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EXEMPT ORGANIZATION NEWS: PRIVATE FOUNDATION DISCLOSURE RULES ISSUED

FINAL TREASURY REGULATIONS RELATING TO PUBLIC DISCLOSURE REQUIREMENTS APPLICABLE TO PRIVATE FOUNDATIONS UNDER SECTION 6104 OF THE INTERNAL REVENUE CODE WERE RELEASED ON JANUARY 13, 2000. THE REGULATIONS DEPART SIGNIFICANTLY FROM PRIOR DISCLOSURE RULES IN THAT PRIVATE FOUNDATIONS WILL SOON BE REQUIRED TO MAKE AVAILABLE PHOTOCOPIES OF THEIR ANNUAL INFORMATION RETURNS AND APPLICATIONS FOR EXEMPTION TO ANY PERSON MAKING A REQUEST FOR SUCH INFORMATION. *THE REGULATIONS WILL APPLY TO REQUESTS MADE ON OR AFTER MARCH 13, 2000.* THIS MEMORANDUM SUMMARIZES THE REGULATIONS.

PUBLIC DISCLOSURE REQUIREMENTS

Public Inspection

Under the regulations, a private foundation will be required to make its application for exemption and its three most recent annual information returns available for public inspection during regular business hours at its principal, regional, and district offices. The organization may have an employee present during an inspection. The individual making the inspection must be allowed to freely take notes and to make copies free of charge if the individual provides his or her own photocopying equipment.

A regional or district office is an office, other than a principal office, that has employees who regularly work, in the aggregate, 120 paid hours or more per week. An office will not be considered as a regional or district office, however, if the services performed at the site only further exempt purposes (such as day care, health care or scientific or medical research), and the office does not serve as an office for management staff, other than managers who are involved solely with managing the site's exempt activities.

1. Application for Exemption. With respect to its application for exemption, a private foundation must generally make avail-

able the application form (IRS Form 1023), all documents required to be filed with the application, all documents submitted in support of the application, and any documents issued by the IRS concerning the application. *Organizations that applied for tax exemption before July 15, 1987, are exempt from this rule unless the organization possessed a copy of the application on that date.*

2. Annual Information Returns. With respect to its three most recent annual information returns, a private foundation must make available all information furnished to the IRS on Forms 990-PF, 4720, and 1065 (in both their original and amended versions), as well as all schedules, attachments, and supporting documents. This information includes compensation schedules and names and addresses of contributors. However, it does not include Form 990-T (Exempt Organization Business Income Tax Return) or Schedule K-1 of Form 1065. Note that the annual return disclosure requirement applies only to a return the due date (without regard to an extension of time for filing) which is on or after March 13, 2000. Thus, for example, a private foundation would not have to make its 1998 information return available under this rule.

Requests for Copies

Under the regulations, a private foundation must also provide photocopies of its disclosable annual information returns and application for exemption (or any requests for any specific part or schedule of its application or annual return) to any person making a request. Requests for copies of an application for exemption and annual returns must be satisfied without charging a fee other than for reasonable copying and actual mailing costs. A fee is reasonable if it is no more than the per page copying charge stated in Treasury regulation § 601.702(f)(5)(iv)(B), which is currently \$1.00 for the first page and \$.15 for each subsequent page. A private foundation may require prepayment before honoring copy requests. If it does not require prepayment, it must obtain consent from the requester before providing copies for which the fee charged will exceed \$20.

For requests made in person, copies must be provided on the same day unless unusual circumstances exist such that immediately fulfilling the request would place an unreasonable burden on the private foundation. Unusual circumstances include, for example, the receipt of a volume of requests that exceeds the organization's daily capacity to produce copies and requests received shortly before the end of the regular business day that require an extensive amount of copying. In such cases, the copies must be provided on the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the request, whichever occurs first. For requests made in person, a private foundation is not required to accept personal checks or credit cards but must accept cash and money orders.

If the request is made in writing, which includes by fax or electronic mail, copies must be provided within 30 days of the request. A copy may be provided exclusively by electronic mail if the requesting individual consents. For requests made in writing, a private foundation must accept certified checks, money orders, and either personal checks or credit cards as the form of payment for copying fees.

Failure to Comply

The penalty for failure to comply with the public disclosure rules relating to an organization's annual information return is \$20 per day for each day during which the failure occurs, up to a maximum of \$10,000 per return. The penalty for failure to comply with the public disclosure rules relating to an organization's application for exemption is \$20 per day for each day during which the failure occurs, with no maximum. No penalty is imposed if the failure is due to reasonable cause. If there is a willful failure to comply with the public disclosure rules, there is an additional penalty equal to \$5,000 for each document involved.

EXCEPTIONS TO THE PUBLIC DISCLOSURE RULES

The Internet Exception. A private foundation does not need to comply with requests for copies if the organization makes the requested information "widely available." *The organization must nevertheless still comply with the public inspection requirements.* A document will be deemed "widely available" if:

(1) the document is posted on a World WideWeb page established by the private foundation (or another entity as part of a database of similar documents of other tax-exempt organizations);

(2) the document is posted in a format that, when downloaded, viewed and printed in hard copy, exactly reproduces the image of the document as originally filed with the IRS (except for information exempt from public disclosure); and

(3) any individual can access, download, view and print the document without payment of a fee and without any special computer hardware or software (other than software readily available to the public for free).

Harassment Campaign Exception. If the IRS determines that the requests are part of a "harassment campaign" and that compliance with the requests are not in the public interest, a private foundation does not need to comply with requests for copies that it reasonably believes are subject of a harassment campaign by submitting a signed application to the district director for the key district where the organization's principal office is located.

THIS LETTER IS FOR GENERAL INFORMATIONAL PURPOSES ONLY AND DOES NOT REPRESENT OUR LEGAL ADVICE AS TO ANY PARTICULAR SET OF FACTS, NOR DOES THIS LETTER REPRESENT ANY UNDERTAKING TO KEEP RECIPIENTS ADVISED AS TO ALL RELEVANT LEGAL DEVELOPMENTS. FOR FURTHER INFORMATION, PLEASE CONTACT ONE OF THE LAWYERS LISTED BELOW. ALSO AVAILABLE AT WWW.WILMER.COM.

EXEMPT ORGANIZATION TAX PRACTICE

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