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November 27, 2017

L. Brimmer
Senior Tax Analyst
Internal Revenue Service
Room 6526
1111 Constitutional Ave., NW
Washington, D.C. 20224

RE: COMMENTS ON PROPOSED FORM 1024-A

Dear L. Brimmer:

Attached please find comments of the Public Policy Legal Institute, a Washington educational charity dedicated to protecting the rights of Americans to free speech and assembly, concerning the proposed Internal Revenue Service Form 1024-A. 82 FED. REG. 48746.

In summary, the comments find that the proposed form does not respond to Congressional concerns clearly enunciated in the legislative history of Internal Revenue Code § 506, especially those related to the amount of work engaged in by the Service during processing of applications for determination letters by section 501(c)(4) organizations. The comments propose that the Service adjust its efforts to implement section 506 by shifting resources to educational activities, and utilize the Service's recent experience with "self-declaring" organizations and applications and with analytics to deploy available resources.

I would be happy to answer further questions.

Thank you for your assistance.

Sincerely,

Barnaby Zall
Chairman and President

COMMENTS ON PROPOSED FORM 1024-A

THE PUBLIC POLICY LEGAL INSTITUTE[1]

November 27, 2017

I. EXECUTIVE SUMMARY:

The Internal Revenue Service proposed Form 1024-A for applications filed by organizations wishing to obtain official determination letters attesting to their tax-exempt status under Internal Revenue Code § 501(c)(4). The IRS proposed this form in response to the legislative history of IRC § 506, created by the PATH Act of 2015, in which the Joint Committee on Taxation suggested that requests for such determination letters be made on a form that notified applicants that such requests were optional.

The IRS proposal, however, ignores most of the rest of the legislative history of IRC § 506, which indicates clearly that Congress found the IRS's efforts on these applications "a complete waste of time." The language of IRC § 506 came directly from H.R. 1295, The IRS Bureaucracy Reduction and Judicial Review Act (2014), which was passed unanimously by both the Ways & Means Committee and the entire House (there was no similar Senate provision). The legislative history of H.R. 1295 shows that Congress felt that the 10,000 hours spent by the IRS on processing these applications could have been better spent on other backlogged applications; that Congressional intent should be the guiding principle for Form 1024-A.

Fortunately, recent IRS efforts at analytics and increasing efficiency have shown that such applications can be handled in a much more efficient and less resource-intensive manner. One of the major steps in such improvements has been recognizing that the IRS can effectively deploy "self-declaration" procedures in applications while relying on background reviews of annual information returns, rather than spending so much time on "front-end" reviews of applications. These efforts have been most effectively concentrated on smaller organizations, which generally do not have experienced legal and tax counsel.

Unfortunately, proposed Form 1024-A does not reflect either Congressional intent or these modernization and efficiency techniques. Both the IRS's approach and the form itself can be improved by:

- ceasing work on the proposed Form 1024-A until the IRS has deployed its analytic and efficiency efforts on information available from the annual Forms 990 (as Congress intended);
- expanding public education and transition efforts on compliance with IRC § 506; and
- providing a "self-declaring" Form 1024-A, similar to the Form 1023-EZ, rather than a "front-loaded" form that requires significant effort for both applicants and the Service.

[1] The Public Policy Legal Institute is a Washington corporation, recognized by the Internal Revenue Service in 2017 as exempt from most federal taxation under Internal Revenue Code § 501(c)(3). www.publicpolicylegal.com. The principal author of these comments for PPLI is Barnaby Zall, President and Chairman of PPLI.

II. BACKGROUND:

Internal Revenue Code § 501(c)(4) describes tax-exempt organizations that are "operated exclusively for the promotion of social welfare." Section 501(c)(4) organizations (unlike section 501(c)(3) organizations) do not provide their donors with a charitable deduction but may engage in unlimited lobbying and some political activity. A section 501(c)(4) organization's donor information is not subject to public disclosure, and under current informal Internal Revenue Service guidance, contributions to a section 501(c)(4) organization are not subject to gift tax. Section 501(c)(4) organizations include a wide variety of organizations large and small, such as garden clubs,[2] not-for-profit roller skating rinks[3] and civic leagues.[4]

There is no requirement that a section 501(c)(4) organization apply to the IRS for recognition of its tax-exempt status.[5] Thus, the IRS does not "grant" tax-exemption to section 501(c)(4) organizations; it only issues a "determination letter" which officially "recognizes" the organization's status.[6]

