



IRS Issues Final Rules for Notice of Intent to Operate as 501(c)(4) Social Welfare Organization

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The IRS on July 23 issued final regulations (Final Rules) implementing the Internal Revenue Code section 506 requirement that an entity notify the IRS of its intent to operate as a Code section 501(c)(4) social welfare organization, generally within 60 days of start-up. The IRS' Final Rules adopt with little change its temporary regulations in place since July 2016, and so our original 2016 alert about section 506 (added by the 2015 Protecting Americans from Tax Hikes (PATH) Act) still applies. Still, the IRS Explanation accompanying the Final Rules gives some useful guidance.

What the Final Rules Provide

To summarize, the Final Rules:

- require a new entity to notify the IRS via Form 8796 of its intent to operate as a 501(c)(4) social welfare organization within 60 days of formation;
- require an existing entity — e.g., a foreign entity operating for the first time in the United States, or a domestic entity that operates for the first time as a 501(c)(4) social welfare organization such as a 501(c)(3) converting to a 501(c)(4) — to file Form 8796 within 60 days of the triggering change in operations;
- require Form 8796 to be filed electronically through the IRS portal; and
- provide late-filing penalties of \$20 per day, up to \$5,000.

The IRS's Explanation accompanying the Final Rule addresses several previously unanswered questions and proposals:

- The IRS rejected public comments that a 501(c)(4) filing an Application for Recognition of Exemption (Form 1024-A) might be excused from filing a Form 8976. The IRS responded that [t]he notification under [the PATH Act] is separate and distinct from the application process.
- The IRS confirmed that an update to a group exemption ruling letter adding a 501(c)(4) entity to the umbrella exemption will *not* satisfy the PATH Act notice requirement. Therefore, regardless of whether an entity has been added to a group ruling letter, it must file its own Form 8976 within 60 days of organization (or other triggering event).
- The IRS declined to adopt a blanket rule for granting reasonable cause relief to late filers. Although a commenter asked the IRS to waive the penalty for all small organizations and certain other classes of applicants, the Final Rules maintain the IRS' case-by-case approach waiving penalties based on reasonable cause. The IRS provided only one additional example of how reasonable cause relief might be granted: An entity that originally organized under another paragraph of section 501(c) (such as a 501(c)(3) charity) and later operated as a 501(c)(4) would be penalized only if it filed Form 8976 more than 60 days after its change in activity as evidenced by a board vote or some other formal action.

Lessons Going Forward

Although the IRS's rules may not have substantively changed, they remind us of the importance of complying with registration and filing requirements, especially for politically-active organizations heading into the 2020 election cycle:

Be vigilant. When forming a new social welfare organization, be vigilant about state and federal filing requirements. Also, maintain consistency across all state and federal forms, particularly when describing your organization's purpose.

Formally applying for exempt status may still make sense. The following bears repeating: PATH Act notification does not mean the 501(c)(4) is *tax-exempt*. To be tax-exempt a 501(c)(4) can self-declare (i.e., proceed under the assumption that it is tax-exempt, and convince the IRS if there is an audit) or get formal assurance from the IRS through a 1024-A exemption application. Whether to file the Form 1024-A depends on a variety of factors – e.g., the projected longevity and life cycle of the organization; budget and projected fees; and the possible fall-out if the organization self-declares and is challenged by the IRS

Always consider federal tax. Many new organizations focus on state law (after all, state nonprofit law forms the basis of the articles of incorporation, state registration, and other important filings). Even if you plan to self-declare as a 501(c)(4) social welfare organization and do not submit a Form 1024-A application for tax exemption, you still must file a Form 8976.

Ballot measure committees, take special note. Ballot measure committees formed to support or oppose a measure may be a political committee under most state laws, but under IRS rules such a committee would be a 501(c)(4) organization. Although campaign finance law may be your main focus when forming a committee, don't lose site of the IRS requirements, including the filing of Form 8976.

How can Nossaman help?

Nossaman attorneys have extensive experience in forming 501(c)(3)s, 501(c)(4)s and PACs; applying for tax-exempt or other special status at the federal, state, and local level; advising clients on affiliations between these types of organizations; and guiding clients through the complex lobbying and electioneering restrictions on these organizations at the federal, state, and local levels. Please contact us if you have questions about the Final Rules, filing Form 8976, or 501(c)(4)s in general.