

Tribal Consultation Summary

Tax Status of Tribally Chartered Corporations

Introduction

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 highlighting the lack of guidance on the federal tax status of Tribally chartered corporations.

In accordance with Treasury's consultation policy, Treasury held two [Tribal consultations](#) on the tax status of Tribally chartered corporations on June 21, 2023 and June 22, 2023 to gather input from Tribal leaders. Specific questions can be found in the [Dear Tribal Leader Letter](#) that was published on May 15, 2023. The consultations were held virtually to maximize Tribal participation across Indian country. Nearly 320 attendees joined the consultations over the two-days. The comment period ended on August 18, 2023. Treasury received 47 written comments from Tribal governments and Tribally-led organizations that collectively represent over 70% of Tribal Nations.

Pursuant to Treasury's Tribal consultation policy, below is a summary of the feedback received in Tribal consultation.

Foundational Concepts

1. Application of the Federal Trust Responsibility and Support for Tribal Self-Determination

Understanding the Condition of Tribal Economies & Existing Federal Policy: Commenters requested that any guidance issued by the Treasury Department should incorporate the federal trust responsibility towards Tribes and citizens, which includes the long-established federal policy, expressed through various congressional and executive actions, to promote Tribal self-determination and economic development. As part of this policy, Tribal business activities have been encouraged by the federal government in order to foster self-determination and to raise the socio-economic status of Tribes from the severe poverty experienced by many Tribal communities. Commenters cited to the United States Civil Rights Commission's 2018 Broken Promises Report¹ which highlighted that:

¹ U.S. Commission on Civil Rights. (2018). *Broken Promises: Continuing Federal Funding Shortfalls for Native Americans*.

Indian Country faces many economic development challenges. Over 25 percent of Native Americans live in poverty, which is higher than the poverty rate of any other racial group in the U.S. Approximately 12 percent of Native Americans are unemployed, which is more than double the national average. For Native Americans living on reservations, the unemployment rate is around 50 percent and for certain reservations, the average unemployment rate is much higher, hovering around 80 percent and up....

Tribes emphasized that this poverty is the consequence of Tribal communities enduring a long history of asset deprivation, colonization, forced removal, war, loss of homelands, and restricted access to traditional lands and resources, which has Tribes "into a near-assetless state for at least a century." The consequences of this sustained economic deprivation persist to this day. Commenters highlighted that they manifest themselves in the form of obstacles to economic development that include, but are not limited to, insufficient access to capital; lack of small business capacity; insufficient workforce development, financial management training and business education; regulatory constraints on land held in trust and land designated as restricted use (prohibiting such land from being used as collateral or as property subject to Tribal taxes); and underdeveloped physical infrastructure. Tribes asked Treasury to understand Tribal economies against this backdrop, which is materially different than the experience of states and local governments.

Understanding the Policy Purpose of the IRA: Further, Tribes expressed that it is critical that Treasury and IRS understand the purpose of the Indian Reorganization Act of 1934 (IRA) because the federal policy behind it is relevant to the evaluation of Tribal entities. The IRA was enacted in response to the Meriam Report of 1928 that detailed extreme poverty in Tribal communities resulting from the federal government's policy of forced assimilation and breakup of Tribal communal land ownership under the General Allotment Act of 1887. The IRA was created to decrease federal control over Tribes by increasing Tribal self-determination over internal affairs. This included the operation of government programs which required the generation of revenue. The IRA was the first formal federal effort to encourage Tribes to become more economically self-sufficient through the creation of corporations that segregated business assets and liabilities from governmental assets. Commenters emphasized that they have followed that federal policy in their development of Tribally chartered business entities.

Consistent with federal policy, Commenters requested that Treasury's guidance support and promote tribal sovereign authority, the right to Tribal self-government and a Tribe's ability to provide for its citizens. Commenters expressed that Tribes should at a minimum be on parity with federal, state, and local governments, who regularly engage in business activities to fund citizen programs and services (such as municipal golf courses, convention facilities, and the like) which are not subject to tax. Above that, the unique government-to-government and trust relationship that Tribes have with the United States requires that guidance not limit in any way a Tribe's ability to generate tax exempt governmental revenue.

2. Impacts of Uncertainty

Tax Uncertainty Contributes to the Underdevelopment of Tribal Communities:

Commenters highlighted that the status of Tribally chartered corporations has been pending for over thirty years. The uncertainty has created a significant barrier to economic development and has impaired Tribes' ability to generate revenues for the programs and services they provide to their citizens. The result of depressed economies has a circular effect. Without the ability to stimulate economic growth, diversify economic activities, and generate revenues to fund governmental programs and services, Tribes lack the resources to invest in building the essential physical and human infrastructure necessary to attract the capital investment needed to compete in the regional, national, and global marketplace. Based on present per-capita income, it is estimated that Tribal citizens will not achieve parity with the rest of the United States for at least four more decades. By clarifying the tax status of Tribal entities, Treasury would take a critical step towards enabling Tribes to raise the socio-economic status of their members.

In the absence of federal guidance, Tribes have become increasingly sophisticated in the structuring of business operations and transactions utilizing a range of options from federally chartered corporations to tribally chartered corporations and LLCs, as well as partnerships and/or joint ventures. Tribes have established under their own laws hundreds if not thousands of corporate entities. Commenters highlighted that IRS risks destabilizing considerable economic development in Indian Country if a regulation does not recognize the tax immunity of Tribally chartered entities that are at least majority-owned by a Tribal government. Tribes would be put in a position of foregoing the benefits of creating Tribal entities in order to avoid the negative impacts on Tribal government revenue that federal taxation would cause.

Tribes Have Been Unable to Obtain Certainty: Commenters noted that after Revenue Ruling 94-16, IRS issued several private letter rulings concerning tribally owned and chartered corporations, concluding in each case, based on several factors, that they were "integral parts" of the Tribal governments and entitled to share in each Tribal government's tax immunity. Despite these early rulings, the IRS declared a moratorium on private letter rulings raising the "integral part" test in 2007 preventing Tribes from ensuring that a Tribal entity is not considered a separate taxable entity. While commenters expressed that they do not support resumption of the Integral Part Test, they highlighted that this moratorium made it impossible for Tribes to obtain tax certainty or their entities that generate governmental revenue.

3. Definitions, Scope, and Process

Definition: Due to the expansion of Tribal corporate structures, commenters frequently referenced entities that extended beyond just Tribally chartered corporations, this included partnerships and limited liability companies. "Tribal entities" is used to encompass all of these categories.

Process: Commenters expressed that the tax immunity of Section 17 corporations is currently only established by IRS ruling, rather than by regulation and requested that Treasury include its prior determination in formal guidance. Additionally, Tribes expressed the importance of additional consultations once guidance is drafted and requested that Treasury and IRS utilize the

expertise of the Treasury Tribal Advisory Committee which statutorily advises the Secretary on matters of taxation.

