



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

October 7, 2024

Via Email

Dear Tribal Leader:

On behalf of the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) (collectively, the Department), I invite you to Tribal consultations on a [Notice of Proposed Rulemaking](#) (“NPRM” or “Proposed Rule”) entitled “[Entities Wholly Owned by Indian Tribal Governments](#)” (REG-113628-21). This proposed rule describes that wholly owned Tribal entities chartered or organized by one or more Tribal Nations would have the Federal tax status of their owning Tribes. This means that these Tribal entities would not be subject to income tax. Further, the proposed rule provides that these Tribal entities would be eligible for Inflation Reduction Act (IRA) tax credits through a payment mechanism known as “elective pay” also commonly called “direct pay.” For background on this proposed rule, please see our [Tribal Consultation Summary and Federal Response](#) and [Tribal Fact Sheet](#).

[You may register for one or more of the Tribal consultations here.](#)

The consultations will be held virtually on December 16, 17, and 18, 2024, from 1:00 p.m. ET, each day. Additionally, the Department will accept written or electronic comments received by January 7, 2025, 11:59 p.m. Alaska Time. Written comments should be sent to tribal.consult@treasury.gov.

A. BACKGROUND

1. Tax Status of Tribal Entities

As a result of Federal policy, Tribal Nations largely lack the same property, income, and sales tax bases as non-Tribal governments. Tribal Nations, therefore, rely on commercial entities to generate governmental revenue and have historically accorded their sovereign privileges and immunities to these entities.

Over the past 30 years, Tribes have requested confirmation that their wholly owned entities chartered under Tribal law (Tribally chartered entities) share their tax status because tax certainty is critical to Tribal economic development. Upon the passage of the Inflation Reduction Act, this question of the tax status of Tribally chartered entities became especially critical as many Tribal Nations began projects owned by Tribally chartered entities. Tribes requested that their entities be eligible for clean energy tax credits that are available to Indian Tribal governments for the first time.

To date, the only regulations addressing Tribal corporations was a 1996 entity classification final regulation that confirmed that Federally chartered corporations under Section 17 of the Indian



Reorganization Act of 1934 and Section 3 of the Oklahoma Indian Welfare Act (collectively, Federally chartered Tribal corporations) are not entities separate from the Tribe for Federal tax purposes. Therefore, they are not subject to Federal income tax on income earned in the conduct of commercial business on or off the Tribe's reservation.¹

In order to obtain Tribal input on the issue, and in accordance with Treasury's Tribal Consultation Policy, the Department held Tribal consultations most recently on June 21 and 22, 2023. The Department also consulted with the Treasury Tribal Advisory Committee (TTAC), which advises the Secretary of the Treasury on Tribal tax matters.

2. Inflation Reduction Act

Under the Inflation Reduction Act, Tribes are eligible for certain clean energy tax credits through a monetization mechanism called elective pay under section 6417 of the Internal Revenue Code (Code). The mechanism requires that a Tribe satisfy the requirements for an underlying energy credit and then claim its applicable tax credit via elective pay. In IRA consultations, Tribes have requested that both Federally chartered Tribal corporations and Tribally chartered entities be eligible to directly claim elective pay when they own the applicable credit property. Under existing elective pay final regulations, Federally chartered Tribal corporations are treated as "disregarded entities" for purposes of section 6417. This then requires that the Tribe—as the owner of the disregarded entity—register and claim its applicable tax credit through elective pay. Tribes shared that this filing process was administratively burdensome and requested the ability for these Tribal entities to directly claim these credits.

B. OVERVIEW OF THE PROPOSED RULE

The NPRM incorporates feedback gathered during the above-described consultations. Below is a summary of key elements of the rule.

1. Preamble Highlights

As described in our [Fact Sheet](#), the NPRM reflects the following support for Tribal sovereignty: **Recognition of the Unique Status of Tribal Economies:** Recognizes that, pursuant to Tribal feedback, Tribal economies are unique and rely on Tribal businesses to generate governmental revenue.

Support for Tribal Sovereignty, Sovereign Immunity, and Self-Determination in Tax Administration: The preamble to the proposed rule describes the Department's recognition, support, and protection of principles of Tribal sovereignty, sovereign immunity, and self-governance that have been repeatedly reaffirmed by the Supreme Court. These commitments reflect the Administration's statement of policy in Executive Order 14112.

¹ 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).



Recognition of Tribal Self-Governance and Inter-Tribal Trade Practices: The proposed rule recognizes that a single Tribe or multiple Tribes would have the right to self-determine their revenue generating entities and charter them under their laws.

Preservation of Tribal Rights Under Other Federal Laws: These proposed rules would address only the application of Federal tax law and would not affect the rights of Tribes and Tribal entities under other Federal laws.

