Executive Compensation:

Are your nonqualified deferred compensation plans up-to-date and being administered properly?

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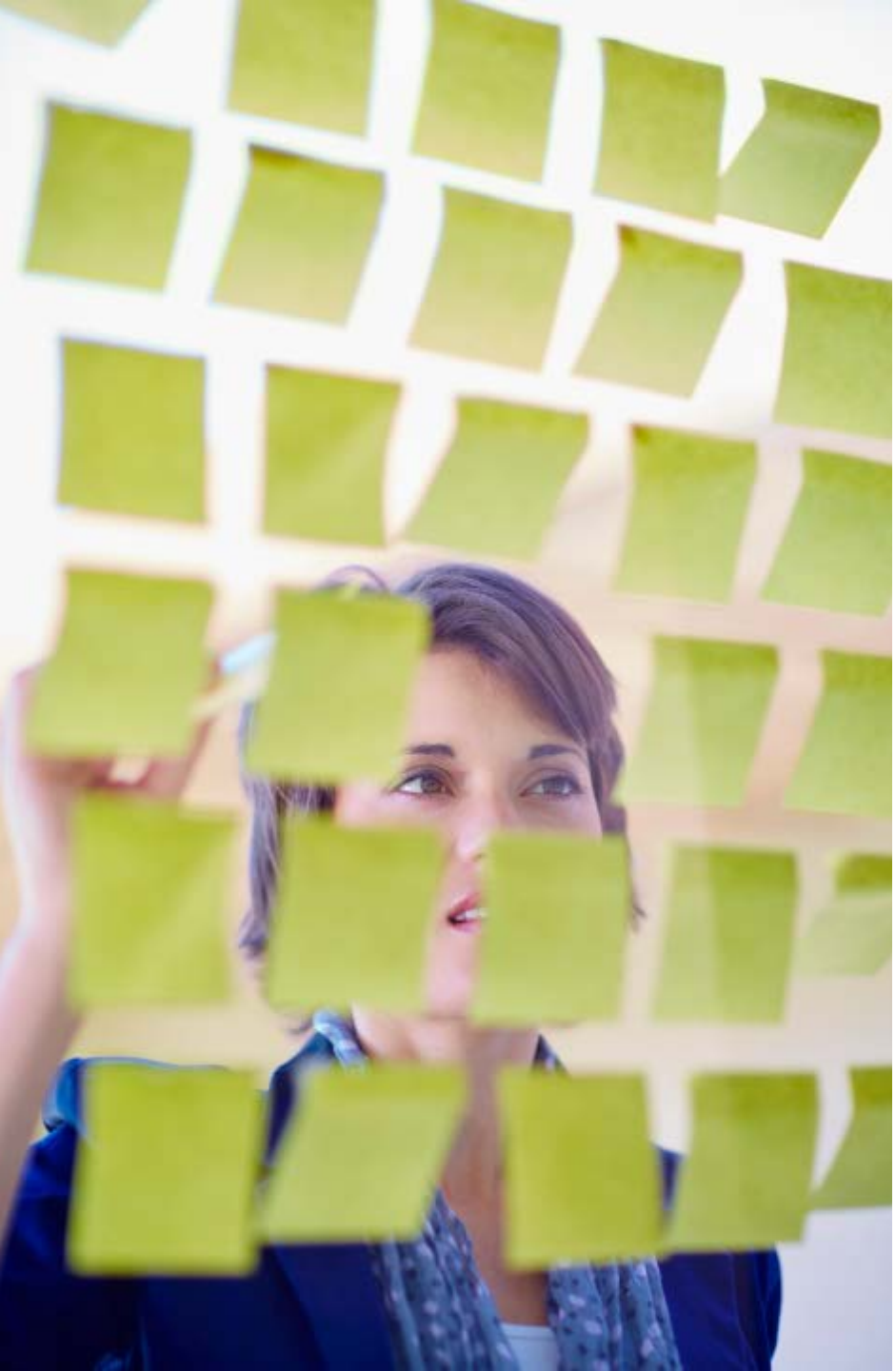
Reviewed: JANUARY 7, 2017

