

U. S. Department of the Interior  
Assistant Secretary—Indian Affairs  
Office of Indian Energy and Economic Development  
Division of Economic Development

Tribal Economic Development Principles at a Glance Series

# Choosing a Tribal Business Structure



*This is the fourth in a series of economic development primers produced by the Division of Economic Development (DED), Indian Affairs Office of Indian Energy and Economic Development (IEED), to offer answers to fundamental questions about creating jobs and expanding economies in tribal communities.*

*Nothing in this primer is intended, nor should it be relied upon, as legal advice. Rather, it is meant to assist tribal governments in organizing a new businesses by providing an overview of basic tribal business structures, better equipping them to work with legal and tax professionals.*

*If you would like to discuss tribal business structures in more detail, please contact the Division of Economic Development at (202) 219-0740.*

## What is a tribal “business structure”?

Tribal “business structure” refers to the form a tribally (as opposed to an individual) owned business takes and under whose laws it will be organized. Tribal businesses can be formed through a federal charter under Section 17 of the Indian Reorganization Act (IRA), as a corporation chartered under tribally enacted laws, under a state’s incorporation laws, or as a limited liability company (LLC) organized under either a tribal code or state law.

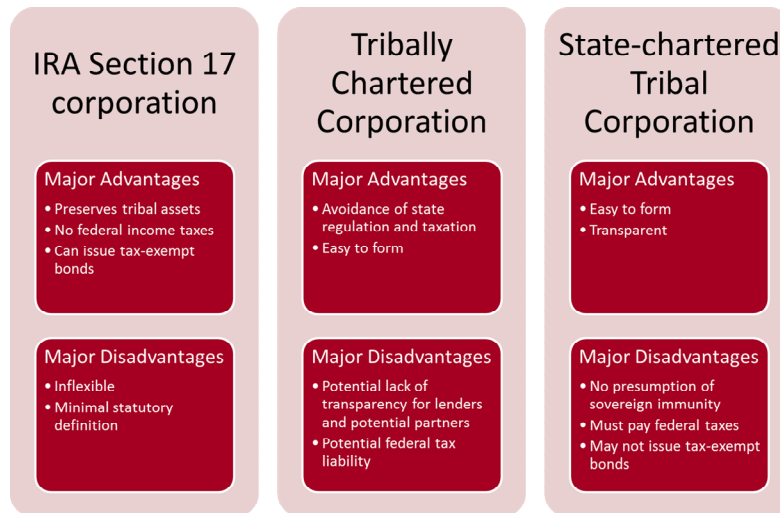
## Why is the selection of a tribal business structure important?

Determining whether a tribal business should be organized under tribal, federal, or state law will have consequences with respect to tax liability, preservation of tribal assets, and transparency of corporate information for potential creditors, investors, and joint venture partners, regulators, and customers.

## Does the Office of Indian Energy recommend any particular tribal business structure over another?

No. IEED is not authorized to offer legal advice. The choice of tribal business structure is a decision for the tribe to make in consultation with its attorneys and tax advisers.

Since each tribe’s circumstances, needs, time restrictions and objectives differ, no single structure may fit all situations.



## What is an IRA Section 17 corporation?

Congress created this tribal business structure when it passed the Indian Reorganization Act of 1934 (IRA).<sup>1</sup> In authorizing this structure, Congress sought to, "permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations."<sup>2</sup>

<sup>1</sup> 25 U.S.C. § 5124.

<sup>2</sup> S. Rept. No. 1080, 73d Cong., 2d Sess. 1 (1934).

## What are its major advantages?

- 1) Preserves tribal assets: A Section 17 corporation is wholly owned by the tribe, but is separate and distinct from the tribal government. If the corporation defaults on the payment of funds it has borrowed, only the corporation's property and assets are at risk. Sovereign immunity removes any tribal government property and assets from risk during a default.
- 2) No federal income taxes: Guided by federal court decisions,<sup>3</sup> the IRS has ruled that Section 17 corporations are not required to pay federal income taxes whether they are operated on or off the reservation.<sup>4</sup> By IRS regulation, "tribes incorporated under section 17 of the Indian Reorganization Act of 1934 are not recognized as separate entities for federal tax purposes."<sup>5</sup> Since tribes are not subject to federal taxation, and IRA Section 17 corporations are not considered separate from them, they enjoy federal income tax immunity as well.<sup>6</sup>
- 3) Can issue tax-exempt bonds: Section 17 corporations can issue these debt instruments if the proceeds are used to finance essential governmental services.<sup>7</sup>

## What are its major disadvantages?

- 1) Inflexible: An IRA Section 17 corporate charter cannot be dissolved or suspended except by an act of Congress. It also cannot be amended without approval from the Secretary of the Interior.
- 2) Minimal statutory definition: Corporations exist to facilitate the economic well-being of communities and nations. This is accomplished by creating standards that govern the relationships between business entities. States promulgate laws governing all aspects of the formation, management, operations, and dissolution of state-charted corporations.<sup>8</sup> By contrast, Section 17 corporations are established under the authority of 25 U.S.C. § 5124, which is a single paragraph of text. The absence of comprehensive corporate statutes may increase litigation risk and make prospective business partners hesitant to enter into contracts with Section 17 corporations.