2. Proposed Amendment of Entity Classification Regulations

i. Tax Status of Tribally Chartered Entities

The proposed amendments to the existing entity classification regulations under section 7701 would provide that entities (1) wholly owned by one or more Tribes; and (2) organized or incorporated exclusively under the laws of the Tribes that own them, are not recognized as separate entities for Federal tax purposes. This means that these entities would not be subject to Federal income tax on income earned in the conduct of commercial business on or off the organizing Tribe's reservation. This proposed rule would provide Tribally chartered entities with the same tax treatment as Federally chartered Tribal corporations.

ii. Entities Owned by Multiple Tribes

Where multiple Tribes work together to establish an entity that is owned by more than one Tribe, each Tribe would need to provide for the entity under its own laws. Under these proposed regulations, an entity could satisfy the wholly owned requirement through a multi-Tribe ownership structure, so long as the entity is organized or incorporated under each Tribe's laws. Proposed §301.7701-1(a)(4)(iii)(D) (Example 4) illustrates an example of the organizational structure of such an entity.

iii. No Imposition of an Integral Part Test and No New Reporting Requirements

In response to Tribal consultation feedback, the proposed rule does not impose an integral part test nor any other multi-factor control test. Instead, the preamble notes, determination of whether an outside investor (a person other than a Tribe) holds stock in a Tribal entity would take into account principles of Federal tax law, such as the substance over form doctrine, debt versus equity analyses, and the economic substance doctrine. These principles currently apply to Federally chartered Tribal entities. Further, the proposed rules do not impose any new reporting requirements on Tribally chartered entities.

iv. Reliance and Feedback on Excise and Employment Tax

The proposed rule provides that Tribally chartered entities may rely on these proposed regulations for tax years that precede the date of this NPRM. However, this option would not be



available for any taxable period for a Federal excise tax or employment tax with respect to which the entity was a party to any administrative or judicial proceeding as of the date of this proposed rule's publication.

Further, related to employment and excise tax, the preamble seeks Tribal feedback on the application of this proposed rule to those taxes, including excise tax exemptions.

v. Partially Owned Tribally Chartered Corporations

In response to consultation feedback, the proposed rules describe that the Department continue to consider the Federal tax treatment of Tribally chartered corporations that are owned in part by persons other than Tribes. The Treasury Department and the IRS would conduct Tribal consultation prior to issuing any additional guidance in that area. To date, the Department has not published guidance specifically addressing this question.

C. Proposed Amendments to Elective Payment Regulations

The proposed rule facilitates Tribally chartered entity access to clean energy tax credits. Specifically, it revises the elective payment regulations under section 6417 of the Code to provide that, for the purposes of registering for and claiming elective pay, Federally chartered Tribal corporations and wholly owned Tribally chartered entities would be treated as instrumentalities of Indian Tribal governments.

This means that such Tribal entities that directly own applicable credit property would pre-register and make the section 6417 election itself, rather than through its owning Tribe. The proposed regulations are intended to simplify the pre-filing registration and filing obligations for Tribes and their wholly owned entities and ensure that the amount of any payment or deemed payment made under section 6417 will be commensurate with the amount of the credit that would be otherwise allowable. The preamble also provides that no inferences should be drawn from the instrumentality treatment in proposed §1.6417-1(c)(7) as to whether any particular entity is or is not an instrumentality in other contexts.

Consultation and Listening Session Content

Pursuant to Treasury's [Tribal Consultation and Coordination with Tribal Nations Policy](#), the Department is commencing consultation on this NPRM.

Specifically, Treasury requests assistance of Tribal Leaders, or their designees, in addressing the following topics:

1. The NPRM provides Tribally chartered entities parity with Federally chartered Tribal corporations. What questions or comments do you have regarding this proposed rule?
2. The NPRM recognizes that Tribally chartered entities are not recognized as separate from their owning Tribe(s) for Federal tax purposes.



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- a. How should this impact employment and excise tax? Should Tribally chartered entities remain separate for excise and employment tax liability?
 - b. Should Tribally chartered entities be able to assert the excise tax benefits of their owning Tribes?
3. The NPRM contains examples describing how the proposed rule would operate. Do you have comments about these examples? Should the Department include more examples, and if so, what topics should be addressed?
 4. The NPRM explains that Tribes may rely on these rules for tax years that precede the date of the NPRM except for limited circumstances. What questions or comments do you have regarding this reliance proposal?
 5. The NPRM explains that these proposed rules do not address Tribally chartered corporations that are partially-owned by persons other than Tribes and that additional guidance on this topic will be subject to Tribal consultation. What questions or comments do you have about this statement in the NPRM?
 6. The NPRM explains that Tribally chartered entities would be eligible for certain clean energy tax credits through elective pay. For the limited purpose of reducing administrative burdens, the NPRM would allow certain Tribal entities to be treated as an instrumentality of an Indian Tribal government. What questions or comments do you have regarding this proposed rule?
 7. What other questions or comments do Tribes have regarding this NPRM?

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

In addition to Tribal consultation, Treasury is accepting written or electronic comments received by **January 7, 2025, at 11:59 p.m. Alaska Time**. Written comments should be sent to tribal.consult@treasury.gov.

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

We will send out an agenda and a list of registered speakers before the consultation.

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



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Sincerely,

Chief Lynn Malerba
Treasurer
U.S. Department of the Treasury