Request for a Bright-Line Rule: Commenters expressed that overly complicated guidance, such as a subjective test similar to the Integral Part Test, will have the unintended consequence of constraining Tribes because certainty is needed to respond to market opportunities to generate governmental revenue. Tribes require a categorical rule as to the tax status of Tribal entities, and not a case-by-case determination. Without a categorical rule, there will be continuing uncertainty over the tax status of Tribal entities, which negatively impacts the ability of Tribes to plan for and realize economic development opportunities.

Application to LLCs: Commenters requested that Treasury clarify that the common treatment of LLCs as disregarded for federal income tax purposes, also applies to tribally chartered LLCs and their subsidiaries, which are owned by an Indian tribe or Section 17 corporation, regardless of location of business activities. Tribes expressed that assessment of a LLC's tax status should be based on ownership and not a control test. Where Tribes and Section 17 and Sec. 3 corporations are members of an LLC, the membership income received by these entities should also not be subject to federal income tax. Additionally, Tribes requested confirmation that "unincorporated commercial businesses," e.g., businesses operating as a division of the Tribe are tax exempt under Revenue Ruling 94-16.

4. Substantive Priority Requests

Confirm the Exempt Status of Tribal Entities that are Majority Owned or Controlled by a Tribe: The majority of Tribes requested that Treasury issue guidance on both wholly owned Tribal corporations and LLCs and for Tribally chartered entities that are at least 51% owned or controlled by a Tribe. Tribes requested that such Tribal entities be found to be owned and controlled by the Tribe for income tax purposes if they are 51% owned or controlled by a Tribe. As such, Tribal entities who meet this test should be deemed to share in the tax status of the Tribe itself and should therefore be nontaxable for federal income tax purposes. Commenters expressed that the 1996 Treasury Regulation §301.7701-1(a)(3), which provides that "[a]n entity formed under local law is not always recognized as a separate entity for federal tax purposes" constitutes the legal basis for such a finding. Further, Tribes expressed that it should be the purpose, activities, and ownership of the entity, rather than the choice of form or jurisdiction of incorporation which should matter for purposes of federal income taxation. Tribes should have the same tax treatment as entities which are under governmental ownership, because regardless of the choice of corporate form or jurisdiction of incorporation, the tribe still owns and controls the company, sets its policy, determines its leadership, can dissolve the company at any time, and uses the revenues generated by the company for essential governmental purposes.

Tribes expressed that the non-tribal minority owners in such entities would be subject to federal income tax generally on any distributions they receive. Further, where a Tribe has less than majority ownership or control, such as in a partnership, commenters expressed that the profit received by the Tribal owner should still be exempt from tax based on the owner's pass-through status. The non-Tribal owner should be taxed based on their status. In contrast to the majority, a

minority of Tribes requested that guidance come out first on wholly owned corporations a because those were structures held by those Tribes.

Inapplicability of the Integral Part Test: Commenters highlighted that the Integral Part Test should not be applied for Tribal entities because it is cumbersome and results in disparate results because it is calibrated to state and local governments. As described in the responses to Question 1, Tribes highlighted that they rely on commercial activities to generate governmental revenue because they do not have a tax base. As a result, analysis such as whether a governmental entity has the power to tax is not the correct lens for Tribal entities. Further, Tribes highlighted that Congress in the IRA encouraged Tribes to establish business entities that are separate and distinct from the political arm of Tribes, so the Integral Part Test used for state governments does not work for Tribes based on Congressional intent.

Revise Prior Guidance on the Tax Status of Tribally Owned State Chartered Entities: Commenters expressed that the relevant consideration for income tax purposes is not which government created the corporate entity but instead, “what is the tax status of the ultimate owner?” For various business purposes and regulatory considerations, particularly with regard to an “off-territory” business venture, a Tribal government may decide to utilize a state-chartered entity. It should be immaterial for tax purposes that a Tribal government does so if the Tribal government is the sole owner of the state-chartered entity. This is particularly true for limited liability companies which are treated as “pass through” entities for federal tax purposes.

5. Additional Clarifications:

Tribal Entities Owned by Tribal Citizens: Commenters requested that Tribal entities owned by individual Indians should carry the same tax status as the individual Indians, including the preservation of treaty and statutory tax immunities. Commenters highlighted that existing guidance recognizes that individual Indians possess income tax immunity for certain forms of income such as income derived from Tribal lands or income earned from exercising treaty fishing rights. Tribes requested that the Treasury confirm the tax-exempt treatment of tax-exempt income earned by Indians through Tribally chartered entities.

Tribal Entities Owned by Tribes, Tribal Citizens, and Tribal Entities: Commenters explained that increasingly Tribes are engaged in economic development ventures and partnerships with other Tribes, individual Tribal citizens, and other Tribal organizations or Alaska Native Corporations. Commenters expressed that the same principles supporting Tribal sovereignty and Tribal economic development, which provides that income earned by Tribal governments is not subject to income tax, should also apply in each of these three scenarios.

Tax exempt status, foundations and supporting organizations: Guidance on Tribal corporations and other entities should reflect the ability of Tribes to retain 501(c)(3) status and (particularly for health care entities) to establish foundations and supporting organizations per Internal Revenue Code Section 509(a)(3). Section 501(c)(3) status is often necessary for grant eligibility independent of whether the entity itself is subject to tax or in need of an exemption. Foundations are similarly needed to raise revenues to supplement inadequate federal funding for health care. The guidance should retain and/or enhance this flexibility.

Tribal Responses to Consultation Questions

1. What role do Tribally chartered corporations (wholly, majority, or jointly owned) perform for Tribal governments and Tribal economies?

Nation Re-Building and Generation of Governmental Revenue: Regardless of corporate structure, commenters explained that Tribal entities serve the vital role of revenue generation to fund governmental services² because—in contrast to states and local governments—Tribes do not have a tax base due to the impacts of federal policy which include, but are not limited to the following:

- Limited to No Land Bases on which to Levy Property Taxes:
 - the removal of Tribal communities from their homelands which extended past the mid-20th century resulted in many Tribes having no reservation;
 - Tribes with land bases have experienced diminishment of their original reserved lands.
- Inability to Tax Tribal Lands Held in Federal Trust:
 - the federal trust status of existing Tribal lands, which means that Tribes cannot levy property taxes on land held in trust by the Department of Interior.
 - Further, in contrast, to states and counties that similarly have federal lands in their boundaries, Tribes do not receive Payment in Lieu of Taxes to compensate for the loss of taxable land.
- Dual Taxation Results in the Loss of Sales Tax:
 - State and local taxation of commercial sales by non-Indians within reservation boundaries creates the specter of “dual taxation” which forces Tribes to forfeit taxing such activities to retain business on their lands.
- Impoverishment of Tribal Communities Makes Personal Income Tax Infeasible:
 - Federal policy such as forced assimilation which entailed the loss of individual property rights has led to some reservation economies having upwards of 80% unemployment.