The Protecting Americans from Tax Hikes Act of 2015[7] created Internal Revenue Code § 506, a new mandatory registration requirement for section 501(c)(4) organizations.[8] Prior to the PATH Act, a new section 501(c)(4) organization could simply organize and, after its first tax year, file its annual tax information return Form 990 as a section 501(c)(4) organization. Organizations that did not file a Form 1024 application for a determination letter, however, could expect the IRS to send them a request to file Form 1024 shortly after they filed their Form 990s; in 2013, the IRS also sent questionnaires to "self-declared" section 501(c)(4) organizations.[9]

In addition to these incentives to file Form 1024, the receipt of a determination letter from the IRS also provides numerous benefits to the organization, including retroactive official

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[2] Rev. Rul. 66-179, 1966-1 C.B. 139.

[3] Rev. Rul. 67-109, 1967-1 C.B. 136.

[4] *United States v. Pickwick Electric Membership Corp*., 158 F. 2d 272 (6th Cir., 1946) (civic organization embodies "the ideas of citizens of a community cooperating to promote the common good and general welfare of the community.").

[5] Except for an organization that seeks reinstatement of exempt status after it has failed to file annual returns or notices for three consecutive years. Section 6033(j)(2). Comm. On Ways & Means, *The IRS Bureaucracy Reduction and Judicial Review Act*, H. Rept. 114-71, https://www.congress.gov/114/crpt/hrpt71/CRPT-114hrpt71.pdf, at 4 ("Organizations seeking exemption under other Code sections (e.g., social welfare organizations claiming exemption under section 501(c)(4)) may submit a formal application for exemption, but are not required to do so."); Levine, "To Apply or Not to Apply: The Question for 501(c)(4)s," *Bolder Advocacy*, May 31, 2013, https://bolderadvocacy.org/blog/to-apply-or-not-to-apply-the-question-for-501c4s.

[6] Form 1024, used to apply for recognition of tax-exemption, is entitled: "Application for Recognition of Exemption Under Section 501(a)." https://www.irs.gov/pub/irs-pdf/k1024.pdf.

[7] Pub. L. No. 114-113, 129 Stat. 2242.

[8] Internal Revenue Code § 506.

[9] https://www.irs.gov/pub/irs-tege/Form14449.pdf; Bolder Advocacy Project, "IRS and Questionnaires: What 501(c)(4)s Need to Know," April 1, 2013, https://www.bolderadvocacy.org/blog/irs-and-questionnaires-what-501c4s-need-to-know.

recognition of the organization's tax-exempt status to the date of the organization's formation,[10] exemption from certain State taxes, and nonprofit mailing privileges.[11]

Many organizations voluntarily file these optional applications with the IRS seeking official letters recognizing their status under Section 501(c)(4).[12] The House Committee on Ways & Means found in 2015 that "Through its investigation of the IRS targeting of certain social welfare organizations, the Committee learned that the IRS spends approximately 10,000 hours a year processing entirely voluntary section 501(c)(4) applications. This is the same process that allowed the IRS to subject applicants to extraordinary delays and inappropriate questions, including demands for donor lists."[13]

The references to "Through its investigation of the IRS targeting of certain social welfare organizations," and "the same process that allowed the IRS to subject applicants to extraordinary delays and inappropriate questions, including demands for donor lists" in the Ways & Means Report refer to a period of extraordinary mismanagement and unconscionable treatment of applicants recounted in litigation and agency reports.[14] Beginning in 2010, the IRS delayed and improperly processed many of these voluntary applications because of the organizations' names or perceived ideologies.[15]

One congressional response to the controversy was to enact IRC § 506, which came directly from The IRS Bureaucracy Reduction and Judicial Review Act, H.R. 1295 (114th Cong.), "to improve the process for making determinations with respect to whether organizations are exempt from taxation under section 501(c)(4) of the Code".[16] The operative language in H.R. 1295 is identical to that in IRC § 506.[17] Penalty and fee revenue was projected as $16 million over ten years.[18]

The Ways & Means Committee report on H.R. 1295 explained the need for the language that became IRC § 506:[19]

> In recent years, section 501(c)(4) organizations that file an application for recognition of exempt status have faced considerable delays in obtaining a determination

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[10] So long as the Form 1024 was filed within 27 months of the organization's formation; otherwise the IRS's recognition was retroactive only to the date of filing of the Form 1024. Rev. Proc. 2013-9, 2013-2 I.R.B. 255.

