#### American Benefits Council:

### **Executive Compensation Briefing**

Webinar #3: NQ Plans and Corporate Considerations

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#### About our Panel

- Lynn Dudley, American Benefits Council
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- Michael Falk, Winston & Strawn
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# Nonqualified Plans Generally

- Who may participate? [not-broad-based]
- What laws primarily govern?
- Basic Types
  - Defined Benefit, e.g. SERP
  - Defined Contribution, e.g. DCP
  - Purposes: Excess Voluntary Employer

# General Tax Principles

- Constructive Receipt Doctrine
- **■** Economic Benefit Doctrine

# Constructive Receipt Doctrine

- Longstanding, fundamental principle of tax law
- Continues to apply post 409A
- Regulations under Code section 451
  - Income in the year actually or constructively received
  - Taxation when right to immediate payment or current right to control without substantial limitations

# Constructive Receipt Doctrine

- Revenue Ruling 60-31
  - Seminal IRS interpretation of constructive receipt principles
  - "Mere promise to pay" that is not secured is not income
  - But taxpayer may not deliberately turn back on income

#### Economic Benefit Doctrine

- Employee taxed on certain rights when receiving the economic benefits of those rights
- <u>Sproull</u> Amounts included in executive's income when assets irrevocably placed in trust for executive's benefit
- Rev. Rul. 60-31 example football player contract
- Minor Contribution to deferred compensation plan taxable where fully vested / nonforfeitable and secured against employer's creditors
- Rabbi Trusts
- Section 83

#### 409A Overview

- Enron and Legislative Reaction
- Scope and Exemptions
- Election requirements
- Distribution restrictions PDEs
- Acceleration/delay prohibition
- Non-compliance penalties

# Nonqualified Plan Accounting

- Basic Principles
  - Defined Benefit Plans
  - Defined Contribution Plans
- Modifications and Benefit Changes
- Controlling or Minimizing Expense

## NQ Plan Design Considerations

- Participation
- Voluntary Deferrals
- Employer Contributions Vesting
- Distributions
- 409A's Impact and Planning for It

### Top Hat Plan Rules

- Origin in ERISA
  - Implications of Failed Top Hat Exemption
- Dept. of Labor Policy and Advisory Opinions
- Coverage parameters drawn from litigation

# Washington and Global Updates

- U.S. Legislative Proposals
  - Camp tax reform draft proposals
  - 162(m) expansion and 409B
  - Potential revenue raisers?
- Global Developments

### C-Suite Exec. Comp. Issues

- Shareholder Relations
  - Say on Pay Say on Parachute
  - ISS, and Equity Plans
- Shareholder Litigation
  - Stock Plan Proposals
  - 162(m) Compliance
- Accounting Considerations

### Conclusion

Final Remarks

Q&A

Follow-up Ideas?