Importantly, Tribes also explained that federal policy involving the attempted destruction of their political unit of government, such as through Congressional termination of hundreds of western Tribes in the 1950s-60s, resulted in Tribes still seeking federal restoration until the 21st century. These policies resulted in Tribes having increased governmental service delivery costs to generate revenue to re-purchase their land bases at market rates in order to meet service delivery needs. Relatedly, as a result of the federal policy of dismantling Tribal families through child removal that lasted into the 1970s, Tribal governments bear significant social service costs. Tribal commenters explained that, as a result of the underfunding of the federal trust and treaty responsibility, Tribes have unmet capital needs in excess of \$44 billion each year.

As a result, commenters expressed that Tribal entities are critical to “Nation-rebuilding” which entails reconstructing Tribal economies; creating jobs to raise the socio-economic status of Tribal households and improving the public well-being and economic self-sufficiency of Tribal citizens and their surrounding communities. Of note, because many Tribes have been removed to remote

² Examples of cited government services include a range from housing, health care, elder care, education, child welfare services, social services, public safety; emergency management, and numerous other services.

and rural locations, Tribal citizens living near Tribal homelands primarily depend on Tribal entities for employment opportunities.

Tribal Entities Support Tribal Governance: Commenters strongly expressed that the revenue generated by Tribal entities directly influences their ability to govern, provide for their citizens, and is critical to the “existence and perpetuation of Tribes” as these entities decrease poverty by providing funding for governmental services. Further, Tribal entities are the ideal structure for generation of revenue because Tribal governments have limited assets that they are often reticent to risk for an economic development venture. The various structures available for Tribal entities enable Tribes broadly to:

- minimize the risk to limited Tribal general funds by allowing the Tribe to segregate various businesses and their related liabilities and provide a limited waiver of sovereign immunity;
- supports stabilization of Tribal services by separating government operations, which are subject to political changes, from revenue generation activities;
- can quickly be created under Tribal law, enabling Tribes to access commercial opportunities as they arise;
- conduct operations in a familiar corporate form or in the form of an LLC which streamlines the process for entering into contracts and arrangements with business partners without having to educate those partners on government operations;
- facilitate economic diversification, which is an important factor in the resiliency of Tribal economies; and
- respects the sovereignty of Tribes, by enabling them to structure their revenue generation according to their unique cultural, social, and economic circumstances instead of the laws of another sovereign.

(a) In what ways are Tribally chartered corporations different than a non-Tribal government owned business?

Tribal Entities Generate Revenue for a Public Purpose: Commenters expressed that non-government owned businesses are conducted to generate a profit for a private purpose whereas Tribal entities generate profit for the public purpose of governmental revenue to fund operations and services for the benefit of Tribal citizens. Commenters explained that Tribal entities are similar to the activities of states and local governments that own and operate commercial entities such as lotteries, convention centers, etc., which produce profit for governmental purposes that are subject to the decision-making of an elected body. Relatedly, some commenters analogized Tribal entities to a nonprofit, Section 501(c)(3), economic development corporation because the funds generated underwrites and offsets the costs of government and contribute to the betterment of the public, rather than individual private beneficiaries.

Tribal Entities Are Influenced by Governmental Needs: Commenters expressed that Tribal entities are also different from private sector businesses because governmental ownership means the Tribe retains control of the business operations and is the primary beneficiary and thus has oversight of decision-making. As a result, Tribal entities may have a multitude of interests to balance such as aligning business operations with overall Tribal government goals and priorities, and minimizing negative impacts of such operations, which can impact revenue. For example,

while generating revenue may be a primary goal, developing employment or training opportunities for citizens may also be a goal of a Tribal entity. This may result in the location of business on or near the reservation, rather than locating business (even if more profitable) away from the reservation. In addition, Tribal entities often give greater consideration to the potential impacts to Tribal resources. For example, a Tribal business may be located away from sensitive cultural resources, even if that location may result in higher costs. Similarly, a business may be scaled down to accommodate other Tribal government uses at the same location, impacting potential revenues.

Taxing Tribal Entity Revenue Would Devastate Tribal Economies: Commenters expressed alarm over the impacts of any potential tax of Tribal entities which would result in less governmental revenue to provide services at the expense of the health, safety, and welfare of Tribal citizens. The impact of a tax on a private business has an effect on only the owners and shareholders. In contrast, for Tribes, the impact of tax on governmental revenue has a direct impact on Tribal citizens that are reliant on their governments for services and employment. Tribes also expressed equity concerns over the disparate treatment they would incur if their governmental revenue was subject to tax, but revenue obtained by states and localities remain tax-exempt. Lastly, Tribes expressed that the loss of governmental revenue would increase their reliance on the federal government because they would have no alternative to supplement for the loss of funding. Given the current underfunding of the federal trust and treaty responsibility, it is unlikely federal support would increase—resulting in further impoverishment of Tribal citizens who presently have some of the highest poverty rates of any demographic group in the United States.

(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.

Application of the “Integral Part Test” is Inapposite to Tribal Governments: The majority of commenters expressed concern with application of an “arm of the Tribe” test from the Integral Part Test because adoption of a multi-part test would result in continued confusion and unequal treatment across Tribes, and further stifle revenue-generating and economic development opportunities. Commenters further expressed that there are sound financial, governance and operational reasons to create separation between revenue generation and politics that do not neatly fit in the Integral Part Test. Commenters highlighted that research supports the conclusion that Tribal government economic development is furthered when the functions of governance and business operation are separated. They emphasized that this was the reason why Congress established separate provisions for the organization of Tribal governments and Tribal corporations under the Indian Reorganization Act. Commenters requested a clear, bright-line rule that Tribal entities that are at least majority owned by the Tribe are not subject to federal tax regardless of where the profits are earned.

Tribal Entities Perform the Sovereign Function of Revenue Generation: For Tribes that did affirmatively respond on this question, they expressed that Tribal entities are the “economic arms” of the Tribe and can be classified as political subdivisions or instrumentalities because these entities are (1) used to perform the sovereign function of raising governmental revenue, (2)

are authorized to act on behalf of the Tribe, which includes extension of a Tribe's sovereign immunity; and (3) are subject to the control of the Tribe by virtue of Tribal majority ownership interest.