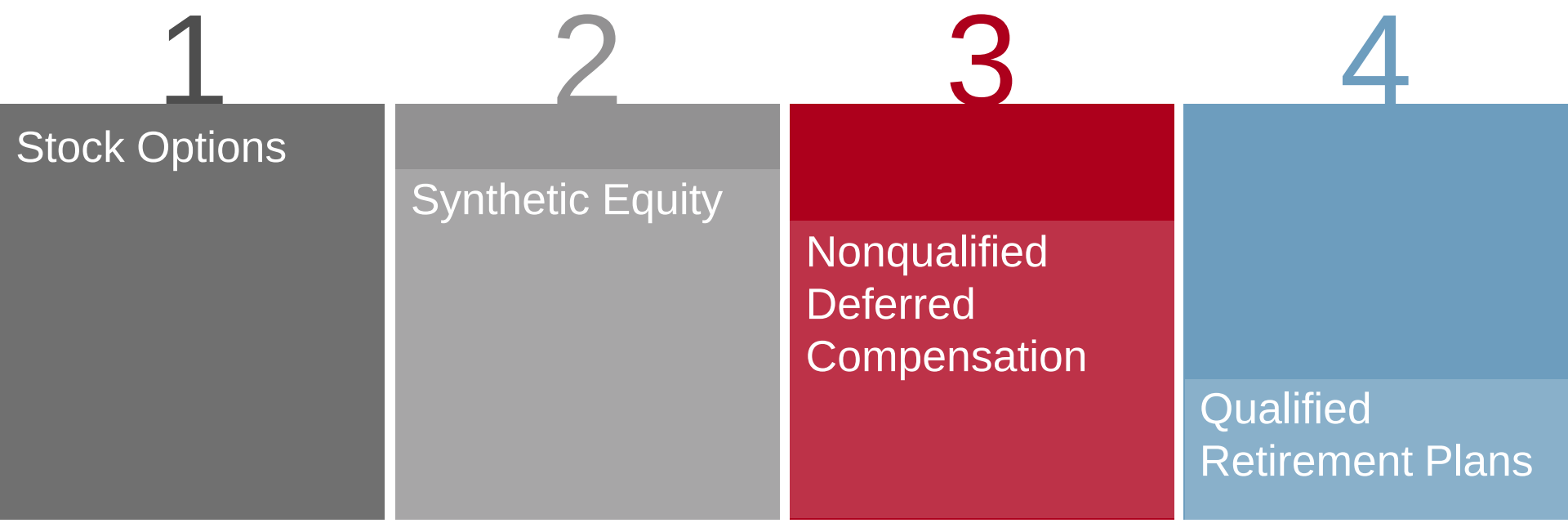


BY THE END OF THE PRESENTATION, YOU WILL HAVE AN UNDERSTANDING OF HOW TO:

- Identify,
- Administer, and
- Correct

Nonqualified deferred compensation plans AND, determine if any plans need to be updated.

Types of Executive Compensation



Nonqualified Deferred Compensation (NQDC) Plans:

AT ITS MOST BASIC:
NQDC results from the making of an enforceable promise to pay in a later tax year, compensation that is earned in the current tax year.

Characteristics of NQDC plans:

- Cover a select group of management or highly compensated employees
- Employer or employee contributions
- Employer flexibility
- Employers generally use a Rabbi Trust
- Allows participant investment direction
- Generally subject to IRC §409A

NQDC and Employment Agreements:

