

ABOUT OUR NONPROFIT PRACTICE GROUP

Our attorneys provide legal services to trade associations, professional societies, public charities, private foundations, fraternal organizations, group insurance trusts, political action committees, schools, hospitals, medical staffs, “captive” insurance companies, and other organizations exempt from federal income tax under Section 501(c) of the Internal Revenue Code. Arnstein & Lehr’s attorneys help such clients deal with a wide array of issues, including:

- Corporate and trust formation and maintenance;
- Development of bylaws;
- Obtaining and maintaining federal and state tax exemptions;
- Avoiding and minimizing unrelated business income taxes;
- Registrations and annual filings with attorneys general and other government officials;
- Proper conduct of organization elections;
- Avoiding antitrust problems;
- Fundraising campaigns, including use of professional fundraisers;
- Self-dealing, inurement and intermediate sanctions;
- Relations with subsidiary groups, including group tax exemptions;
- Protection of intellectual property;
- Charitable gaming;
- Limitations on political and legislative activity;
- Professional ethics matters;
- Public and member disclosure requirements;
- Deductions for donors;
- Nonprofit mailing permits;
- Partnerships and joint ventures with for-profit organizations;
- Employment issues; and
- Insurance issues.

If you would like further information about any of the topics mentioned in this publication, please contact James F. Gossett at 312.876.7833 or jfgossett@arnstein.com.

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Internal Revenue Service Launches Electronic Filing of Annual Returns for Small Nonprofits

The Internal Revenue Service has announced the opening of an electronic system small tax-exempt organizations can employ to file annual returns using Form 990-N. Filing of such returns is required by the federal Pension Protection Act of 2006 for organizations normally having annual gross receipts of \$25,000 or less, effective for tax years beginning in 2007.

Electronic filing of the Form 990-N is now required. Information requested in the form includes only the organization’s employer identification number, its tax year, the legal name and mailing address of the organization, any other names used, an Internet address if one exists, the name and address of a principal officer, and a statement confirming that the organization’s gross receipts are normally \$25,000 or less.

The due date for filing Form 990-N is the fifteenth day of the fifth month after the close of the tax year. Organizations not filing a Form 990-N required by law for three consecutive years will be penalized by loss of tax-exempt status.

Information about the new Form 990-N filing requirements is available on the IRS website at www.irs.gov. Members of the public can also view organization Form 990-N filings on a disclosure section of that site.

FEC Rule Permits Nonprofits Greater Latitude in Advertising During Elections

The Federal Election Commission, in a rule announced November 20, 2007, has allowed nonprofits to run issue ads during election periods, even if they mention specific candidates, provided funding sources are disclosed. The rule implemented a June 25, 2007, decision by the Supreme Court of the United States in *Federal Election Commission v. Wisconsin Right to Life*, which overturned a previous FEC ban on issue advertising during elections as an unconstitutional restriction on free speech.

The new FEC rule does not affect Internal Revenue Service regulation of tax-exempt organizations. Tax laws prohibit political activity by many tax-exempt organizations, including educational, charitable and religious organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and the IRS follows a “facts and circumstances” approach in determining what is prohibited political activity.

IRS Begins Investigation of United Church of Christ for Possible Political Activity in Facilitating 2007 Speech by Obama

The Internal Revenue Service recently sent a letter to the United Church of Christ in Cleveland, Ohio, advising that the IRS is beginning a church tax inquiry to resolve questions arising from a 2007 speech by Presidential Candidate and Senator Barack Obama. Obama addressed nearly 10,000 members of the church at its biennial General Synod on June 23, 2007, and Obama volunteers were reportedly staffing campaign tables outside the meeting facility to promote his campaign.

In its notification to the church, the IRS said that it had a reasonable belief the church was

engaged in political activities that could jeopardize its tax-exempt status. The Service also sent the church a list of questions about its operations/activities, which the organization was requested to answer in order to resolve the Service's concerns about its exempt activity and tax liability.

[Court Will Not Overturn Denial of Section 501\(c\)\(4\) Exemption for Organization Defraying and Assuming Costs of Professional Vision Care for Subscribers and Beneficiaries](#)

The U.S. Court of Appeals for the Ninth Circuit has affirmed a lower court decision approving an Internal Revenue Service ruling that denied an exemption from federal income tax under Section 501(c)(4) of the Internal Revenue Code for an organization created to defray and assume the costs of professional vision care for subscribers and beneficiaries. The IRS had initially granted recognition of tax-exempt status to the organization, finding that it promoted social welfare. But the Service later reversed itself and revoked the exempt status of this entity, prompting the organization to file suit, seeking a judicial determination that it was exempt, a refund of income tax paid, and an order that the Service should issue a private letter ruling recognizing the organization's exempt status.