Tribes Should Not be Limited to the Sovereign Powers Exercised by States: Relatedly, commenters expressed that Tribes do not limit their determination as to whether a Tribally entity is an arm of the Tribal government and/or political subdivision or instrumentality of the Tribe to those activities that are “customarily performed by state and local governments with general taxing powers” as noted by Section 7871(e) of the Internal Revenue Code (the “Code”) pertaining to the Internal Revenue Service’s (“IRS”) definition of an “essential government function”; this definition does not recognize the inability of Tribal governments to generate meaningful revenue through taxes in the same manner as state and local governments. Applying this narrow lens to Tribal governments, in effect, limits the ability of such governments to generate revenue in creative ways not currently implored by state and local governments. For commenters, it is the entity’s control by the Tribal government that should determine the entity’s tax status and Tribes expressed that Tribe should not lose its tax status merely because it performs sovereign acts through a Tribal controlled entity.

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?

The Process to Charter a Section 17 Corporation is Costly & Lengthy: Commenters expressed that chartering a Section 17 corporation is cumbersome and costly because of the lengthy approval process which typically takes between 18 to 24 months. Such a timeline is incompatible with the timeline of most economic development and business opportunities. To incorporate a Section 17 corporation, a Tribe needs to complete a five-step process that entails: (1) submitting a petition to the Secretary of the Department of the Interior to issue a corporate charter; (2) drafting a corporate charter, which describes the organizational framework of the corporate entity; (3) seeking Tribal Council approval of the corporate charter (Tribal leadership may have changed because of the passage of time from the petition); (4) sending the Tribal resolution and approved charter to the local Bureau of Indian Affairs (BIA) office for subsequent approval by the regional BIA office; (5) upon receiving approval from the regional BIA office, the Tribe must ratify the corporate charter which may be different from the original petition because the BIA insists on changes. It is only once the charter is ratified by resolution that the corporation may commence. The multi-step incorporation process for a Section 17 corporation results in significant delays in starting a business and may lead to missed business opportunities. Commenters also expressed that there is no model Section 17 corporate charter, so each section 17 corporation is a case of first impression and may be reviewed by individuals with no corporate experience resulting in further delays.

The Process to Amend a Section 17 or Dissolve is Impractical: In addition to the burdensome and lengthy approval process, commenters expressed that Section 17 corporations require the Tribe to seek Secretary of Interior approval for any amendments to the articles of incorporation or Tribal corporate bylaws. Further, a dissolution of a Section 17 corporation requires an act of

Congress. This is an extremely burdensome component that would prevent a Tribe from being able to make its own decision regarding when to dissolve a wholly owned Tribal business entity and could result in a defunct business entity continuing in existence indefinitely.

The Section 3 Process is Even More Challenging: An Oklahoma Tribe explained that in order to incorporate under the Oklahoma Indian Welfare Act (OIWA), all Oklahoma Tribes “must first incorporate pursuant to Section 3 of the OIWA, 25 U.S.C. § 503.” (Wichita and Affiliated Tribes v. Acting Southern Plains Regional Director, Bureau of Indian Affairs, Docket No. IBIA 13-112, 2015). Section 3 of the OIWA provides:

“[a]ny recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: **Provided, however, that such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote.**” (emphasis added).

For large Tribes, incorporation under Sec. 3 of OIWA is extremely unlikely due to the 30% voter turn-out requirement which is challenging when many Tribes have significantly lower voter turnouts in annual elections.

Federally Chartered Corporations Restrict Tribal Sovereignty: Commenters expressed that Section 17 & Section 3 corporations limit a Tribes exercise of its inherent sovereign authority to generate revenue in culturally customized ways and preferencing federally chartered corporations frames Tribal entities as second class. Tribes also noted that the BIA has certain expectations for the form and structure of a charter when reviewing and deviating from these expectations only serves to lengthen the period of review.

(b) What limitations do Tribes see in these structures that result in chartering under the alternative categories listed in question 3.

Need for Flexibility in Corporate Structure: Commenters explained that there is limited flexibility in the structure of a Section 17 Charter which was adopted based on 1930s expectations of Tribal governments. Tribes also explained that they have limited resources and as a result, often form corporate structures with a holding company with several subsidiaries. Large corporate enterprises become unreasonably difficult to structure using Section 17 corporations because the formation of one Section 17 corporation often takes a full year to form. After taking an entire year to form one company it becomes logistically unreasonable to plan for another year to form each subsidiary within the corporate enterprise. Commenters explained that as Tribes have gotten more sophisticated in their economic development initiatives, the need for more flexibility in corporate structures has become apparent. In contrast to this inflexible structure, a Tribally chartered entity allows for different classes of stock or governance structures and can be created in a day.

Need for Liability Insulation: Commenters expressed that operating multiple Tribal businesses through a single Section 17 Corporation would unfairly expose a Tribe’s business assets to creditors of the Tribe’s other businesses that are operated through the same Section 17 Corporation, as well as present governance challenges as the governing body of the Section 17 Corporation would be overseeing multiple businesses.

Lack of Equity Investment: Commenters highlighted that a Section 17 corporation can only be owned by an Indian tribe, which impairs the ability to raise capital via outside equity partners or investors. As such, this precludes its use in any circumstance where the goal is to bring in outside equity investors or partners in a project – as they are prohibited from owning shares of the Section 17 corporation. Instead, Tribes must often turn to state or tribally chartered limited liability companies, where outside equity investors are sought, or a joint venture is desired to be established. The amount of time and federal oversight required and lack of flexibility has made Section 17 corporations a less desirable choice for tribal economic development matters.

Restricted Uses: Commenters highlighted that the structural limitations of a Section 17 corporation are a barrier to economic development in many instances. For example, under the terms of 25 U.S.C. § 5124, a Section 17 corporation may not lease Tribal land (to a third party) for a period longer than 25 years. That limitation frequently prevents Section 17 corporations from being able to profitably develop Tribal lands for commercial purposes, as sublessees often insist on much longer lease terms to justify substantial investments in improvements. Additionally, Tribes cannot decide to put certain assets at risk in an investment *vis a vis* limited sovereign immunity waivers using a Section 17 corporation.

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);

The majority of Tribal commenters expressed that they primarily use Tribal Corporations and/or a mixture of Tribal Limited Liability Corporations to generate governmental revenue.

Regarding Tribally Chartered Corporations (TCCs), commenters shared the following benefits:

- They support Tribal self-determination by allowing Tribes to generate revenue through structural flexibilities that consider their cultural, community, and priorities.
- They do not subject the Tribe to the laws of a foreign jurisdiction, and are flexible with regard to establishment, changes, and termination.
- They allow Tribes greater flexibility to enter into contracts with other entities by providing limited waivers of sovereign immunity.