[11] *Jt. Comm. On Tax'n, Tech. Explanation Of The Protecting Americans From Tax Hikes Act Of 2015* (JCX-144-15, Dec. 17, 2015), at 239, https://www.jct.gov/publications.html?func=startdown&id=4861.

[12] As noted in Form 1024, "Even if these organizations are not required to file Form 1024 to be tax-exempt, they may wish to file Form 1024 to receive a determination letter of IRS recognition of their section 501(c) status in order to obtain certain incidental benefits." https://www.irs.gov/pub/irs-pdf/k1024.pdf.

[13] H. Rept. 114-71, at 4.

[14] *In Re: United States of America v. NorCal Tea Party Patriots, et al.*, http://caselaw.findlaw.com/us-6th-circuit/1729683.html.

[15] Treasury Inspector General for Tax Administration (TIGTA), "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," May 14, 2013, Ref.No. 2013-10-053, https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf;

[16] H. Rep. 114-71.

[17] The first portion of H.R. 1295 became IRC § 506, the second became IRS § 7428, providing a right to a declaratory judgment of tax-exempt status.

[18] https://www.cbo.gov/publication/50080.

[19] H. Rept. 114-71, at 8-9.

from the IRS.[20] The Committee found that the IRS was spending thousands of hours each year developing such 501(c)(4) applications, which are voluntarily filed, while thousands of section 501(c)(3) applications, for which a determination is required, were not being expeditiously processed. The Committee further found that still other groups simply organized under section 501(c)(4) without providing notice to the IRS, a practice that is currently permitted under the Code. The Committee therefore believes it is desirable to eliminate the need for a section 501(c)(4) that desires written IRS acknowledgment of its exempt status to apply for a formal IRS determination by requiring all organizations organizing under the section to provide the IRS with notice of existence and requiring the IRS to provide timely acknowledgment of that notice.

…

With its first annual information return (Form 990, Form 990– EZ, or Form 990–N) filed after providing the notice described above, a section 501(c)(4) organization must provide such information as the Secretary may require, and in the form prescribed by the Secretary, to support its qualification as an organization described in section 501(c)(4). The Secretary is not required to issue a determination letter following the organization's filing of the expanded first annual information return.

A section 501(c)(4) organization that desires additional certainty regarding its qualification as an organization described in section 501(c)(4) may file a request for a determination, together with the required user fee, with the Secretary. Such a request is in addition to, not in lieu of, filing the required notice described above. It is intended that such a request for a determination be submitted on a new form (separate from Form 1024, which may continue to be used by certain other organizations) that clearly states that filing such a request is optional. The request for a determination is treated as an application subject to public inspection and disclosure under sections 6104(a) and (d).

Additional Views presented in the Ways & Means Committee report reported that "We support the improvements made by H.R. 1295 for section 501(c)(4) organizations applying to the Internal Revenue Service for tax exemption."[21] The bill was reported out of the Committee by voice vote on March 25, 2015.

H.R. 1295 was considered by the House of Representatives on April 15, 2015, and passed by voice vote.[22] The bill's sponsor, Rep. George Holding, told the House: "this legislation before us would simplify the review process for the IRS and allow them to better focus their resources on the thousands – thousands, Mr. Speaker – of 501(c)(3) applications which are outstanding and languishing for review.[23] Rep. John Lewis, floor manager on the bill for the minority, said: "I support the improvements the bill makes to the taxpayers' exempt process for social welfare

[20] *Citing* Treasury Inspector General for Tax Administration (TIGTA), "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," May 14, 2013, Ref.No. 2013-10-053, https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf

[21] H. Rept. 114-71, at 52.

[22] CONG'L REC., April 15, 2015 (daily ed.) H2237-38.

[23] *Id*., at H2237 (Statement of Rep. Holding).

organizations. … The intent is to provide the agency with certain key information."[24] Rep. Peter Roskam, chair of the relevant oversight subcommittee, said:

> [The IRS has] said that they have spent 10,000 hours reviewing 4,000 applications for 501(c)(4) organizations, which sounds sort of interesting. … that is 10,000 hours of a complete waste of time. That is 10,000 hours from an organization that is saying, Oh, we are just begging for mercy, and we are not able to meet these claims, and we are not able to make these calls. … But my point is this: Representative HOLDING's concept says, this is a complete waste of time. Let's clean this up. Let's free up 10,000 hours so that we can do more with less and reject the IRS notion that the best that they can do is to do less with less.[25]

The Joint Committee on Taxation report on the PATH Act did not provide a similar description of the need or intent of section 506.[26] There was no comparable Senate provision.