OFTENTIMES, NQDC IS HIDING IN AN EXECUTIVE'S EMPLOYMENT AGREEMENT

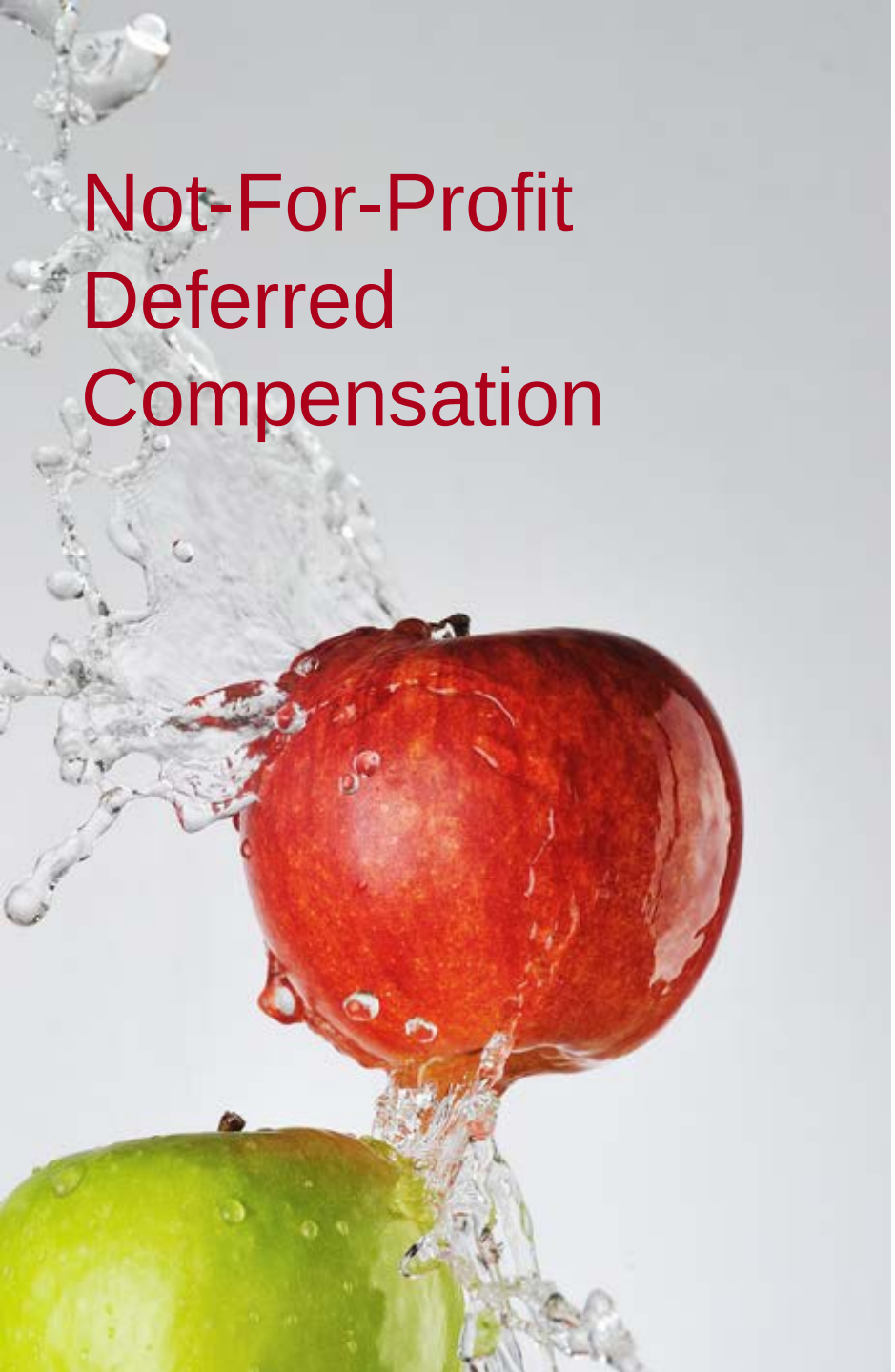
- Bonus clauses (straight bonuses & incentive bonuses)
- Post-termination salary continuation benefits
- Vesting in a not-for-profit situation
- Poorly worded (non-compliant with Sec. 409A)

Identify NQDC within an employment agreement:

- Not-for-profit organization
- Severance pay upon voluntary or involuntary separation
- Accrue additional month of benefit per year of service

DEFERRED COMPENSATION?

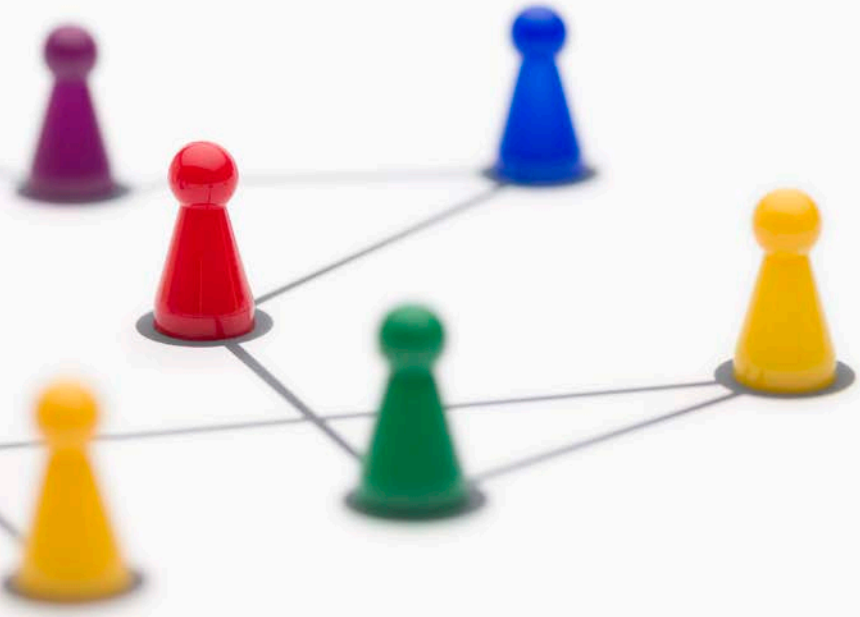
- Yes?
- No?