The Ninth Circuit affirmed a federal district court decision to grant summary judgment for the IRS, finding that, while the organization in question offered some public benefits, they were not enough to support a conclusion that it was primarily engaged in promoting the common good and general welfare of the community, which would have been required for a Section 501(c)(4) exemption. In that connection, the court noted that the organization's own articles of incorporation stated that its primary purpose was to establish a fund from payments by subscribers to defray and assume the costs of vision care for those subscribers' employees and other beneficiaries, which meant that the organization benefited subscribers, rather than the general welfare.

[Nonprofit's Tax Exemption Revoked for Making Political Campaign Donations Through Intermediaries](#)

The Internal Revenue Service has revoked the federal income tax exemption of an ostensibly charitable organization because its president diverted funds from the nonprofit to make prohibited political contributions through intermediaries. The organization had previously been granted IRS recognition of its exempt status under Internal Revenue Code Section 501(c)(3) because of its stated charitable and public purposes, namely, providing bilingual education services, services to senior citizens, and youth education services.

In this case, the IRS was following up on newspaper reports that the president had diverted funds a state department of parks and recreation had granted to the nonprofit for the construction of a community center, instead using the money to reimburse individuals for campaign contributions made to one of the president's political allies. The IRS investigated and found that the newspaper allegations were well founded, concluding that the intermediary contributors had

submitted false invoices for construction work on the community center, which, in fact, had not been performed, and that the president had then used the invoices to secure state funding that was used for the indirect political contributions.

Because of its own investigation into the nonprofit's activities, the IRS demanded that the nonprofit establish that it was operated exclusively for an exempt purpose under the requirements of Section 501(c)(3), requesting specific records as to the nonprofit's activities. The nonprofit failed to provide the requested records, advising the IRS that they had been turned over to the state attorney general's office, which had launched its own investigation of the nonprofit. Consequently, the IRS revoked the organization's exempt status not only because of the allegations against it, but also because of its failure to keep books and records available for inspection by the IRS at all times.

[Activities of Wholly-Owned LLC Operating as Insurance Agency Attributed to Social Welfare Organization, Producing Unrelated Business Taxable Income but Not Adversely Affecting Nonprofit's Tax Exemption](#)

A nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code Section 501(c)(4) has obtained a ruling from the Internal Revenue Service that its tax exemption will not be adversely affected by the activities of its wholly-owned limited liability company operating as a licensed insurance agency. However, the IRS advised that the income of the LLC would be treated as unrelated business taxable income for the nonprofit.

The members of the social welfare organization were municipal corporations in a certain state. The nonprofit formed the limited liability company to operate as an insurance agency selling supplemental life, accident, dental and health insurance policies, underwritten by various unrelated insurance companies, to employees of municipalities in that state.

Viewing the activities of the LLC as important to its members, the social welfare organization was performing administrative services for the LLC that included providing a support staff, claims management monitoring, financial information and management information services. In return, the social welfare organization received a fee from the limited liability company for its administrative services, which represented one percent to two percent of the nonprofit's total revenues.

Considering the nonprofit's request for various rulings regarding its relationship with the LLC, the Internal Revenue Service noted that the activities of the insurance agency would be attributed to the nonprofit because it was a wholly-owned LLC that would be treated as a disregarded entity under federal income tax law. The activities of the agency were found to be not substantially related to the nonprofit's social welfare purposes and would be treated as an unrelated trade or business. But, because the agency's activities were an insubstantial part of the nonprofit's total activities, the IRS found that the activities of the agency did not adversely affect the nonprofit's tax exemption.

Organization Offering Work Opportunities to Disadvantaged Individuals and Providing Minimal Training Does Not Qualify for Tax Exemption

The Internal Revenue Service has refused a federal income tax exemption under Internal Revenue Code Section 501(c)(3) for an organization created to offer services to disadvantaged individuals in a certain metropolitan area, primarily through work opportunities and providing minimal training for manual work. As the IRS explained, the purposes of the organization were not inherently charitable, and the entity's organizational documents did not expressly limit its activities to those furthering only charitable purposes.