New Internal Revenue Code § 506 did not replace the voluntary application process through which section 501(c)(4) organizations could file Form 1024 to apply to the Internal Revenue Service for a "determination letter" recognizing their status under section 501(c)(4). Now, section 501(c)(4) organizations must file Form 8976 to comply with new IRC § 506, but may also file a request asking the IRS to issue a determination letter. In explaining the provision, the Joint Committee on Taxation stated that "[i]t is intended that such a request for a determination be submitted on a new form (separate from Form 1024, which may continue to be used by certain other organizations) that clearly states that filing such a request is optional."[27]

The IRS devised a separate Form 1024-A to meet the Joint Committee's intention that section 501(c)(4) organizations that wish an official determination that they are tax-exempt can request it on a form separate from Form 1024 that states that filing the request is optional.[28] The proposed Form 1024-A states in small print in two places that filing the form is optional.

III. ANALYSIS:

The enactment of the language of H.R. 1295 as IRC § 506 implicates the legislative history of the section, as the IRS recognizes by preparing the proposed Form 1024-A as suggested by the Joint Committee Report. But the IRS proposal does not reflect the full depth of the legislative history of this section, including in particular, the congressional intent that the IRS discontinue the level and intensity of scrutiny which the Ways & Means Committee and the House found unanimously was a "complete waste of time." "The Committee therefore believes it is desirable to eliminate the need for a section 501(c)(4) that desires written IRS acknowledgment of its exempt status to apply for a formal IRS determination …"[29]

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[24] *Id*. (Statement of Rep. Lewis).
[25] *Id*. (Statement of Rep. Roskam).
[26] JCX-144-15, at 237-241.
[27] JCX-144-15 at 241.
[28] 82 FED. REG. 40228 (Aug. 24, 2017).
[29] H. Rept. 114-71, at 8.

The Service's approach to Section 506 is incomplete and inconsistent with Congressional intent and the express terms of the legislative history. Congress intended a three-part process that would reduce the burden on both taxpayers and the Service:

1) File an acknowledged notice of intent to operate as a section 501(c)(4) organization;

2) File any additional information on an "expanded first annual information return" the Secretary shall require to demonstrate its qualification as a section 501(c)(4) organization; and

3) If the organization wishes a separate determination letter, then an application request separate from the Form 1024.[30]

The proposal for a Form 1024-A does create a separate determination letter, but at best replicates the process that resulted in 10,000 hours of Service personnel-hours. The only noticeable reduction in effort for either taxpayer or Service is in ignoring certain schedules to existing Form 1024, which might result in a few minutes saved, but not the wholesale work reductions envisioned by Congress. Even worse, the proposed Form 1024-A does not "clearly state[] that filing such a request is optional;" instead it buries the statements in tiny print. Nor does the proposed form apparently utilize the Service's recent experience with "self-declaring" applicants, particularly for smaller organizations.

The Service would better spend its time on the second required step of the streamlining process: determining what information needs to be added (if any) to the Form 990 to allow the Service to review, and address any question about, the qualification of an organization to tax-exemption. This approach is entirely consistent with recent Service efforts to streamline and economize, such as the "self-declaring" Form 1023-EZ. After reviewing its workload, the Service determined that the rate of errors and violations by smaller charitable organizations did not warrant the expenditure of significant resources on a full Form 1023; the same is true for the Form 990-N "postcard" return for smaller organizations. Indeed, the entire Form 990 process is largely one of "self-declaration" under present and historic procedures: the vast majority of returns are analyzed to determine where to allocate oversight examination resources rather than requiring all returns to be examined in the ordinary course.

The "self-declaring" approach of the 990s and the Form 1023-EZ may not be perfect, but it reflects the current IRS's budgetary and congressional resources. Congress simply does not want to pay for intensive scrutiny of voluntary 1024s, even those which divulge an intention to engage in political campaign-related activities. Congress would prefer after-the-fact examination, presumably based on the same type of data-mining and significant analysis that the Service has utilized in recent years (and plans on increasing).

The legislative history does not support a "let's do it the way we always did it" approach. It does support more of what the IRS is intending to do: use modern analytics to determine problem areas, and address those in a pinpoint fashion. The proposed Form 1024-A does not meet the Congressional intention.

