



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

May 15, 2023

via Email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to consultations on the tax status of Tribally chartered corporations. These consultations will be held virtually on June 21, 2023, and June 22, 2023, 1:00 – 4:00 p.m. ET. [You may register for the consultation here.](#)

***Background***

In consultations, Treasury Tribal Advisory Committee meetings, and engagements with Treasury, Tribal governments have requested guidance on the tax status of Tribally chartered corporations to provide certainty for Tribal economic development to support the generation of Tribal government revenue. These requests for guidance have increased as Tribal governments have become eligible for tax credits via the elective pay mechanism under the Inflation Reduction Act. During the November 2022 Tribal consultations on the Inflation Reduction Act, many Tribes requested that their enterprises be able to access these tax credits bringing into question the underlying status of the Federal tax status of Tribally chartered corporations.

To date, the Internal Revenue Service (IRS) has confirmed that Federally chartered corporations under Section 17 of the Indian Reorganization Act of 1934 and Section 3 of the Oklahoma Indian Welfare Act are not entities separate from the Tribe for Federal tax purposes and are not subject to Federal income tax on income earned in the conduct of commercial business on or off the Tribe's reservation.<sup>1</sup> Relatedly, the revenue rulings have determined that a corporation organized by an Indian Tribe under State law is subject to Federal income tax on the income earned in the conduct of commercial business on and off the Tribe's reservation.

Presently, however, no guidance addresses the Federal tax status of corporations chartered under Tribal law that may be wholly owned, majority owned, or jointly owned by a Tribe. In response to substantial Tribal leader requests for guidance on this question for over thirty years, Treasury's Office of Tax Policy is seeking Tribal leader feedback to inform its understanding of Tribally chartered corporations.

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<sup>1</sup> See [26 CFR §301.7701-1\(a\)\(3\)](#) (providing that Section 17 corporations and Section 3 corporations are not recognized as entities that are separate from the Tribe for Federal tax purposes); [Revenue Ruling 94-16](#) (Section 17); [Revenue Ruling 94-65](#) (Section 3).

Pursuant to Executive Order 13175, President Biden's Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships, and Treasury's Action Plan for Tribal Consultation and Collaboration, Treasury is commencing consultation to inform the development of guidance to address the tax status of Tribally chartered corporations.

Specifically, we request the assistance of Tribal leaders in addressing the following questions:

1. What role do Tribally chartered corporations (wholly, majority, or jointly owned) perform for Tribal governments and Tribal economies?
  - (a) In what ways are Tribally chartered corporations different than a non-Tribal government owned business?
  - (b) Do Tribes consider Tribal corporations to be arms of the Tribal government and/or political subdivisions or instrumentalities. If so, please explain the factors that inform this determination.
  
2. Existing IRS Regulations and Revenue Rulings provide that Federally chartered corporations under the Indian Reorganization Act of 1934 (IRA) and Oklahoma Indian Welfare Act (OIWA) are not subject to Federal income tax.
  - (a) What challenges do Tribes encounter in chartering such corporations?
  - (b) What limitations do Tribes see in these structures that result in chartering under the alternative categories listed in question 3.
  
3. Tribal governments may charter a business under Federal, State, or Tribal law and subject to such laws Tribes may consider a variety of structures, including but not limited to wholly owned, majority owned, and jointly owned corporations.
  - (a) What advantages and disadvantages exist for the following business structures for Tribal governments
    - (1) Corporations chartered under Tribal law (tribally chartered corporations);
    - (2) Corporations chartered under the law of a State;
    - (3) Limited liability companies organized under Tribal law or State law; and
    - (4) Partnerships organized or operating under Tribal law or State law (for example, joint venture partnerships).
  - (b) What factors shape a Tribes decision to charter a corporation as a wholly owned, majority owned, or jointly owned corporation?

- (c) How important to the success of a Tribal business enterprise is stock investment from investors other than the Tribal government (as opposed to, for example, debt financing).
4. Some Tribes have partnerships with outside investors that consist of varying degrees of ownership by the Tribe and its non-governmental partner. We seek to better understand the reason for these structures and the needs they address. To that end, when launching a business enterprise with investors other than the Tribal government:
- (a) What are the most important considerations for Tribes when choosing what type of legal entity to operate the business enterprise?
  - (b) What are some typical barriers that Tribes face when competing with non-tribal competitors in the marketplace?
  - (c) In addition to typical barriers described above, what are a few noteworthy barriers that you have faced when competing with non-tribal competitors in the marketplace?
  - (d) Are there different considerations or barriers that Tribes face in forming business structures for investments involving tax credits, for example, the New Markets Tax Credit?
5. With regard to a non-wholly owned Tribally chartered corporation or company that limits the legal liability of its owners:
- (a) Is there a typical threshold percentage of stock or equity investment from investors other than the Tribal government that a Tribe would be comfortable with to maintain Tribal government control of an enterprise it charters?
  - (b) Is there a typical threshold percentage of board seats controlled by investors other than the Tribal government that a Tribe would be comfortable with to maintain Tribal government control of an enterprise it charters?
6. How important to Tribal governments are the following requirements when creating a Tribally chartered corporation or other entity that limits the legal liability for its owners under the law of the Tribal Council (or other legislative body)?
- (a) The Tribal Council (or other legislative body) must approve the entity's:
    - (1) Articles of incorporation or organization or charter (including amendments);
    - (2) Bylaws (including amendments); and

- (3) Decisions regarding major actions of the entity (for example, acquiring or investing in a business, selling a business, paying dividends or making other distributions to owners, liquidating or dissolving, etc.).
    - (4) Decisions regarding the day-to-day operations of the entity's business.
  - (b) A majority of the entity's board of directors (or other government body) must be Tribal members.
  - (c) The Tribal Council (or other legislative body) has the power to:
    - (1) Select and remove board directors (throughout the life of the corporation);
    - (2) Review the financial and operating records of the corporation;
    - (3) Approve, or disapprove, all capital and operating budgets of the corporation; and
    - (4) Receive periodic (for example, quarterly) financial reports from the corporation.
7. How feasible would it be to require that more than half of a Tribally chartered corporation's board consist of members of the Tribe?
8. How important to Tribal governments is the use of corporate or partnership subsidiaries in carrying out a business venture?
9. To the extent the Federal tax status of a Tribally chartered entity derives from the tax status of the Tribal government that owns interests in the entity, what mechanism would you recommend for the IRS to know if the ownership of a Tribally chartered entity or its other characteristics is significantly changed (for example, the Tribal government sells or transfers its interests in the entity to an individual or a new entity that is not a Tribal government)?
10. Based on your experience, how do the rules of your Tribe's business or corporate code that govern Tribally chartered corporations, companies, or other entities differ (if at all) from corporate codes of neighboring State governments?

11. What other information, comments, or suggestions are important for the Department of the Treasury and the IRS to know in developing guidance on the Federal tax status of Tribally chartered corporations or companies organized under Tribal laws that protect owners from legal liability?

[Register here for one or more days of the consultation.](#)

We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants

**Please note that consultations are off the record and not for press purposes.**

We will send out an Agenda and a list of registered speakers before or on June 15, 2023.

The deadline to submit written comments is Friday, August 18, 2023 at 11:59 p.m. Alaska Time. Written comments should be sent to [tribal.consult@treasury.gov](mailto:tribal.consult@treasury.gov).

We hope that you will be able to join us for this important discussion and value your participation.

Sincerely,

Chief Lynn Malerba  
Treasurer  
Point of Contact for Tribal Consultation  
U.S. Department of the Treasury