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TAX CUTS AND JOBS ACT
SUMMARY OF IMPACT ON GOVERNMENTAL PLANS

HOUSE BILL • Amendment in the Nature of a Substitute to H.R. 1 (11/3/2017) • Second Amendment in the Nature of a Substitute to H.R. 1 (11/9/17) • Committee on Ways and Means H.R. 1 Section by Section Summary (11/2/2017)	SENATE BILL • Description of the Chairman's Mark of H.R. 1, prepared by Joint Committee on Taxation Staff (11/9/2017)	ICE MILLER SUMMARY AND COMMENTS	EMPLOYERS AND PLANS IMPACTED
RETIREMENT PLAN PROVISIONS			
Section 1502 – **Reduction in minimum age for allowable in-service distributions** **Current Law** Defined contribution plans generally are not permitted to allow in-service distributions (i.e., distributions while an employee is still working for the employer) attributable to tax-deferred contributions if the employee is less than 59½ years old. For state and local government defined contribution plans and for all defined benefit plans, the restriction on in-service distributions applies if the employee is less than age 62. **Provision** All defined benefit plans, as well as state and local government defined contribution plans, would be permitted to make in-service distributions beginning at age 59½. **Provision would be effective for plan years beginning after 2017.**	**Nothing comparable**	**Current Law** Defined contribution plans may generally permit in-service distributions beginning at age 59½. However, 457(b) plans cannot permit in-service distributions until the year the participant attains age 70½. Moreover, defined benefit and money purchase pension plans generally cannot permit in-service distributions before age 62. **CHANGE:** *All defined contribution plans and defined benefit plans would be able to permit in-service distributions beginning at age 59½.*	• All Employers • DB Pension Plans • Money Purchase Pension Plans • Governmental 457(b) Plans

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Section 1503 – **Modification of rules governing hardship distributions** **Current Law** Defined contribution plans are generally not permitted to allow in-service distributions (distributions while an employee is still working for the employer) attributable to elective deferrals if the employee is less than 59½ years old. One exception is for hardship distributions, which plans may offer participants only if the plan follows guidelines such as requiring an immediate and heavy financial need of the employee for any distribution to be made. Treasury regulations require that plans not allow employees taking hardship distributions to make contributions to the plan for six months after the distribution. **Provision** The IRS would be required within one year of the date of enactment to change its guidance to allow employees taking hardship distributions to continue making contributions to the plan. **The revised regulations under this provision would be effective for plan years beginning after 2017.**	**Nothing comparable**	**Current Law** Treas. Reg. § 1.401(k)-1(d)(3)(iv)(E)(2) provides that an employee cannot make elective contributions and employee contributions to a 401(k) plan and all other plans maintained by the employer for at least 6 months after receipt of a hardship distribution. Treas. Reg. § 1.403(b)-6(d)(2), which applies to 403(b) plans, incorporates this rule by reference. **CHANGE:** *The six month suspension period would no longer apply.*	• 401(k) and 403(b) Plans • All Employers

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Section 1504 – **Modifications of rules relating to hardship withdrawals from cash or deferred arrangements** **Current Law** Defined contribution plans are generally not permitted to allow in-service distributions (distributions while an employee is still working for the employer) attributable to elective deferrals if the employee is less than 59½ years old. One exception is for hardship distributions, which plans have the option of offering to participants. Hardship distributions may be allowed only for amounts actually contributed by the employee and may not include account earnings or amounts contributed by the employer. **Provision** Employers may choose to allow hardship distributions to also include account earnings and employer contributions. **The provision would be effective for plan years beginning after 2017.**	**Nothing comparable**	**Current Law** A hardship distribution from a 401(k) or 403(b) plan is limited to the employee's elective deferrals, not including earnings on elective contributions made prior to Dec. 31, 1988. A hardship distribution may not include employer contributions. **CHANGE:** *Hardship distributions from a 401(k) plan or profit sharing plan could be made from employee and employer contributions, and earnings thereon.* **Current Law** A hardship distribution must be necessary to satisfy an immediate and heavy financial need of the employee and the need cannot be relieved by other resources that are reasonably available to the employee, including nontaxable loans from any plan maintained by an employer. **CHANGE:** *An employee is not required to take a loan under a 401(k) or 401(a) profit sharing plan before receiving a hardship distribution.*	• 401(k) and 401(a) Profit Sharing Plans • All Employers **Note:** *This change is not applicable as written to 403(b) plans.*