Commenters expressed that the primary disadvantages of TCC are the following:

- Difficultly attracting partners and/ or assessing economic viability given the uncertainty

of their federal tax status;

- Non-Tribal parties and lenders are often hesitant to conduct business with Tribes because of an unfamiliarity with TCCs and concerns over sovereign immunity.
 - Note: Many Tribes expressed that their Tribal Corporation Codes increase transparency for outside business parties by demonstrating that these entities are subject to rules and regulations and have dispute resolution options.

(2) Corporations chartered under the law of a State;

Most commenters stated that, as a threshold matter, forming a state-chartered corporation, LLC, or other venture under a state's laws is inconsistent with the Tribes sovereign status and is therefore not an option Tribes typically pursue, absent extraordinary circumstances.

In terms of advantages, Tribes identified that state-chartered corporations are:

- a familiar structure to outside investors and parties.
- compared to federally chartered corporations, they are easier to form and dissolve (but still more complex than Tribally chartered corporations); and
- Tribes may need to form these corporations to access certain funding or build infrastructure.

In contrast to the advantages, commenters highlighted the significant disadvantages of these corporations as follows:

- Tribes would be subjected to another jurisdiction's laws and regulations,
- depending on the jurisdiction, and any mandatory "sue and be sued clauses", a state incorporation may result in a waiver of Tribal sovereign immunity; and
- according to Revenue Ruling 94-16, a state-chartered corporation exposes a Tribe to federal taxation.

Regarding the tax status of these entities, commenters expressed that the prior guidance is in error and should be withdrawn. Tribes expressed that the relevant consideration for income tax purposes is not which government created the corporate entity but instead "what is the tax status of the owner." For various business purposes and regulatory considerations, particularly with regard to an "off-territory" business venture, a Tribal government may decide to utilize a state-chartered entity. It should be immaterial for tax purposes that a Tribal government does so if the Tribal government is the sole owners of the state-chartered entity. This is particularly true for limited liability companies which are treated as "pass through" entities for federal tax purposes.

(3) Limited liability companies organized under Tribal law or State law; and LLCs Organized Under Tribal Law:

Commenters expressed that during the time that the IRS has been reviewing the tax status of Tribally chartered corporations, Tribes have become much more sophisticated in how they structure their business operations. Given the uncertainty surrounding the tax status of TCCs, many Tribes have shifted to organizing various businesses as limited liability companies formed under Tribal law because of these advantages:

- Provide much the same benefits as TCCs;
- gives a Tribe greater flexibility on how the Tribal business will be managed.
- LLCs do not have the same procedural requirements as a corporation such as annual board meetings, recording minutes of the board meetings, having a quorum present at board meetings; and
- while not confirmed by the IRS, Tribes believe that LLCs well-established disregarded tax treatment under 26 CFR § 301.7701-2, provides the legal basis for application of the tax immune nature of the Tribe or a Section 17 corporation as the LLC's parent company/owner.

Notwithstanding the last point, commenters identified that the main disadvantage of Tribally chartered LLCs is that their tax status has not been confirmed by the IRS which impacts their engagements with non-Tribal entities. Commenters strongly urged that any tax guidance confirm that a Tribal LLC has the tax status of its owning Tribal government.

Lastly, as an example of the value of LLCs, a commenter explained that when a new business opportunity arises, they typically establish a new LLC to undertake the venture because the Section 17 process makes it impossible to utilize such a corporation for a new business initiative without long-term planning. In contrast, using an LLC formed under a Tribal LLC ordinance (which can be done same day) is a much easier process. The same holds true when changes are needed to an LLC's Articles of Organization, or when a certificate of good standing might be needed. The Tribe also noted that when a business involves federal contracting, it can be easier to set up the necessary registrations to obtain a UEI³ and SAM.gov using a Tribal LLC, as these systems were not built to accommodate the unique structure of a Section 17 corporation.⁵

LLCs Organized Under State Law: Tribes expressed these entities have the same benefits of state-chartered corporations and are largely not utilized unless required under the circumstances by the 3rd party investor. Relatedly, these LLCs have the same disadvantages as state-chartered corporations and Tribes reiterated concerns that Revenue Ruling 94-16 may expose a Tribal LLC chartered under state law to federal income tax.

(4) Partnerships organized or operating under Tribal law or State law (for example, joint venture partnerships).

Commenters expressed that partnerships and other non-corporate forms organized under Tribal law should be available to Tribes but noted that they are not commonly used because Tribes prefer business entities that provide limited liability to reduce business assets at risk. When they are used, Tribes typically do so for specific reasons such as to access funding for a tax credit or for the expertise of the partner. Overall, commenters requested that Tribes in partnerships not be subject to income tax because the profit they derive is utilized for a governmental purpose and they do not cease to act as a government when engaged in a partnership.

(b) What factors shape a Tribe's decision to charter a corporation as a wholly owned, majority owned, or jointly owned corporation?

³ In 2022, the DUNS numbers transitioned to the Unique Entity ID (UEI).

Commenters expressed that there are a multitude of factors that inform the structure of their revenue generators and many of the considerations are detailed in the “Tribal Business Structuring Handbook⁴.” In addition, Tribes noted that they choose the business structure that best fits the nature of the business or investment being considered and take into consideration the following when making that determination:

- the extent to which the tribe controls the assets, revenues, and leadership of the company as Tribes have a lot at stake because a bad business decision is not just a financial loss, but impacts their whole community;
- the flexibility in formation, amendment, and dissolution to be able to respond to business opportunities;
- the extent to which the entity enables the Tribe to limit liability to protect its ability to deliver governmental services;
- whether the company shares in the Tribe’s sovereign immunity and whether the legal structure subjects the Tribe to taxation or the laws of another jurisdiction which diminish Tribal sovereignty;
- acceptance by outside business partners;
 - (ex. Stock corporations are the preferred choice for many non-Tribal investors and the flexibility of various classes of stock. LLCs can imitate all of these stock features, but these features of LLC membership interests are less well accepted by investors.)
- the need to access specific federal funding available only to certain types of legal entities (ex. Partnerships for tax credits);
- the need to overcome specific barriers, such as a lack of access to capital or expertise may lead to a Tribe offering a minority interest or entering a partnership in order to acquire equity investments.

Overall, commenters emphasized that guidance should not impair or impede a Tribe's ability to structure a business entity in the way that best serves its purposes because Tribes are the best situated to prioritize the economic goals of their communities. The decision to charter a TCC as a wholly owned, majority owned, or jointly owned corporation rests solely with the Tribal government and is an exercise of sovereignty and self-determination.

(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)?

