THE NONQUALIFIED ADVISOR
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FIN 48: Administrative Overview

This year privately held companies will join their public counterparts in complying with FIN 48, *Accounting for Uncertain Tax Positions*. FIN 48 prescribes how a company should recognize, measure, present and disclose uncertain tax positions that the company has taken or expects to take in its income tax returns.

The purpose of FIN 48 is mainly to disclose tax positions that may not be sustained under audit; however, it is important to note that FIN 48 extends beyond the disclosure of controversial tax items. It provides for a review of all income tax positions including depreciation, deferred tax assets/liabilities, and future payments or income streams that could potentially become taxable. While the tax positions related to BOLI/COLI and nonqualified benefits are fairly certain and the 101(j) requirements for tax-free death proceeds are rather simple procedures, employers may still be required to document their respective tax positions in their FIN 48 analysis.

The following is brief overview of FIN 48 and its key requirements as they relate to BOLI/COLI and nonqualified benefits:

Who Does FIN 48 Apply To?

1) FIN 48 applies to all entities that prepare financial statements under GAAP; and

2) All income tax positions in "open" tax years that are subject to audit.

What Does FIN 48 Require?

1) FIN 48 requires an analysis of tax positions and prescribes separate reporting of:

   (a) the deferred tax balance, based on the sustainable book/tax difference according to FIN 48's recognition and measurement model; and

   (b) a FIN 48 liability for any "unrecognized" benefit.

   For purposes of recognition and measurement, a liability is only recognized for income tax positions that fail to meet the "more-likely-than-not" or 50% threshold. Since the tax treatment of BOLI/COLI and nonqualified deferred compensation is fairly well established, there shouldn't be any recognition or measurement of a liability. However, BOLI/COLI and nonqualified benefits, like all tax-deferred or tax-preferred items, have some level of uncertainty associated with them and should be cited in the FIN 48 tax analysis with a brief description of the applicable law.

2) For public companies, FIN 48 liabilities are reported in the MD&A tabular disclosure of contractual obligations when they can be reasonably estimated. In general, there shouldn't be any FIN 48 disclosures related to BOLI/COLI or nonqualified benefits.

3) Income tax positions should be evaluated annually for any change in position based on new case law, revenue notices and other interpretations.

A good BOLI/COLI vendor should be able to help you with statutory documentation and help you establish and maintain BOLI/COLI program so that no liability is ever recognized.