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Section 1505 – **Extended rollover period for the rollover of plan loan offset amounts in certain cases** **Current Law** Defined contribution plans are permitted (but not required) to allow plan loans. If the employee fails to abide by the applicable rules, the loan is treated as a taxable distribution that may also be subject to the 10-percent penalty for early withdrawals. If a plan terminates or an employee's employment terminates while a plan loan is outstanding, the employee has 60 days to contribute the loan balance to an individual retirement account (IRA), or the loan is treated as a distribution. **Provision** Employees whose plan terminates or who separate from employment while they have plan loans outstanding would have until the due date for filing their tax return for that year to contribute the loan balance to an IRA in order to avoid the loan being taxed as a distribution. **The provision would apply to tax years beginning after 2017.**	**Nothing comparable**	**Current Law** When a plan is terminated or a participant terminates employment, outstanding loans must generally either be repaid to the plan or rolled to an IRA within 60 days to avoid immediate taxation. **CHANGE:** *Participants who have an outstanding loan balance when a plan terminates or the participant terminates employment would have until their tax filing deadline to roll the loan balance to an IRA to avoid immediate taxation.*	• 401(a), 403(b), and Governmental 457(b) Plans • All Employers

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Nothing comparable	**III.M-1** – **Conformity of contribution limits for employer-sponsored retirement plans** **Present Law** Account-based, tax-favored, employer-sponsored retirement plans include a qualified defined contribution plan, a tax-sheltered annuity plan (referred to as a "section 403(b) plan"), and an eligible deferred compensation plan of a state or local government (referred to as a "governmental section 457(b) plan"). A qualified defined contribution plan may include a qualified cash or deferred arrangement (referred to as a "section 401(k) plan"), under which an employee elects to have contributions made to the plan (referred to as "elective deferrals") rather than receiving the same amount as cash compensation. Elective deferrals are generally made on a pretax basis unless designated by the employee as Roth contributions, which are made on an after-tax basis. A defined contribution plan may also provide for after-tax employee contributions and for employer non-elective contributions and matching contributions. A section 403(b) plan may also provide for these different types of contributions. Although a governmental section 457(b) plan may provide for employer contributions, these plans generally provide only for elective deferrals.	**Current Law** The 402(g) limit ($18,000 for 2017) and age 50 catch-up limit ($6,000 for 2017) applicable to elective deferral contributions applies to a 403(b) plan and a 401(k) plan in aggregate. The 457(b) limit ($18,000 for 2017) and age 50 catch-up limit ($6,000 for 2017) applies to both elective deferral and employer contributions, and is not aggregated with the 402(g) limit applicable to 403(b) and 401(k) plans. **CHANGE:** *A single limit would apply to elective deferral contributions made to a 403(b) and 401(k) plan and contributions made to a governmental 457(b) plan in aggregate.*	• Defined Contribution 401(k), 401(a), 403(b), and Governmental 457(b) Plans. • All Employers

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	In the case of a section 401(k) plan or a section 403(b) plan, specific annual limits apply to elective deferrals by an employee and additional annual limits apply to aggregate contributions for the employee. For 2017, elective deferrals are generally limited to the lesser of (1) $18,000 plus an additional $6,000 catch-up contribution limit for employees at least age 50 and (2) the employee’s compensation. If an employee participates in both a section 401(k) plan and a section 403(b) plan of the same employer, a single limit applies to elective deferrals under both plans. However, under a special rule, in the case of employees who have completed 15 years of service, additional elective deferrals are permitted under a section 403(b) plan maintained by an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches. In this case, the annual limit is increased by the least of (1) $3,000, (2) $15,000 reduced by the employee’s additional elective deferrals for previous years, and (3) $5,000 multiplied by the employee’s years of service and reduced by the employee’s elective deferrals for previous years. For 2017, the limit on aggregate contributions to a qualified defined contribution plan (including a section 401(k) plan) or a section 403(b) plan is the lesser of (1) $54,000 and (2) the employee’s	**Current Law** An additional catch-up limit for employees with 15 or more years of service with a qualified organization (up to $3,000 per year, with a $15,000 lifetime limit) can be made to a 403(b) plan. 403(b) plans can provide for employer contributions to be made up to the 415(c) limit ($54,000 for 2017) for up to five years after termination of employment. **CHANGE:** *Both the 15 year of service catch-up and the five year post-employment contributions to 403(b) plans would be repealed.* **Current Law** 457(b) plans have an additional catch-up limit during the last three years before normal retirement age (up to twice the normal 457(b) limit for the year). **CHANGE:** *The normal retirement age catch-up to governmental 457(b) plans would be repealed.*	

