation by changing the taxability of certain fringe benefits.			
Taxable fringe benefits *(section 132)* The provisions would disallow exclusions for certain fringe benefits.	✓ The House bill would include as taxable income: – Employer-provided education assistance *(section 1204)* – Employer contributions to Archer Medical Savings Accounts *(section 1311)* – Employee achievement awards *(section 1403)* – Moving expenses *(section 1405)* – Adoption assistance *(section 1406)*	✓ The Senate bill would include as taxable income (for taxable years beginning after 12/31/17 and before 1/1/26): – Moving expenses *(section 11049)* – Bicycle commuting expenses *(section 11048)*	✓ *(sections 11048 & 11049)* Follows Senate bill
Tax-exempt bond provisions The proposals address and modify certain rules relating to tax-exempt bonds.			
Repeal of advance refunding bonds *(section 149(d))* The proposal would tax the interest earned on bonds used to pay the principal, interest, or redemption price on a prior governmental or qualified 501(c)(3) bond issued more than 90 days before redemption.	✓ *(section 3602)*	✓ *(section 13532)*	✓ *(section 13532)*

Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Donors In addition to proposed amendments to the charitable contribution deduction (discussed below), a number of other provisions may be of interest to donors of tax-exempt organizations: e.g., an increased standard deduction, modification or repeal of the AMT, modification of the estate tax, lower tax rates, and a repeal of the overall limit on itemized deductions.			
Increase the 50% AGI limit to 60% for cash contributions *(section 170(b)(1))*	✓ *(section 1306(a))*	✓ *(section 11023)* Effective from 12/31/17 and before 1/1/26	✓ *(section 11023)* Follows Senate bill
Deny the deduction for college athletic event seating rights *(section 170(l))*	✓ *(section 1306(b))*	✓ *(section 13703)*	✓ *(section 13704)*
Repeal substantiation exception for contributions reported by donees *(section 170(f)(8)(D))*	✓ *(section 1306(d))*	✓ *(section 13704)*	✓ *(section 13705)*

Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Exempt organizations			
Permit section 501(c)(3) organizations to make political campaign statements in the ordinary course of their activities, provided the expenses are de minimis *(new section 501(s))*	✓ *(section 5201)*	✗	✗
Enhance the reporting required by sponsoring organizations of donor advised funds ("DAFs") *(new section 6033(k)(4), (5))*	✓ *(section 5202)* The House bill would require sponsoring organizations to annually report the percentage of assets paid out of DAFs and policies on inactive accounts.	✗	✗
Simplify the private foundation excise tax on net investment income to a single 1.4% rate *(section 4940)*	✓ *(section 5101)*	✗	✗
Create an exception from the excess business holdings rules for independently operated philanthropic businesses *(new section 4943(g))*	✓ *(section 5104)*	✗	✗
Limit private operating foundation status for art museums to those that are open to the public for at least 1,000 hours per year (new section 4942(j)(6))	✓ *(section 5102)*	✗	✗
Subject public pension funds and other organizations exempt from tax under section 501(a) to UBIT, even if they exclude income from tax under section 115(1) *(new section 511(d))*	✓ *(section 5001)*	✗	✗
Modify the fundamental research exception *(section 512(b)(9))*	✓ *(section 5002)* The House bill would limit the UBTI exclusion for fundamental research organizations to research that is made freely available to the general public.	✗	✗

Proposal	House bill (11/16/17)	Senate bill (12/2/17)	H.R. 1 (12/20/17)
Tax-exempt organizations as employers			
Modification of employer-provided housing exclusion *(section 119)*	✓ *(section 1401)* The House bill would limit the exclusion for employer-provided housing to $50,000 annually and would phase out the exclusion for highly compensated employees.	✗	✗
Repeal exclusion for qualified tuition reductions made by tax-exempt colleges and universities *(section 117(d))*	✓ *(section 1204)*	✗	✗
Tax-exempt bond provisions			
Termination of private activity bonds *(section 103(b))*	✓ *(section 3601)* The House bill would eliminate the tax-exempt treatment of interest received from "qualified 501(c)(3)" bonds as well as certain other bonds.	✗	✗
Donors			
Adjust the charitable mileage rate for inflation *(section 170(i))*	✓ *(section 1306(c))*	✗	✗