Some Tribes expressed that they do not pursue these types of investments because they prefer total control of their entities. However, a majority of commenters expressed that it is critical that Tribal corporations have access to both debt and equity financing to generate governmental revenues. As noted above, commenters expressed that a non-Tribal investor may be needed because Tribes experience significant access to capital barriers and an equity investor may be providing capital not available through debt financing. Tribes also noted that investor capital is important because the bond market is not a viable alternative. As of May 1, 2023, the volume cap

⁴ Atkinson, K., Nilles, K., (2009). Tribal Business Structure Handbook.

for Tribal Economic Development Bonds (TEDBs) has been extinguished and the restrictions on the issuance of Tribal bonds remain. Treasury's guidance will be important in giving Tribes the ability, through business structuring, to attract private financing. See also, answers to 4 and 5 below in which Tribes also expressed that granting a minority interest may be necessary where an individual has expertise not held by the Tribe. Giving the third-party a percentage interest in the business (as opposed to simply a management agreement) can be intended to incentivize the partner.

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?

Tribes listed the same factors explained question 3(b) regarding the factors that inform the legal entity that Tribes select for generation of governmental revenue.

(b) What are some typical barriers that Tribes face when competing with non-Tribal competitors in the marketplace?

Commenters expressed that the most significant barrier they encounter is uncertainty over the tax status of their business entities, which is not a situation that state and localities experience in the marketplace or in their generation of governmental revenue. Additionally, Tribes noted that:

- Tribes experience significant barriers in accessing capital, this is worsened by lenders lack of familiarity with Tribally chartered corporations and their governing documents;
- due to the limitations on how Tribes hold and control property and the prevalence of trust property in Indian Country, Tribes may lack the ability to use real property as collateral—or may have significant barriers when using real property as collateral.
 - The lack of collateral may deter outside investors from lending to Tribes because lenders will fear that they will not be able to recoup any of their investment if a Tribe defaults on its loan.
- Tribes' revenue is often used to fund vital government programs, limiting the amount of re-investment possible to increase business reach or capacity;
- lenders or partners may be hesitant to deal with Tribes because they fear Tribal sovereign immunity will preclude them from suing the Tribe.
 - Lenders also lack familiarity with how Tribes and Tribal courts operate, which can discourage lending to a Tribe. Tribes have used contract law to agree to limited waivers of sovereign immunity with non-tribal lenders to ease concerns. Other Tribes use minority ownership to attract investors.
- depending on the industry and location of the business, a state license may be needed (ex. for the sale of liquor). Many statutory frameworks in state law do not contemplate the inclusion of Tribally owned entities, so in many cases the Tribe is simply shut out from obtaining a commonly held license or authority to conduct certain types of businesses.

Regarding the lack of access to capital, commenters identified this as the greatest barrier facing Tribes. The largest asset the Tribe may hold is often their land, but if the land is in trust, then the land itself and the assets on the land cannot be used as collateral. This complication often limits a Tribal company's ability to access the capital needed to compete. Banking and bonding entities are often reluctant to work with Tribal entities that do not have a significant track record in the industry of meeting financial obligations. So, often the Tribe must fund most of the initial investment working without outside help. The slow pace of clarification of the Tribal corporations' tax status has led to additional uncertainty which hurts a Tribal entity's ability to compete.

As an example of lender discrimination, one commenter shared that after obtaining their 8(a) status for a Tribal entity and increasing federal contracting, they reached out to a well-known bank in Indian country to inquire about obtaining a line of credit. The bank would only agree to provide the line if the Tribe deposited funds in an amount equal to the amount of the line being requested (which essentially defeats the purpose of the line of credit). In their experience, given the well-known issues related to financing projects in Indian country, it can be incredibly difficult to obtain financing outside of either government supported programs or for casino gaming projects specifically.

(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?

Commenters expressed that people and companies outside of Indian country generally do not understand the unique nature of Tribal governments and Tribal entities. This can lead to confusion about something as simple as a sales tax re-sale certificate (which a Section 17 or Tribal entity generally will not have as a non-state-chartered entity), which can make something as simple as procuring equipment for re-sale difficult. The lack of understanding adds time and cost to what would otherwise be straightforward responses in a non-Tribal context. In turn, this can jeopardize business opportunities, for which the ability to quickly respond and facilitate smooth transactions is paramount.

Additionally, one commenter shared that for businesses that engage in land transactions, a major consideration is whether the Tribe wants its involvement with the company to be publicly known. This is because non-Indian land sellers may impose a "Tribal premium" on the price they are willing to accept for a parcel of land if they know that a Tribe is the prospective purchaser. Because Tribes have been deprived of the vast majority of their traditional land base, purchasing back their own lands near or adjacent to their reservations is a common priority. Landowners in these areas will often take advantage of this fact to increase the price for a prospective Tribal purchaser if it is a Tribal corporation versus a state-chartered entity.

(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?

Commenters re-iterated that a frequent impediment to attracting private investors for tax credits is misapprehension and misunderstanding of a Tribal sovereign immunity. Providing limited waivers of sovereign immunity is often insufficient incentive to assuage an investor's concerns. Non-Tribal competitors do not face this barrier to entry. Therefore, joint ownership in a business form that provides commercially understood protections for liability and capital risks, and known costs of business, is important for Tribes to be able to offer.

One commenter explained that it is developing solar-generated microgrid with energy storage on the reservation with funding from the Bi-Partisan Infrastructure Law and Inflation Reduction Act. To offset microgrid project costs and conserve governmental resources, the Tribe is trying to attract an investor to share the execution risk of development and operation. However, key prospective investors have dropped out of the pool because they do not want to expend the resources required to conduct the due diligence necessary when dealing with an Indian tribe for a project located in Indian country. Nontribal competitors do not face these types of barriers to entry. Therefore, joint ownership in a business form that provides commercially understood protections for liability and capital risks, and known costs of business, is important for Tribes to be able to offer.

With regard to tax credits outside of the Inflation Reduction Act, commenters expressed that because Tribes are not subject to federal income taxes tax credits need to flow to non-federal partners or be allocated to such non-Tribal partners as a partnership allocation. With regard to the New Market Tax Credit (NMTC) program, Tribes expressed that the underlying law takes away much of the decision making of the Tribe and requires that a non-Tribal entity have ownership of a business looking to locate in Indian Country. Tribes also expressed that given the complexity of the NMTC program structure, and the unique considerations requested by investors, it is often easier to utilize a state chartered limited partnership which gives the investors the comfort and security of a known structure sufficient to facilitate their investment in the project. With regard to the program itself, Tribes further explained that the rules, costs, and application processes associated with NMTCs often impede Tribal participation in the program altogether.

Lastly, commenters expressed that if the intent of this question is to imply that if Tribal entities were taxable then they could better utilize tax credits, this implication is wrong. Taking away the general tax-exempt status of an entity so that it can better utilize tax credits is not a fair economic trade and should not be used as a rationale for taxing Tribal entities. "It is like curing the common cold by cutting off someone's head. If the concern is the access to federal tax credits, then make them easier to sell by the Tribe to outside investors."