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	compensation. Because employees generally do not receive compensation for years after they have terminated employment, contributions generally cannot be made for former employees. However, under a special rule, employer contributions to a section 403(b) plan can be made for up to five years after termination of employment. The limit described above on aggregate contributions to a qualified defined contribution plan applies to contributions for an employee to any defined contribution plans maintained by the same employer, defined generally to include any members of a controlled group (using an ownership standard of more than 50 percent, rather than at least 80 percent) or affiliated service group. Similarly, the limit on aggregate contributions to a section 403(b) plan applies to contributions for an employee to any section 403(b) plan maintained by the same employer, including any members of a controlled group or affiliated service group. However, contributions to a qualified defined contribution plan and to a section 403(b) plan maintained by the same employer are subject to separate limits unless the employee in the section 403(b) plan is in control of the employer maintaining the qualified defined contribution plan. This could occur, for example, if the employee in the section 403(b) plan owns a separate business that maintains a qualified defined contribution plan.	**Current Law** The 415(c) limit ($54,000 for 2017) applies to total employee and employer contributions to all defined contribution 401(a) and a 401(k) plans maintained by an employer and all employers in the same controlled group in aggregate. The 415(c) limit generally applies separately to total employee and employer contributions to a 403(b) plan. 457(b) plans are not subject to the 415(c) limit. **CHANGE:** *A significant change would be to aggregate essentially all defined contribution plans for purposes of applying the IRS contribution limits. A single limit would apply to total employee and employer contributions to all 401(a), 401(k), 403(b), and governmental 457(b) plans maintained by the same employer and all employers in the same controlled group.*	

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	In that case, a single limit applies to the contributions for the employee to the section 403(b) plan and the defined contribution plan. However, deferrals under a governmental section 457(b) plan are not taken into account in applying this limit. In the case of a governmental section 457(b) plan, all contributions are subject to a single limit, generally for 2017, the lesser of (1) $18,000 plus an additional $6,000 catch-up contribution limit for employees at least age 50 and (2) the employee's compensation. This limit is separate from the limit on elective deferrals to section 401(k) and section 403(b) plans. Thus, for example, if an employee participates in both a section 403(b) plan and a governmental section 457(b) plan of the same employer, the employee may contribute up to $18,000 (plus $6,000 catch-up contributions if at least age 50) to the section 403(b) plan and up to $18,000 (plus $6,000 catch-up contributions if at least age 50) to the section 457(b) plan. In addition, under a special rule, catch-up contributions may be made by an employee to a governmental section 457(b) for the last three years before attainment of normal retirement age. Additional contributions may be made up to the lesser of (1) two times the otherwise applicable dollar limit for the year (two times $18,000 for 2017, or $36,000) and (2) the employee's otherwise applicable limit for the year plus the amount by which the limit applicable to the employee for previous years exceeded the		

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	employee's deferrals for the previous years. If a higher limit applies to an employee for a year under this special rule than under the general catch-up rule ($6,000 for 2017), the general catch-up rule does not apply for the year. **Description of Proposal** The proposal applies a single aggregate limit to contributions for an employee in a governmental section 457(b) plan and elective deferrals for the same employee under a section 401(k) plan or a 403(b) plan of the same employer. Thus, the limit for governmental section 457(b) plans is coordinated with the limit for section 401(k) and 403(b) plans in the same manner as the limits are coordinated under present law for elective deferrals to section 401(k) and section 403(b) plans. The proposal repeals the special rules allowing additional elective deferrals and catch-up contributions under section 403(b) plans and governmental section 457(b) plans. Thus, the same limits apply to elective deferrals and catch-up contributions under section 401(k) plans, section 403(b) plans and governmental section 457(b) plans.		