Not-For-Profit Deferred Compensation

Two Types of Plans:

- Eligible 457(b) plans
- Ineligible 457(f) plans



Common NQDC - SERPs:

- Generally defined benefit plan type benefits (moving towards defined contribution)
- Can be integrated with other retirement benefits provided to executive
- Generally for executives and not directors
- What is the average replacement ratio?

Common NQDC - Synthetic Equity

Nonqualified deferred compensation plans that provide benefits to employees based on hypothetical shares of company stock

STOCK APPRECIATION RIGHTS (SARS)

- Measured by increase in stock price from Grant Date
- Employees receive cash
- Vesting can apply

PHANTOM STOCK

- Measured by stock price at payment date
- Employees receive cash
- Vesting can apply

Taxation of NQDC:

FOR-PROFIT DEFERRED COMPENSATION

Deferred amounts are taxable upon the earlier of payment or funding

TAX-EXEMPT DEFERRED COMPENSATION

Deferred amounts are taxable when there is no longer a substantial risk of forfeiture (SRF)

Except for eligible 457(b) plans!

Plus, Taxability and Deductibility coincide!

Taxation of NQDC:

FICA TAX

- FICA imposed when substantial risk of forfeiture lapses (why is this helpful?)
- Be careful of plans established within 12 months of termination/retirement

Administering NQDC:

New deferred compensation plan for select group of management. Different vesting schedules for each participant with employer contributions funded annually.

HOW TO DETERMINE THE FOLLOWING:

- FICA/Medicare tax withholding each year?
- Investment earnings impact on withholding?
- What if the employer is a not-for-profit organization?

Administering NQDC:

- Not-for-profit organization
- Retention plan based on 457(b) plan structure
- Annual employer contributions subject to a 10-year vesting schedule
- Permits employee deferrals

ISSUES:

- Vesting impact on annual 457(b) plan contribution limits?
- Vesting impact on FICA/Medicare tax withholding?

May non-compliant NQDC be corrected?

YES – IRS limited operational and document error self-correction program

Generally, participation in the operational self-correction program is desirable because:

- It largely avoids the dreaded "bucket" rule
- Always avoids the additional interest tax
- In some cases avoids the 20% tax

Early detection & correction is the key!!

Operational error self-correction

Generally, allows correction for 4 types of failure:

1. Failures to defer (missed deferral or early payment)
2. Early payment(s) of certain types
3. Excess deferrals (deferral of too much)
4. Below market value stock rights

Sec. 409A Operational Errors Self-Correction

Generally as follows:

Same year correction	Following year correction (n/a for Insiders)	Two-year correction	Limited amount correction (2 years)
NO 20% TAX	NO 20% TAX	20% TAX APPLIES	20% TAX APPLIES

Employer & Employee (except for same year corrections) must file statements with their tax returns.

The only true “freebie” is a same year correction!

Sec. 409A Document Error Self-Correction

LIMITED COST CORRECTIONS: Available on an ongoing basis for certain document failures. Often result in the EE having to recognize 50% of the amount in question as current income. Also require reporting on ER and EE tax returns.

Correcting NQDC:

Distribution paid prior to (or after) specified date.

