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Election Year Updates for Section 501(c)(4) Social Welfare Organizations

The Protecting Americans from Tax Hikes Act of 2015, or the PATH Act, made several changes to tax law applicable to section 501(c)(4) organizations operating this election year. In addition, two relatively recent IRS denials of applications for section 501(c)(4) status illustrate some points a section 501(c)(4) organization should consider if it is intending to intervene in this year's political campaigns or apply for recognition of section 501(c)(4) status.

New Notification Requirement

The IRS recently announced that section 501(c)(4) organizations must begin complying with a new notification requirement contained in section 405 of the PATH Act. (See [Rev. Proc. 2016-41](#).) Unless an exception applies, every section 501(c)(4) organization must file a new [IRS Form 8976](#), Notice of Intent to Operate Under Section 501(c)(4) (and pay the accompanying \$50 fee), online by the later of September 6, 2016, or 60 days from the date of its formation.

The form is required only for section 501(c)(4) organizations that have not done at least one of the following, on or before July 8, 2016:

- Applied for recognition of exemption under section 501(c)(4) on IRS Form 1024.

- Filed at least one Form 990 or, if eligible, Form 990-EZ or Form 990-N.

The Form 8976 merely notifies the IRS that an organization is operating as a section 501(c)(4) organization. It is not an application seeking recognition of section 501(c)(4) status, and the acknowledgment by the IRS that it has received the Form 8976 (which filers should receive within 60 days) is not equivalent to a determination of section 501(c)(4) status by the IRS. Organizations are not required to obtain a determination of section 501(c)(4) status by the IRS, but if they want this determination, they must apply for it on Form 1024.

Section 501(c)(4) Organizations May Now Seek Declaratory Judgments

Under section 406 of the PATH Act, any applicant that receives a denial of section 501(c)(4) by the IRS may now seek a declaratory judgment to reverse the denial from the U.S. Tax Court, the U.S. Court of Federal Claims or the U.S. District Court for the District of Columbia. The ability to seek a declaratory judgment is granted under section 7428 of the Internal Revenue Code, which has long applied to section 501(c)(3) organizations and now applies to all organizations

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described in section 501(c). The section 7428 procedures apply not only to denials but also to any revocation of section 501(c)(4) status or any failure by the IRS to make a determination as to section 501(c)(4) status within 270 days of an organization's application on a Form 1024.

In order to preserve the right to challenge a denial or revocation of section 501(c)(4) status under section 7428, an organization must file a protest statement with the IRS within 30 days of receiving the proposed denial or revocation letter. If the organization subsequently receives a final denial or revocation letter, a petition with the selected court must be filed before the 91st day after the date of the letter. The extension of the section 7428 declaratory judgment procedures to section 501(c)(4) organizations is effective for petitions filed after December 18, 2015.

No Gift Tax for Donors to Section 501(c)(4) Organizations

Under section 408 of the PATH Act, the federal gift tax does not apply to contributions to a section 501(c)(4) organization, effective for contributions made after December 18, 2015. This change ends long-standing uncertainty on the issue. In July 2011, IRS Deputy Commissioner Steve Miller announced in a memorandum that all enforcement activity involving the application of the gift tax to such contributions would be suspended while the need for further guidance in the area was assessed.

Recent IRS Denial Letters Offer Cautionary Guidance for Section 501(c)(4) Organizations

Two recent IRS denials of applications for section 501(c)(4) status illustrate some important substantive and procedural points organizations should consider if filing such applications.

In [PLR 201615014](#), the applicant had apparently been in operation for all or part of three years prior to its application. In the first year, 100 percent of its expenditures were devoted to the production and distribution of mailers and radio ads that encouraged the defeat or election of candidates for public office and were found by the IRS to constitute intervention in a political campaign, based on all of the facts and circumstances. In the second and third years, however, the applicant represented that it had spent 100 percent of its time (but not expenditures, because the hours were all volunteered) on educational campaigns for job promotion and job training for residents of its city, which the IRS acknowledged promoted social welfare. The applicant also stated that it intended to produce print and radio ads in the future as its "primary" expense. The IRS concluded that the applicant was not exempt under section 501(c)(4).

A section 501(c)(4) organization must engage primarily in activities that promote social welfare and cannot be engaged primarily in political campaign intervention — which is commonly understood to mean that it must devote more than half of its expenditures and/or time to the former and less than half to the latter. Because the applicant devoted 100 percent of its expenditures to political campaign intervention in the first year, it is not especially surprising that the IRS concluded that the applicant failed to qualify as a section 501(c)(4) organization that year (although perhaps the IRS should also have considered what the organization was devoting time to during that period). What is more surprising is that the IRS did not find that the applicant qualified as a section 501(c)(4) organization during the second and third years, even though the IRS acknowledged that all of the applicant's activities promoted social welfare during those years.

Perhaps the IRS would have granted section 501(c)(4) status beginning the first day of the second year if the applicant had actually spent money on its social welfare activities in the second and third years. It is also possible that the IRS would have granted section 501(c)(4) status starting on the first day of the second year were it not for the applicant's statement about future expenditures on ads, given that the only ads the IRS had seen with the application constituted political campaign intervention. Nonetheless, the denial suggests that applicants for section 501(c)(4) status should not necessarily assume that they can "make up" for one year of excessive political campaign intervention with subsequent years of activities that promote social welfare.

In [PLR 201552032](#), the IRS denied section 501(c)(4) status to an organization that had as its only activity at the time of the application a candidate forum that the IRS acknowledged might have promoted social welfare. However, the applicant's descriptions of its other planned activities were vague. According to the ruling, the IRS sent a letter requesting additional information about the applicant's past, present and future activities and made several attempts to contact the applicant by telephone, but the applicant failed to respond. As a result, the IRS denied section 501(c)(4) status on the basis that the applicant failed to establish its exemption. This ruling demonstrates that applicants should both try to provide sufficient detail in their initial application (on Form 1024) and promptly respond to any requests for additional information they receive, because failure to do so can result in a denial, even absent any evidence of activities inconsistent with section 501(c)(4) status.

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Loeb & Loeb LLP's Nonprofits and Exempt Organizations Practice

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