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	The proposal repeals the special rule allowing employer contributions to section 403(b) plans for up to five years after termination of employment. The proposal also revises application of the limit on aggregate contributions to a qualified defined contribution plan or a section 403(b) plan (that is, the lesser of (1) $54,000 (for 2017) and (2) the employee's compensation). As revised, a single aggregate limit applies to contributions for an employee to any defined contribution plans, any section 403(b) plans, and any governmental section 457(b) plans maintained by the same employer, including any members of a controlled group or affiliated service group. **The proposal is effective for plan years and taxable years beginning after Dec. 31, 2017.**		

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Nothing comparable	**III.M-2** – **Application of 10 percent early withdrawal tax to governmental section 457(b) plans** **Present Law** Tax-favored, employer-sponsored retirement plans include a qualified retirement plan, a tax-sheltered annuity plan (referred to as a "section 403(b) plan") and an eligible deferred compensation plan of a state or local government (referred to as a "governmental section 457(b) plan"). A simplified employee pension ("SEP") plan and SIMPLE IRA plan are also tax-favored plans under which the employer makes contributions to an individual retirement arrangement ("IRA") established for each of its employees. In general, similar tax treatment applies to contributions to and distributions from these plans. Distributions are generally includible in income except to the extent attributable to after-tax contributions or qualified distributions from Roth accounts. In addition, unless an exception applies, a distribution from a qualified retirement plan, section 403(b) plan, or IRA (including a SEP or SIMPLE IRA) before age 59½ is subject to an additional tax (the "early withdrawal tax").	**Current Law** Governmental 457(b) plans are exempt from the 10% early withdrawal tax that applies to other qualified retirement plans when taxable distributions are made before a participant attains age 59½ (unless an exception applies). **CHANGE:** *Governmental 457(b) plans will be subject to the 10% tax on early withdrawals.*	• Governmental 457(b) Plans

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	The early withdrawal tax is equal to 10 percent of the amount of the distribution that is includible in income (25 percent in the case of certain SIMPLE IRA distributions). The early withdrawal tax does not apply to distributions from governmental section 457(b) plans. **Description of Proposal** Unless an exception applies, the early withdrawal tax applies to a distribution from a governmental section 457(b) plan before age 59 ½ to the extent the distribution is includible in income. **The proposal is effective for taxable years beginning after Dec. 31, 2017.**		

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Nothing Comparable	**III.M-3** – **Elimination of catch-up contributions for high-wage employees** **Present Law** Account-based, tax-favored, employer-sponsored retirement plans include a qualified defined contribution plan, a tax-sheltered annuity plan (referred to as a section 403(b) plan) and an eligible deferred compensation plan of a state or local government (referred to as a governmental section 457(b) plan). A simplified employee pension ("SEP") plan and SIMPLE IRA plan are also tax-favored employer-sponsored retirement plans under which the employer makes contributions to an individual retirement arrangement ("IRA") established for each of its employees. For purposes of these plans, a self-employed individual is treated as an employee. As discussed above, contributions to these plans for an employee are subject to an annual limit of the lesser of a specified dollar amount and the employee's compensation. In the case of an employee age 50 or older, the specified dollar amount is increased by a certain amount (generally $6,000 for 2017), allowing the employee to make additional "catch-up" contributions for the year.	**Current Law** All employees can make age 50 catch-up contributions ($6,000 for 2017) to a 403(b), 401(k), and/or governmental 457(b) plan beginning with the year that they attain age 50. **CHANGE:** *Age 50 catch-up contributions to a 403(b), 401(k), and/or governmental 457(b) plan would be eliminated for employees who received more than $500,000 in wages the preceding year.*	• Defined Contribution 401(k), 403(b), and Governmental 457(b) Plans. • All Employers

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	Description of Proposal An employee may not make catch-up contributions for a year if the employee received wages of $500,000 or more for the preceding year. **The proposal is effective for taxable years beginning after Dec. 31, 2017.**		

