

PROPOSED REGULATIONS PROVIDES FURTHER GUIDANCE ON AMENDED SECTION 162(M)

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The Internal Revenue Service has issued Proposed Regulations under Internal Revenue Code Section 162(m). Section 162(m) limits the compensation deduction available to publicly traded companies to \$1.0 million for covered employees. In large part, the Proposed Regulations follow the guidance issued by the Internal Revenue Service in Notice 2018-68 (see coverage here).

There are some areas where the Proposed Regulations extend the guidance or cover periods not previously discussed in the Notice. Highlights of the Proposed Regulations include:

- Guidance where an affiliated group of companies contains two or more companies that are public companies
- Application of the rules with respect to a corporation that has issued American depository receipts
- Clarification of the definition of “predecessor corporation” for determining if someone was a principal executive officer, a principal financial officer, or one of the three executive officers with the greatest amount of compensation
- Further guidance on the application of the written binding contract exception to the application of amended Section 162(m)

The Proposed Regulations are highly complex. While generally the effective date of the Proposed Regulations will be for taxable years beginning after the date of publication of the Final Regulation, there are many exceptions. Most importantly:

- The definitions of what constitutes a written binding contract and what is a material modification generally applies to taxable years ending on or after September 18, 2018.
- The rules applicable to corporations that become publically traded apply for periods after December 20, 2019.
- The definition of covered employee generally applies to taxable years ending on or after September 10, 2018.

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As part of the effective date rules, taxpayers are not permitted to selectively choose whether or not to apply any of the guidance in the Proposed Regulations. A taxpayer that relies on part of the Proposed Regulations for a position must be consistent and follow all the other provisions contained in the Proposed Regulations. (Proposed Rule: Certain Employee Remuneration in Excess of \$1,000,000 Under Internal Revenue Code Section 162(m) <https://www.federalregister.gov/documents/2019/12/20/2019-26116/certain-employee-remuneration-in-excess-of-1000000-under-internal-revenue-code-section-162m>)