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?**

The majority of commenters requested that Treasury adopt a 51%-49% bright-line rule that provides that Tribes with a 51% majority stake in a Tribal entity are exempt from federal taxation because that threshold demonstrates that the Tribe has control of the entity. In citing to this standard, Tribes explained that 51% threshold is a general practice and reflected in several government contracting regulations concerning Tribal 8(a)s, Indian Economic Enterprises (“IEE”), and Indian Small Business Economic Enterprises (“ISBEE”).

Commenters also explained that Tribes could maintain control with even less than a majority of ownership such as in a general partnership arrangement. They requested that any new rule should not prevent tribes from maintaining governmental control with less than a majority ownership.

(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?

Commenters expressed that there is no typical threshold. At the minimum, however, they requested that this determination should not be made more complicated for a Tribe than it is for any business owner. Tribes expressed that a 51%-49% bright-line rule would demonstrate a Tribe’s majority control over the Tribal corporation as a majority shareholder. Because a Tribe would be the majority shareholder, a Tribe would be able to elect a majority of members to sit on the board of directors and make other significant decisions as a majority owner. Additionally, a 51%-49% bright-line rule may enhance a Tribe’s access to outside investments while still maintaining a majority ownership stake in the tribally chartered corporation. Commenters strongly urged Treasury to create a bright-line rule that provides a presumption that a 51% ownership of a tribally chartered corporation is Tribally controlled and carries the tax status of the Tribe.

Outside of the presumption, commenters highlighted that there may be instances in which a Tribe chooses to hold fewer seats on the board of directors while still maintaining Tribal government control of the enterprise by other control factors, particularly for partnership structures. Control factors could include approving its governing documents (e.g., articles of incorporation and bylaws) and requiring the entity to provide the Tribal government with periodic reports that hold the entity accountable for meeting certain benchmarks or other goals. Additional, non-Tribal board seats may be required, for example, to obtain outside industry expertise (e.g., members of other federally recognized Tribes or non-Tribal members) or a Tribe is unable to fill all of its seats on the board of directors for other reasons (e.g., size of the Tribe, lack of interest by Tribal members, to establish appropriate checks and balances or separation of power, and more). Accordingly, the composition of the board of directors alone should not determine whether a Tribal government still controls an enterprise it charters and Tribes with less than 51% ownership should be permitted to demonstrate control factors.

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)?

Commenters broadly expressed that control factors of a Tribally chartered entity are subject to the determination of the Tribal government. They emphasized that Tribal leadership have maximum authority to determine entity formation, control, governance, and management. Additionally, they highlighted concerns that the control factors identified in these questions appear similar to the Integral Part Test which they stated should not be the lens for evaluation of Tribal control over their sources of revenue generation. Whether and to what extent the Tribal Council should control the entity is different for each Tribe and a uniform rule requiring some level of legislative control will unnecessarily limit Tribes' abilities to respond to economic opportunities. For example, a disadvantage of forming a Tribal business entity as an unincorporated instrumentality of a Tribal government is that the sovereign status of the Tribe may impact a Tribe's ability to obtain credit and financing for its business transactions if agreements are not enforceable through judicial action. If a Tribe does waive its immunity from suit through a Tribal instrumentality, it may subject its assets to potential liability for the obligations of the Tribal instrumentality. Since there is no separate legal entity conducting business, the assets and obligations of the Tribe are intermingled with the business.

As a result of these concerns, Tribes reiterated the need to have a bright-line rule that adopts a presumption that a Tribe is exercising majority control over a Tribal entity when it has 51% ownership of such an entity.

(a) The Tribal Council (or other legislative body) must approve the entity's:
(1) Articles of incorporation or organization or charter (including amendments);

Commenters expressed that approval of formation documents such as the articles of incorporation or charter of a Tribal entity, and any amendments, are usually subject to approval by a Tribe's governing body or its political subdivision and/or instrumentality that has its delegated authority for this specific purpose. Commenters also explained that Tribes may delegate this authority to an entity they have already chartered under Tribal law (ex. a holding company) in order to create subsidiaries.

(2) Bylaws (including amendments); and

Amongst commenters, there was less uniformity regarding this requirement. Some Tribes expressed that bylaws and amendments to the bylaws are subject to the governing body and/or its political subdivision/instrumentalities approval. In contrast, other commenters expressed that more flexibility may be provided for an entity to amend its own bylaws without governing body approval, where the limitations on the board or management teams' authority is clearly spelled out in the articles. Such a limitation in the articles of incorporation would restrict the ability to make material changes in the operations of the company that are averse to the Tribe.

(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.).

Commenters expressed that Tribal corporate codes, articles of incorporation, and charters address the actions which require governing body, political subdivision, or instrumentality approval and explained that there is no uniformity across Tribes in these standards because of their diversity of needs and structures. For example, the board of directors of the Tribally chartered corporation – like the board of directors in a state-chartered corporation – may be delegated authority for managing and serving as fiduciaries of the corporation and may be best positioned to make decisions regarding major actions of the entity. Overall, Tribes explained that the key evaluation should be whether the Tribe has authorized the entity or its board of directors to engage in certain major actions and has placed limitations on that decision-making.

(4) Decisions regarding the day-to-day operations of the entity’s business.

Commenters opposed requiring a governing body to be involved in the day-to-day operations of a Tribal entity because the purpose of creating a business entity and hiring staff with expertise is to authorize these individuals to make operational decisions, subject to the oversight of a board. The authority of an entity’s staff is not unlimited, as the scope of that authority is subject to rules set forth by the governing body or an entity to which it has delegated that authority. Tribes also noted that because a governing body can change due to electoral politics, Tribes seek stability in their revenue generation which supplies the resources for continuance of governmental services. This is accomplished through delegation of day-to-day decision making to individuals with expertise and a fiduciary duty to the Tribal entity subject to Tribal laws. Lastly, commenters highlighted day-to-day operations for state-chartered corporations and other entities do not require approval by the state or other government entity and are left largely as a design decision in the corporate articles, bylaws, or similar governing documents (ex. operating agreements) and requested that Tribes not be held to a more stringent and impractical standard.

(b) A majority of the entity’s board of directors (or other government body) must be Tribal members.

Commenters strongly opposed this requirement and described it as:

- **Paternalistic:** this standard erodes Tribal sovereign decision-making and assumes Tribes do not possess the judgement to determine what is in their best interest;
- **Problematic:** limits a Tribe’s ability to attract expertise and diverse voices. It would also prevent Tribes from appointing individuals from other Tribes. Broadly, this standard misunderstands that the key decision for control is not the citizenship of a representative, but whether the appointment for the board of directors are subject to the Tribe’s control through direct appointment or delegated authority.
- **Infeasible:** this standard would also be infeasible for many small Tribes, which constitute over 50% of Indian Country, as these Tribes often have less than 500 people, inclusive of elders and children.