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DEFERRED COMPENSATION			
<u>Section 3801</u> – **<u>Nonqualified deferred compensation (general)</u>** [Original proposed changes struck by Second Amendment. The original proposed changes would have included nonqualified deferred compensation in the employee's income for income tax purposes on the earlier of (i) actual or constructive receipt or (ii) when the employee's right to the compensation is not subject to a substantial risk of forfeiture.]	**<u>III.H – Nonqualified deferred compensation</u>** **<u>Present Law</u>** Under general income tax principles, nonqualified deferred compensation is not included in the employee's income for income tax purposes until actually or constructively received. Code Section 409A requires that substantial additional requirements be satisfied for income taxation on nonqualified deferred compensation to be deferred until actual or constructive receipt. If these requirements are not satisfied, nonqualified deferred compensation is includable on the earlier of (i) actual or constructive receipt or (ii) when the employee's right to the compensation is not subject to a substantial risk of forfeiture. Section 409A applies to the arrangements of taxable and tax-exempt employers, including state and local governments. Section 409A also imposes a 20% additional tax and interest payments on non-compliant arrangements.	**<u>Current Law</u>** See Senate Bill description. **CHANGE:** *The tax rules for most nonqualified deferred compensation plans of state and local governments would not change significantly, as those plans are already subject to Code Section 457(f). Certain concepts, such as "substantial risk of forfeiture," are somewhat different under than proposal that under current Section 457(f), so the final details of the change, if it is adopted, will be important.* *Unless QEBAs are grandfathered or carved out from the change, the proposal would render them ineffective as a deferred compensation tool.*	• All Nonqualified Deferred Compensation Arrangements, Including 457(f) Plans and Non-Governmental 457(b) Plans • 415(m) Plans • All Employers

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	The nonqualified deferred compensation plans of tax-exempt employers and state and local governments are also subject to Code Section 457(f), which generally provides that amounts deferred under such programs are taxable on the earlier of (i) actual or constructive receipt or (ii) when the employee's right to the compensation is not subject to a substantial risk of forfeiture. Thus, the rules of income tax exclusion for the nonqualified deferred compensation of employers subject to Code Section 457(f), including state and local governments, are not as favorable as those for taxable employers that comply with Code Section 409A. Under Code Section 415(m), a governmental employer may establish a qualified governmental excess benefit arrangement (or QEBA) to provide for benefits that cannot be provided under a related qualified retirement plan due to the limits of Code Section 415. Code Section 415(m)(2) provides that participants in a QEBA are taxed under the same rules that apply to the nonqualified deferred compensation plans of taxable employers. **Description of Proposal** Compensation deferred under a nonqualified deferred compensation plan would be includible in the gross income of the employee when the employee's rights to the compensation are not		

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	subject to a substantial risk of forfeiture. For this purpose, the employee's rights are treated as subject to a substantial risk of forfeiture only if they are conditioned on the future performance of substantial services. Under the proposal, a condition related to a purpose of the compensation other than the future performance of substantial services (such as a condition based on achieving a specified performance goal or a condition intended in whole or in part to defer taxation) does not create a substantial risk of forfeiture, regardless of whether the possibility of forfeiture is substantial. In addition, a covenant not to compete does not create a substantial risk of forfeiture. Thus, the definition of substantial risk of forfeiture under the proposal is more restrictive that the definition under Code Section 457(f). Deferrals under a QEBA would be included in the income of employee's for employment tax purposes on the earlier of (i) actual or constructive receipt or (ii) when the employee's rights are not subject to a substantial risk of forfeiture. **The proposal is effective for taxable years beginning after Dec. 31, 2017.**		

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INVESTMENTS			
Section 3314 – Re-characterization of certain gains in the case of partnership profits interests held in connection with performance of investment services [Amendment] The proposal would extend the holding period from one year to three years for gains on a carried interest in an investment or real estate business.	**Nothing comparable**		• All Employers

Last Updated November 13, 2017

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Section 5001 – **Clarification of unrelated business income tax treatment of entities treated as exempt from taxation under section 501(a)** **Present Law** Income derived from a trade or business regularly carried on by an organization exempt from tax under Code section 501(a) (including pension plans) that is not substantially related to the performance of the organization's tax-exempt functions is subject to the unrelated business income tax ("UBIT"). A college or university that is an agency or instrumentality of a state government (or political subdivision) generally is subject to UBIT on any unrelated business taxable income. It is unclear, however, whether certain state and local entities (such as public pension plans) that are exempt under Code section 115(l) as government-sponsored entities, as well as section 501(a), are subject to the UBIT rules. **Provision** All entities exempt from tax under section 501(a), notwithstanding the entity's exemption under any other provision of the Code, would be subject to the UBIT rules. **The provision would be effective for tax years beginning after 2017.**	**Nothing Comparable**	**Current Law** Many governmental plans have relied upon statements by the Internal Revenue Service (IRS) that indicated that the IRS would not challenge the position that governmental plans were not subject to the UBIT rules. **CHANGE:** *Subjecting governmental plans to the UBIT could result in state departments of revenue requiring filing returns and paying state tax on UBIT. Given the number of jurisdictions where funds have activity, this will create significant compliance burdens.*	• Tax-Exempt Employers

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