Currently and in the future, the organization's activities appeared to consist of three types: assembling gift baskets using products purchased from other exempt organizations; organizing group tours or pilgrimages to various foreign countries; and providing various "back office" clerical functions. The organization's workers were part-time and/or temporary and included persons who were low-income, handicapped, elderly and developmentally disabled.

The organization trained its workers in such skills as stuffing and assembling envelopes for mailings. But the IRS concluded that, as such training and education activities were minimal, it was apparent that the organization's primary activity was the operation of certain businesses for commercial purposes, using the labor of the "disadvantaged individuals" supposedly benefited by it, rather than providing meaningful training or educational services to a class of persons in need of such services.

Court Upholds Denial of Illinois Sales Tax Exemption for Nonprofit Public Facilities Corporation

The Illinois Appellate Court, Second District, has upheld a decision by the state Department of Revenue to deny a sales tax exemption for purchases by Lombard Public Facilities Corporation, a nonprofit organization formed to assist the municipality of Lombard, Illinois, in the financing and construction of a convention hall and hotel facility. The Appellate Court held that Illinois law clearly exempted from sales tax all purchases made by governmental bodies. But the court held that the exemption did not extend to purchases by the agents or instrumentalities of a governmental body.

The Lombard Public Facilities Corporation had been granted the authority to issue, sell and deliver bonds, encumber real property or equipment, and enter into contracts for the sale of bonds and the construction and acquisition of the convention hall and hotel facility. The title to the facility was to be transferred to the municipality of Lombard upon redemption of bonds issued for that project.

Arguing for a sales tax exemption, the corporation contended that the municipality was the ultimate beneficiary of tax revenues and employment opportunities created by the corporation's activities. Additionally, the corporation contended that the municipality's power to appoint directors of the corporation constituted equitable owner-

ship of its property, justifying an exemption for the corporation as an agent of the municipality.

The Appellate Court disagreed, saying that an entity seeking a sales tax exemption must be examined separately from any organization it benefits. The court said that an exemption must apply to the actual purchaser, which, in this case, was the corporation, and not future beneficiaries of purchases. Furthermore, the court pointed out that the municipality was not dependent on the corporation for continuation of its governmental activities, and the corporation was not dependent on the municipality for continuation of its day-to-day project management functions, which indicated that an exemption could not be based on any effect taxing the corporation would have on the municipality.

Nonprofit's Operation of Health Insurance Plan for Federal Agency's Trainees Will Not Jeopardize Federal Income Tax Exemption

A charitable entity administering a health insurance plan for trainees of a federal agency will not thereby jeopardize its federal income tax exemption under Internal Revenue Code Section 501(c)(3), according to a private letter ruling by the Internal Revenue Service. The organization had a close working relationship with the agency and had administered group health insurance plans in order to assist the agency in its research programs for many years.

The program in question was to provide health insurance for recent pre-doctoral and doctoral degree recipients who had been given an opportunity to pursue research at the agency's facilities. The agency had a written policy to pay for health insurance to cover the trainees and their dependents, many of whom were not eligible for the health insurance benefits provided to employees by the federal government.

The IRS analyzed the health insurance plan in question and concluded that it lessened burdens of government, so that it would qualify as a Section 501(c)(3) charitable activity. In so concluding, the IRS noted that the agency clearly considered the charitable entity's activities to be its own burden, having established a policy of paying for the health insurance benefits and having paid the charitable entity an administrative fee for the health insurance plan at issue. The IRS found that administration of the plan was necessary to the agency's performance of its governmental responsibilities, because it facilitated the agency's attracting and supporting research personnel, and the charitable entity's activities even saved the agency money, ensuring maximum efficiency and reducing administrative burdens.

For all of the above reasons, IRS ruled that the charitable entity's operation of the health insurance plan for trainees and their dependents would not jeopardize its tax-exempt status under Section 501(c)(3). Furthermore, the IRS found that income derived by that entity from providing administrative services for the health insurance plan would not be unrelated business taxable income, since administration of the plan was substantially related to the organization's tax-exempt purpose of promoting and supporting the agency's research program.

Court Finds Bluetooth Association Not Tax-Exempt

The U.S. District Court for the Western District of Washington has held that an association promoting Bluetooth technology is not exempt from taxation under Internal Revenue Code Section 501(c)(6) as a business league. The organization develops specifications for and promotes Bluetooth technology, supporting short-range wireless connections between electronic devices. Companies pay fees to the corporation to use the Bluetooth trademark on their products.