(c) The Tribal Council (or other legislative body) has the power to:

Commenters broadly expressed that these decisions should be left to the Tribe to determine as their unique governing structures may make it challenging to have a uniform standard. For example, one Tribe explained that their General Membership has the ability to perform the activities set forth in subsection (c). Other Tribes highlighted that Tribes ordinarily seek to insulate the entities that generate revenue from political interference which can be destabilizing. One Tribe explained that its governing body is subject to annual elections. If the Tribe's revenue generation was subject to significant interference by the governing body, it would cause instability and limit the transfer of institutional knowledge necessary to transact and close revenue opportunities.

In summary, the majority of commenters strongly expressed that Tribes would oppose any rule that included a multi-factor test for Tribal "ownership" or "control" because it is critical that Tribes maintain the greatest flexibility to structure their business operations as they see fit, without being forced into a series of boxes that need to be checked in order to maintain the tax immune status of the entity.

For those Tribes that did respond directly to questions, below are their answers.

(1) Select and remove board directors (throughout the life of the corporation);

Commenters agreed that the ability to appoint a majority of the board of directors, or delegate that appointment to a Tribal political subdivision, instrumentality, or holding company was critical to demonstration of control. Regarding removal, commenters expressed that Tribes ordinarily seek to limit political interference in their sources of revenue generation so ordinarily removal of the board of directors is subject to Tribal control through the procedures laid out in the authorizing documents.

(2) Review the financial and operating records of the corporation;

Commenters generally agreed that the ability to review financial and operating records by the governing body, or its entities that it delegated this authority to, is important.

(3) Approve, or disapprove, all capital and operating budgets of the corporation; and

Commenters generally agreed that the ability to conduct this review is important for the governing body, or its entities that it delegated this authority to.

(4) Receive periodic (for example, quarterly) financial reports from the corporation.

Commenters generally agreed that the ability to conduct this review is important for the governing body, or its entities that it delegated this authority to.

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?

As expressed above, commenters reiterated that Treasury should recognize that in hiring talent to strategically grow and diversify our economies, Tribes need access to the best talent available, including members of any federally recognized Tribe and non-Tribal members. Tribes possess other ways to ensure businesses remain owned and controlled by the Tribe without being forced to adhere to strict guidelines imposed by the federal government in a one-size-fits-all approach.

8. How important to Tribal governments is the use of corporate or partnership subsidiaries in carrying out a business venture?

Commenters expressed that subsidiaries are essential to the diversification of Tribal economies because a subsidiary allows a Tribe to minimize risk to other assets of the Tribe. A Tribe's liability only extends to the assets of the subsidiary. Because a Tribal subsidiary allows a Tribe to minimize the risk to other assets of the Tribe, a Tribe can take calculated risks when pursuing economic development projects. Further, commenters shared that some special federal programs (e.g., SBA 8(a) status), mandate separate subsidiaries. As an example of the importance of subsidiaries, one commenter shared that their:

gaming operations are contained within a dedicated LLC which is itself a subsidiary to our Section 17 holding corporation. The gaming operation currently carries 100% of the debt related to a prior expansion, for which neither the Section 17 or the Tribe itself are ultimately liable (thereby protecting the Tribal resources which run important government programs). Our 8(a) business is also run via a dedicated LLC which is a subsidiary of the Section 17 holding company. This segregates those federal contracting operations from the gaming operations, for example.

Overall, commenters emphasized that subsidiaries are important to Tribal decision making as they enable Tribes to limit liability, control the assets at risk, and compartmentalize the particular business activity to protect governmental revenue streams.

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)?

Commenters expressed that Tribes should not have to file annual documentation to prove the tax-exempt nature of their entities as this is burdensome. Further, given that Tribes are engaged in business operations for the sake of creating revenues to fund Tribal government services, Tribes highlighted that it is very unlikely that a Tribe would simply sell its interest in a business to a non-tribal entity for an economic benefit, rather than wind up the operations. However, in those cases where a Tribe sells its interest to another entity, Tribes expressed that there is an existing

process for this. IRC § 1060 requires disclosure to the IRS of sales and purchases of business assets. Form 8594 is used for this purpose. Tribes expressed that if a Tribal entity's ownership changes to where all or a majority of Tribal ownership is transferred to a non-Tribal entity, then the non-Tribal entity should be responsible for informing the IRS of the change.

Lastly, a transfer of the economic interest in a Tribal entity should be treated differently than the sale of the full interest. For example, many Tribes lack the ability to put up sufficient collateral to secure funding from lenders. As such, the economic interests in a Tribal business enterprise are used as collateral to secure funding from lenders.

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?

Commenters opposed any requirements that Tribal corporate codes mirror or be similar to federal codes or the state codes and explained that Tribes have the inherent sovereign authority to craft their own codes that meet their community's needs. Some Tribes explained that their corporate codes mirror state codes, while others expressed that their codes are significantly different. For example, one Tribe explained that their corporate code also functions as their Tribal entity corporate charter and annual plans must be reviewed by Tribal membership in addition to Tribal leadership. Even where a Tribal code mirrors a state, the compliance often looks different as Tribes do not have large offices to manage corporate filings, similar to what you would see in a Secretary of State's office. Instead, responsibility for review and approval for a new entity may be shared amongst multiple departments in a Tribe.

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?

See answers under the foundational concepts section above. In addition to that feedback, the majority of Tribes requested that the Form SS-4 Application for Employer Identification Number be updated because Tribes currently run into delays when submitting for EINs. Specifically, Tribes expressed that:

- SS-4, Box 9a does not cleanly accommodate Section 17 Corporations, instructions should be provided as to where these entities fit.
- SS-4, Box 9a should be modified, so that a Tribe applying for an EIN not only selects the box "Indian tribal governments/enterprises" but also has a line to identify the affiliated Tribe. This modification will help ensure Tribal businesses are properly classified within the IRS and could be used for a searchable database.
- Section 9b also requires a state or foreign country of organization for corporations, which does not apply to Section 17 or Tribally chartered corporations.
- The IRS's internal EIN processing manuals should be updated to acknowledge Tribal businesses. The addition of "inc.," "comp.," "LLC," or "LLP" in box 1 - Legal name of the entity - should not result in an error, rejection, or request for further information.

Lastly, some commenters also requested that Tribes be permitted to make an S-Corporation election which they explained would reduce the disparity between Tribal entities and state-chartered entities.