ISSUE FOR:

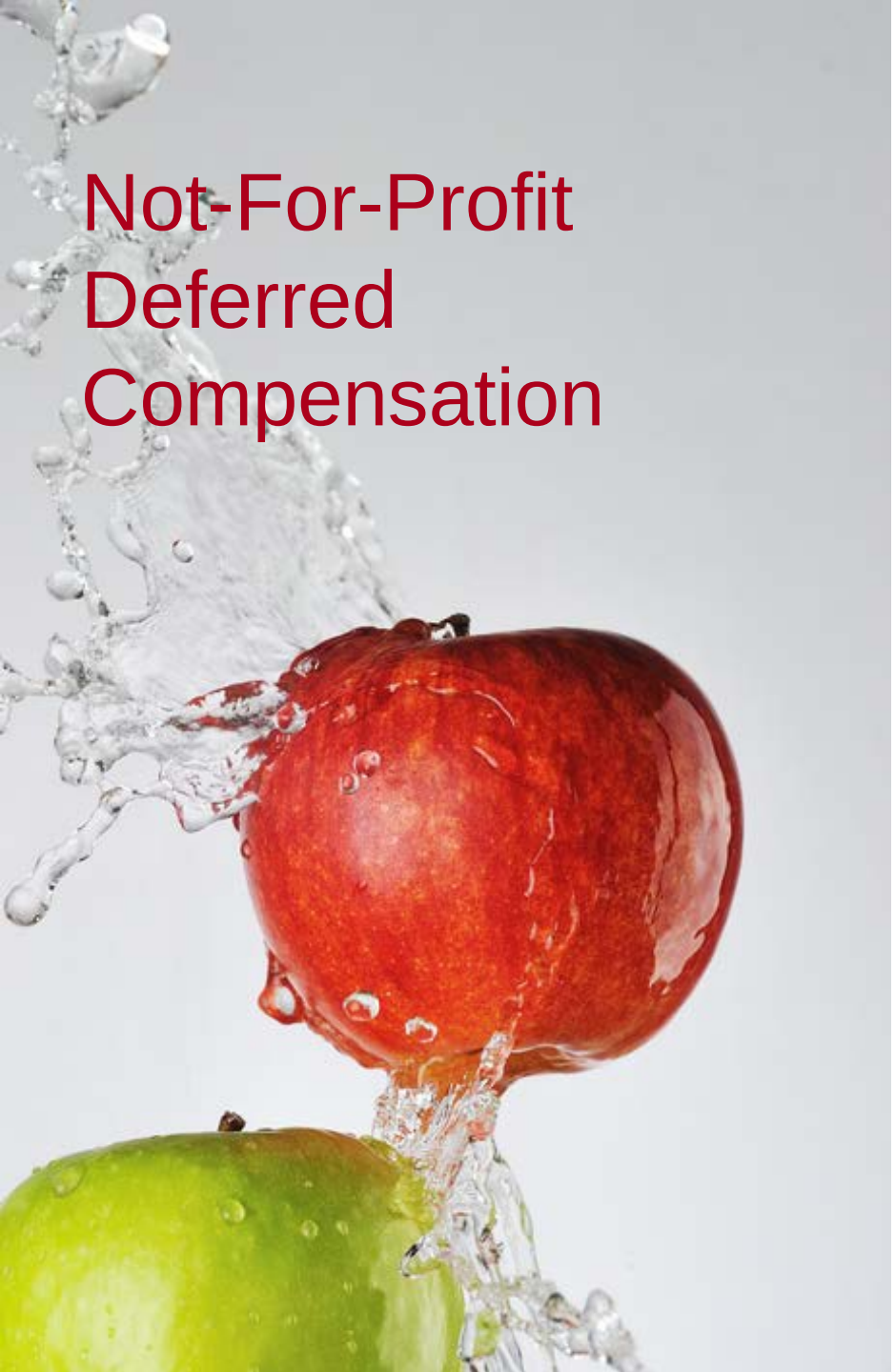
- 409A?
- 457(f)?
- 457(b)?

Correcting NQDC:

- For-profit employer
- Plan for select group of management
- Employee salary deferral elections made online and not communicated to payroll

ISSUES:

- Missed deferrals?
- More than 1 year old?
- Correction possible?



Not-For-Profit Deferred Compensation

New Guidance for Ineligible 457(f) plans

2016 Proposed Regulations – 457(f)

What is considered a substantial risk of forfeiture?

1. Non-compete agreements
2. Rolling risks of forfeiture
3. Apply to elective deferrals?

2016 Proposed Regulations – 457(f)

What is not considered an ineligible 457(f) plan?

1. Short-term deferrals
2. Bona fide severance pay plans
3. Bona fide Sick Leave or Vacation Plans
4. Certain other exclusions

Does your plan need updating:

- NQDC contained within employment agreements?
- Existing 457(f) plans?

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