Bluetooth SIG Inc. had been seeking a federal income tax exemption under Section 501(c)(6) since 2002, but the IRS issued a final adverse ruling in February, 2004, after which the corporation filed income tax returns for 2000 through 2002 and paid nearly \$1 million in taxes. Then, the corporation filed suit for a refund as well as a judicial declaration that it was exempt from tax.

Ruling on motions for summary judgment filed by both the corporation and the United States, the federal district court held that the corporation's activities, and particularly its development and marketing of the Bluetooth technology brand, were of a kind ordinarily carried on for profit, though the mere fact that it conducted testing and promotional activities did not automatically disqualify it from an exemption. As support for its conclusion that the corporation's activities did not entitle it to a Section 501(c)(6) exemption, the court said those activities adhered to the exclusive benefit of its members, as the use of the Bluetooth trademark was absolutely limited to members paying an appropriate listing fee, all of the corporation's activities being conducted through its Bluetooth technology and trademark.

Homeowner's Association Loses Section 501(c)(4) Tax-Exempt Status for Providing Benefits Solely to Members

The Internal Revenue Service has revoked a tax exemption under Section 501(c)(4) of the Internal Revenue Code for a homeowner's association that was found not to be promoting social welfare, but providing benefits solely to members. The organization was formed to promote and develop the common good of the residents within a particular community and good fellowship, neighborliness, and civic responsibility among its members.

Explaining its decision to revoke the organization's exemption, the IRS noted that the association provided its members with a crime watch patrol and had an agreement with a neighboring homeowner's association for a similar patrol. For this service, the association charged dues, giving members access to a voicemail system, extra attention to their homes while they were away and other security services. In addition, the organization provided its members with an annual directory, monthly newsletters, meetings and a chance to participate in certain other neighborhood activities.

The problem with the organization's exemption, according to the IRS, was that the association limited its services to certain property owners and it was operated to serve the members' individual interests, rather than the community as a whole. Services provided by the organization were similar to those offered by for-profit entities, and the organization did not provide other services, commonly provided

by exempt homeowner's associations, such as ownership and maintenance of common areas open to the public, which would bring about civic betterment and social improvements.

Child-Care Center and Preschool Owned by Religious Institution Denied Religious and Educational Use Property Tax Exemptions

The Appellate Court of Illinois, Fourth District, has upheld a decision by the Illinois Department of Revenue to deny an exemption from property taxes for Heartland Childcare Center and Heartland Preschool, finding that the facility did not qualify for a religious use or educational use exemption. The property was owned and operated by Faith Builders Church, Inc., a religious institution, but was found to be used primarily to provide day care, rather than religious instruction as the church contended.

The church's representatives testified that it was the purpose of the facility to provide religious instruction even to six-week-old children. Asked to elaborate on the instruction provided at the facility, the representatives noted that "[s]imple Bible and children's stories, games, finger plays, music, songs, movements, and sounds will be incorporated into the daily routine."

The Appellate Court, however, noted that, according to a "Parent Handbook" published by the church, only one of eleven "activities and experiences" provided at the facility involved religious instruction, the others consisting of things like "learning to sit, crawl, roll, walk, and other movement activities" and "[a]ttending to the physical needs and hygiene of the children." Denying a religious use exemption, the Appellate Court commented that, "Infants, toddlers, and preschoolers have an extremely limited capacity for assimilating theological concepts. With children so young, the supervising adult's primary purpose, from 6 a.m. to 6 p.m., will inevitably be day care – and Faith Builders' descriptive literature reflects that reality."

The Appellate Court had even less difficulty denying the facility an exemption for educational use. To qualify for such an exemption, the Court noted, the facility would have to be a school offering an established, commonly accepted program of academic instruction. But the Appellate Court found that the record showed no evidence the Heartland Childcare Center and Heartland Preschool offered curricula consisting of traditional subject matter common to accepted schools and institutions of learning.

Operation of New Blood Banking Facility for Another Nonprofit Organization Will Not Adversely Affect Managing Entity's Tax Exemption

In response to a request for a private letter ruling, the Internal Revenue Service has held that a nonprofit exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, which was formed to establish and operate a blood banking facility in a certain location, could contract to provide management services for a new blood banking facility in a different location without realizing adverse tax consequences. The new facility was owned by a different nonprofit organization, which had been recognized by the Internal

Revenue Service as exempt from federal income tax under Code Section 501(c)(3) but had not obtained a license from the Food and Drug Administration to operate the facility.

