

One Year After Implementation, Confusion Lingers Over New IRS 501(c)(4) Notice Requirement

September 2017

It has now been a little more than a year since the Internal Revenue Service (IRS) implemented a requirement for newly formed 501(c)(4) social welfare organizations to notify the agency of their operation (*See Election Law News*, July 2016). To commemorate the one-year anniversary of the IRS Form 8976, we take this opportunity to clarify some of the confusion that may continue to exist in the non-profit community over this new requirement, particularly as it relates to the separate preexisting process for applying for formal IRS recognition of tax-exempt status.

As we first wrote about last year, the new IRS requirement is a result of an enigmatic provision that was slipped into the monstrous 888-page Protecting Americans From Tax Hikes (PATH) Act – a budget bill enacted at the end of 2015. The new provision requires a new 501(c)(4) entity to notify the IRS of the organization’s operation within 60 days of its formation.

Last July, the IRS implemented this new requirement by promulgating Form 8976, which must be completed and submitted on the agency’s website, along with a \$50 fee. The notification form requires the following basic information:

- The organization’s name, address, and taxpayer identification number;
- The organization’s date of formation and state in which it was formed;
- A statement of the organization’s purpose.

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A penalty of \$20 per day, up to a maximum of \$5,000, may accrue for late filings.

Importantly, as the IRS has interpreted this new requirement:

- The Form 8976 is not a substitute for the optional Form 1024 application for formal agency determination of a 501(c)(4) organization's tax-exempt status;
- Conversely, filing a Form 1024, even within 60 days of an organization's formation, does not satisfy the requirement to separately file the Form 8976.

There appears to be two sources of confusion over these separate filings: (1) the lack of understanding over their purposes; and (2) the PATH Act's legislative history. To help clarify things, it is useful to first review the purpose of the Form 1024 application, which had long preexisted the 2015 PATH Act.

501(c)(4) social welfare organizations have never been strictly required to apply with the IRS for recognition of their tax-exempt status. Rather, prior to the PATH Act, they were permitted to simply "self-declare" and operate as tax-exempt organizations by filing annual Form 990 tax returns with the IRS. However, 501(c)(4) entities could receive additional assurance that they were structured and operating properly by filing an optional Form 1024 application with the IRS for a formal agency determination of their status.

The Form 1024, which typically involves at least eight pages of information plus schedules, requires an organization to provide fairly extensive details about its planned activities and anticipated budget for three tax years. A "user fee" of \$850 also is required for organizations with even a modest amount of revenues. The upshot is that obtaining a formal IRS determination:

- Provides extra reassurance to donors—especially to organizational donors, which often avoid making grants to organizations that lack a formal IRS determination;
- Exempts organizations from certain state taxes;
- Facilitates nonprofit mailing privileges.

For a while, the IRS also had been targeting self-declared 501(c)(4) organizations with a 36-item questionnaire (Form 14449), asking for much of the same information that is required on the Form 1024.

In 2013, news broke that the IRS was apparently targeting groups' Form 1024 submissions for extra scrutiny and delays based on their political leanings. Later that year, the IRS issued a proposed rulemaking, which was widely panned, to expansively define what activities would qualify as restricted political campaign intervention by 501(c)(4) entities.

Enter the PATH Act, which sought to rein in the IRS's abuses by: (1) prohibiting the IRS from issuing its political activity rules; and (2) providing quicker judicial relief for applicants that receive an adverse determination from the IRS on their tax-exempt status (*See Election Law News*, January 2016). With respect to the new Form 8976 notification requirement, some members of Congress (or at least their staff) also apparently thought they were enacting streamlined replacement for the Form 1024 application. According to a Senate Finance Committee section-by-section analysis of the PATH Act, which appears to have been released a few days

before the bill was enacted: “The provision provides for a streamlined recognition process for organizations seeking tax exemption under section 501(c)(4) . . . The current, voluntary 501(c)(4) application process will be eliminated.”

The actual legislative text that was enacted into law, however, fails to reflect this understanding. Instead, the law merely provides that, “[u]pon request by an organization to be treated as an organization described in section 501(c)(4), the [IRS] may issue a determination with respect to such treatment,” and that such a request “shall be treated . . . as an application for exemption from taxation.” The law does not specify that filing the one-page Form 8976 obviates the need to file the optional Form 1024 for a formal IRS determination of a 501 (c)(4) entity’s tax-exempt status, and the IRS did not interpret the law in this manner.

According to the IRS’s FY 2017 work plan, the agency received approximately 1,200 Form 8976 filings in FY 2016 (after the notification requirement went into effect), and the agency estimates it will receive an additional 2,500 such filings during this fiscal year. Thus, instead of minimizing the regulatory burdens on 501 (c)(4) entities, the PATH Act ended up creating a new one.

Wiley Rein’s Election Law practice routinely assists clients with creating new 501(c)(4) entities and preparing their Form 8976 and 1024 filings (in addition to applicable state filings). While obscure, loosely drafted legislative provisions like the one resulting in the new Form 8976 are difficult to forestall, we also monitor legislative and regulatory developments to assist our clients in opposing bills and rulemakings that would adversely affect the non-profit community.