Indeed, the new Form 1024-A will likely increase confusion among practitioners and organizations about what and how to file requests for determination letters.[31] Instead of an

[30] JCX-144-15 at 241.

optional Form 1024 and a mandatory annual Form 990, all new section 501(c)(4) organizations must file a Form 8976 within sixty days of organization. Unlike the recent automatic revocation efforts,[32] there was no IRS three-year education and transition effort for section 506, which became fully effective in 2016. While most larger organizations which can afford qualified legal counsel are likely to know about and understand IRC § 506, the vast majority of smaller new organizations are unlikely to even know there is such a requirement, much less about the sixty-day requirement. These are the areas in which the IRS first should concentrate its efforts, as it did with the mandatory 990 filing requirement.

IV. GENERAL RECOMMENDATIONS:

1) Cease work on the proposed Form 1024-A until the second required step intended by Congress (maximize the use of Form 990 information) is addressed. Shift those resources to determining what, if any, new information is required on the 990 returns (including Forms 990-EZ and 990-N) to demonstrate the taxpayer's qualification for 501(c)(4) status and how to obtain that information. Concentrate appropriate Form 990 analytics efforts on determining how to maximize the information currently available from existing Form 990s to determine if there are appropriate measures to determine organizations' qualifications for tax-exemption which can serve Congressional intent to reduce Service reviews of other forms, including a new Form 1024-A.

2) Expand and continue public education efforts about the new IRC § 506 mandatory filing requirement. Provide and publicize a clear process for the procedure to remedy failures to file by clueless smaller organizations.

3) Provide a "self-declaring" Form 1024-A that doesn't require so much work for both applicants and the Service. Congress has already demonstrated that it will use hourly metrics to determine statutory priorities. The Service should recognize that Congress does not want it to use a "front-loaded" application form with multiple required attachments and detailed schedules of projected financial activities; Congress wants this process streamlined.

V. SPECIFIC COMMENTS ON PROPOSED FORM 1024-A:

1) **You buried the main point: the 1024-A is not required for status.** The main Congressional intent on the Form 1024-A is to reduce workload while notifying potential applicants that the form is optional. The Service knows how to inform people of important information on this form; for example, the phrase "Don't include social security numbers on this form as it may be made public." is clear, imperative, bold-faced and in a much larger font at the top of the first page.

In contrast, the phrase "A request for a determination under section 501(c)(4) is optional." is buried at the end of the first paragraph, written in the passive voice, and confusing to laypersons. The whole point of this form is to inform applicants that they don't need to file it.

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[31] Many smaller tax-exempt organizations do not understand the increasingly complex reporting and registration requirements. See David van den Berg, "EOs May Not Know Exemption Applications Often Aren't Required," 2013 TAX NOTES TODAY 111–19 (June 10, 2013).

[32] https://www.irs.gov/charities-non-profits/charitable-organizations/automatic-revocation-how-to-have-your-tax-exempt-status-retroactively-reinstated.

Why bury this information? Why write it so it's hard to read? Why not put it in red, as in the Form 1023's instructions on public support advance rulings?

2) **Organizational Structure Questions Can Be Simplified:** In most cases, section 501(c)(4) status is grounded in the first instance on state law compliance. Unlike charitable status, how many applications are kicked back for failures to include required language in 501(c)(4) organizing documents? Unless you have data showing that this is a big problem, just ask for evidence that they have complied with state requirements, as in a link to the state's registry. Only if there is no similar opportunity for rapid and easy verification should this trigger further scrutiny or require filing additional documents.

3) **The Narrative and Financial Requirements Are Onerous:**

These forms will be filed principally by new organizations, which by and large won't have track records. Narratives are predictions, often lengthy and ambiguous or confusing, that are refined over time by Form 990s. The vast majority of smaller applicants' narratives are probably too optimistic, and the financials are similarly optimistic informed predictions. Can't the Service's concerns be handled in a self-declarative fashion, similar to the 1023-EZ? Are problems with section 501(c)(4)s that much more frequent or significant that they require additional narrative from all applicants?

For example, in Part IV, why seek information about compensation paid to all employees, rather than just those about whom private benefit issues arise?

VI. CONCLUSION:

The Service cannot do Congress's work for it, but it can address the specific intent about which the committees of jurisdiction were clear. Congress wanted the Service to spend less time on section 501(c)(4) organizations' voluntary applications for determination letters. It wanted the Service to use its limited resources in a smarter, more modern fashion. The Service, which has been moving in that direction already, should not take a step backwards with the proposed Form 1024-A; instead it should reflect those modern approaches in this form.