Under the terms of a management agreement with the owner of the new facility, the nonprofit seeking the private letter ruling had agreed to assist the owner in developing and operating that facility until the owner was able to operate it independently under its own FDA license. The nonprofit seeking the ruling was given total control over the facility under the agreement, pursuant to FDA regulations, and that nonprofit was to provide the owner of the new facility with various FDA-related management and clinical services under a license previously granted to the nonprofit seeking the ruling by the FDA, as well as access to all of that organization's FDA-mandated regulatory documents and policies and procedures.

Considering the effect of the management agreement on the tax exemption previously recognized for the operating organization, the IRS noted that establishment and operation of the new facility would further the manager's tax-exempt charitable purpose of promoting health. Therefore, provision of services under the management agreement would not adversely affect the manager's current tax-exempt status. Furthermore, because services rendered to the owner of the new facility under the management agreement would be substantially related to the exempt purpose of the managing entity, income derived from providing services would not be unrelated business taxable income to the managing organization.

Federal Court Reinstates Tax-Exempt Status of Democratic Leadership Council, Finding That Internal Revenue Service Violated Regulations in Retroactively Revoking Council's Exemption

The U.S. District Court for the District of Columbia has ruled that the Internal Revenue Service violated its own regulations when it retroactively revoked the tax-exempt status of the Democratic Leadership Council under Internal Revenue Code Section 501(c)(4) in 2002. The Service revoked the Council's tax-exempt status for the years 1997, 1998 and 1999, concluding that the Council rendered an impermissible level of private benefit during those years – namely, support to Democratic officials. The Council then paid approximately \$20,000 in total taxes and interest for those years, but filed a lawsuit for a refund.

The Council had been granted recognition of exempt status as a social welfare organization in 1996, and the Council contended that it acted within the bounds of Section 501(c)(4) from 1997 through 1999, but that, in any event, Treasury Regulation 601.201(n)(6) prohibited the retroactive revocation of exempt status that occurred here. That regulation states that an organization's exemption may be retroactively revoked or modified if it has omitted or misstated a material fact from its exemption application, operated in a manner materially different from that originally represented to the IRS, or engaged in a prohibited transaction described in the regulation, involving diversion of monies from an exempt purpose.

Responding to the Council's contentions, the Internal Revenue Ser-

vice argued that the Council did not qualify as a Section 501(c)(4) organization during the three years in question and that Treasury Regulation 601.201(n)(6) does not apply in refund suits such as the one at bar, but that, in any event, the IRS had complied with that regulation. The district court disagreed with the Service, however, and granted summary judgment to the Council in the suit, ordering a refund of taxes paid.

In its opinion, the district court stated that there may have been legitimate questions about whether the Council was originally entitled to Section 501(c)(4) status, but that the regulation cited by the Council limited the ability of the Service to retroactively revoke the Council's exemption. The court concluded that the Council did not omit or misstate a material fact in its original application for recognition of exempt status or operate in a manner materially different from that originally represented to the IRS in the Council's exemption application, which clearly indicated that the Council intended to be connected with the Democratic party, although it would work with Republicans whenever it could to promote common issues. In fact, the court noted that the Council had alluded to the potential private benefits it would provide to Democrats as part of its original application for recognition of exempt status.

Although the district court ruled for the Council in its refund suit, the court also stated that its ruling did not preclude the IRS from revoking the Council's exempt status prospectively if it should conclude again that the Council is not entitled to that status.

Social Club's Income from "Members for a Day" Causes Loss of Exempt Status

A social club previously regarded as exempt from federal income tax under Section 501(c)(7) of the Internal Revenue Code has suffered revocation of its exempt status by the Internal Revenue Service retroactively to a date when a material change in its exempt status was noted, namely, its deriving of substantial income from "members for a day" and other special members having no voice in the management of the club. The purpose of the organization initially was to promote an interest in clay target shooting of all kinds, to provide fellowship through mutual interests, to provide instruction in the safe handling of guns, to provide instruction in marksmanship, and to encourage good sportsmanship among its members.

In revoking the club's exemption, the IRS noted that the club's bylaws included as members those belonging to other associations that entered into a registered shoot sponsored by the club, upon payment of a daily registration fee. Other bylaws provisions allowed nonmembers in general to become "members for a day" by paying a daily membership fee.

Unfortunately for the club, the IRS found that the "members for a day" were not actually members at all for purposes of determining whether the club had exceeded limits on receipts from nonmembers by a Section 501(c)(7) organization. Not even considering the amount of other income received by the organization from nonmember participation in various shooting events sponsored by the club, the IRS

concluded that limitations on nonmember income for Section 501(c)(7) organizations had been exceeded by the club in that daily registration fees and daily membership fees received by the organization were considered to be income from nonmembers. But the IRS also found that the club's sponsored events produced a great deal of income from nonmembers other than those fees.

The club argued that it should still be entitled to its tax exemption because the club had operated at a net loss every year and the organization was making charitable donations and charitable expenditures. However, the IRS concluded that, although the organization had not produced net income overall, the club may have engaged in charitable activities, and the predominant activity of the club was not selling "daily" memberships, the level of the club's nonmember income, and the fact that the costs members would otherwise have had to bear alone were being subsidized through nonmember patronage, justified revocation of the club's exemption. With regard to the club's net losses, the IRS further noted that, without the level of nonmember income the organization had received, the club's losses would have been substantially higher.

IRS Publishes Final Regulations Clarifying Relationship Between Exempt Status and Excess Benefit Transactions

The Internal Revenue Service has finalized regulations intended to clarify the relationship between Internal Revenue Code Sections 501(c)(3) and 4958, and how the Service will determine whether excess benefit transactions penalized by Section 4948 could jeopardize an organization's exempt status. The final regulations were effective March 28, 2008.

The final regulations contain several examples illustrating the requirement that an organization exempt from federal income taxes under Section 501(c)(3) must serve a public interest, rather than a private interest. The purpose of the examples is to indicate that prohibited private benefits may involve non-economic benefits as well as economic benefits and that prohibited private benefits may arise regardless of whether payments made to private interests are reasonable or

excessive.

The regulations also contain guidance indicating that, in determining whether to revoke an organization's exempt status under Section 501(c)(3) because of Section 4958 excess benefit transactions, the IRS will consider all relevant facts and circumstances, including, but not limited to, the following factors:

- A. The size and scope of the organization's regular and ongoing activities that further exempt purposes before and after the excess benefit transaction or transactions occurred;
- B. The size and scope of the excess benefit transaction or transactions (collectively, if more than one) in relation to the size and scope of the organization's regular and ongoing activities that further exempt purposes;
- C. Whether the organization has been involved in multiple excess benefit transactions with one or more persons;
- D. Whether the organization has implemented safeguards that are reasonably calculated to prevent excess benefit transactions; and
- E. Whether the excess benefit transaction has been corrected, or the organization has made good faith efforts to seek correction from the disqualified person(s) who have benefited from the excess benefit transaction.

The regulations further indicate that the Service will consider all of the above factors in combination with the other factor in determining whether an exemption should be revoked. Depending on the particular situation, the IRS may assign greater or lesser weight to some factors than to others. Implementation of safeguards and correction of excess benefit transactions will weigh more heavily in favor of continuing an exemption when the organization has discovered excess benefit transactions and taken action before the IRS discovery of the transactions. Finally, correction of excess benefit transactions after they have been discovered by the IRS, by itself, will never be considered a sufficient basis for continuing to recognize exempt status.

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Chicago

120 South Riverside Plaza, Suite 1200
Chicago, Illinois 60606
P 312.876.7100 F 312.876.0288

Hoffman Estates

2800 West Higgins Road, Suite 425
Hoffman Estates, Illinois 60169
P 847.843.2900 F 847.843.3355

Springfield

808 South Second Street
Springfield, Illinois 62704
P 217.789.7959 F 312.876.6215

Boca Raton

2424 North Federal Highway, Suite 462
Boca Raton, Florida 33431
P 561.322.6900 F 561.322.6940

Fort Lauderdale

200 East Las Olas Boulevard, Suite 1700
Fort Lauderdale, Florida 33301
P 954.713.7600 F 954.713.7700

Miami

200 South Biscayne Boulevard, Suite 3600
Miami, Florida 33131
P 305.374.3330 F 305.374.4744

Tampa

Two Harbour Place
302 Knights Run Avenue, Suite 1100
Tampa, Florida 33602
P 813.254.1400 F 813.254.5324

West Palm Beach

515 North Flagler Drive, Suite 600
West Palm Beach, Florida 33401
P 561.833.9800 F 561.655.5551

Milwaukee

7161 North Port Washington Road
Milwaukee, Wisconsin 53217
P 414.351.2440 F 414.352.6901

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