<sup>3</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, n.13 (1973).

<sup>4</sup> Rev. Rul. 94-16; 1994-1 C.B. at 20; citing *Mescalero Apache Tribe*, *supra*.

<sup>5</sup> 26 C.F.R. §301.7701-1(a) (3).

<sup>6</sup> Rev. Rul. 94-65; 1994-2 C.B. 14.

<sup>7</sup> 26 U.S.C. § 7871(c) (1).

<sup>8</sup> E.g., Title 8, Delaware Code Ann; 8 Del. C. § 101 ff. Chapter I of Title 8, covering "General Corporation Law," consists of approximately 195 sections in 18 subchapters.

## **What powers can be included in the charter of an IRA Section 17 corporation?**

Section 17 describes the powers that may be conferred on a corporation by its charter. An IRA Section 17 corporation is only authorized to exercise the powers specified in the corporation's charter. These include the power to buy and sell real property including "the power to purchase restricted Indian lands" – a right otherwise held exclusively by tribes. Section 17 corporations may also be empowered to enter into leases or mortgages of tribal land for a term of 25 years and to enter into contracts and agreements.<sup>9</sup> This can be done without the approval of the Secretary of the Interior, who must normally approve any "agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years."<sup>10</sup> Section 17 corporate charters may also confer "such further powers as may be incidental to the conduct of corporate business."<sup>11</sup>

## **What is the process for setting up an IRA Section 17 corporation?**

In order to establish a Section 17 corporation, the IRA requires that a tribe submit to the Secretary of the Interior a resolution adopted by its tribal council petitioning for the issuance of a Federal Charter of Incorporation (charter).<sup>12</sup> However, in 2003, the Secretary's power to approve and issue corporate charters was delegated to the Bureau of Indian Affairs (BIA) regional offices. Therefore, a tribe should submit to the appropriate BIA regional office a resolution petitioning for issuance of a charter, accompanied by a proposed charter, which is typically prepared by the tribe's attorney. The proposed charter, which is similar to articles of incorporation, should set out in detail the business's purpose, how the business will be managed, when and how meetings will be conducted, what its powers and limitations will be, and other pertinent operational and structural information. The regional director of the receiving regional office will review these submissions to ensure that the resolution was duly adopted in accordance with tribal law and that the charter contains no provisions contrary to federal law. Then, the regional director will sign and submit to the tribe a Certificate of Approval. The tribal council must then pass another resolution to ratify the charter. When that resolution is enacted, the corporation will officially come into being.

<sup>9</sup> 25 C.F.R. §§ 84.004(b) and § 84.004(f).

<sup>10</sup> 25 U.S.C. § 81(b).

<sup>11</sup> 25 U.S.C. § 5124.

<sup>12</sup> 25 C.F.R. § 83.2.

## **May tribes in Oklahoma incorporate businesses under IRA Section 17?**

No. Tribes in Oklahoma must incorporate instead under Section 3 of the Oklahoma Indian Welfare Act.<sup>13</sup> Similar to an IRA Section 17 corporation, an Oklahoma Section 3 corporation is not subject to federal income taxation no matter where it does business.

## **Can a tribe that voted to reject the Indian Reorganization Act form an IRA Section 17 corporation?**

Yes. When first enacted, Section 17 of the IRA permitted only those tribes that had adopted an IRA Section 16 constitutional amendment to organize IRA Section 17 corporations. It further required the tribe to conduct a referendum vote of the full membership in order to approve a Section 17 Federal Corporate Charter. However, Congress in 1990 removed both of these requirements.

## **Who manages an IRA Section 17 corporation?**

A Section 17 corporation's charter must set out the details of how, and by whom, the corporation is managed. Typically, the corporation is managed by a board of directors, the members of which are appointed by the tribal government. The board operates in accordance with the federally approved charter.

## **May an IRA Section 17 corporation set up subsidiary corporations?**

Yes. However, the specific authority to set up a subsidiary corporation would have to be contained in the charter approved by the Secretary of the Interior.

## **May an IRA Section 17 corporation sell stock to the general public?**

No. Shares cannot be sold or devised, even to tribal members, except under certain conditions.<sup>14</sup>

## **Can a Tribe obtain a Certificate of Good Standing for an IRA Section 17 corporation?**

Yes. If an IRA Section 17 corporation has been duly organized and Congress has not rescinded its charter, a Certificate of Good Standing may be obtained for that business from a BIA Regional Director by sending a request to the BIA regional office that services the specific Tribe.

<sup>13</sup> 25 U.S.C. § 5203.

<sup>14</sup> *Id.* at § 5107.

## **What is a tribally chartered corporation?**

A tribally chartered corporation is an entity organized pursuant to a tribal code or resolution

## **What is the process for organizing a tribally chartered corporation?**

If the chartering tribe has enacted a business corporation code, this will often spell out precisely what must be included in the business's articles of incorporation and by-laws. On the other hand, if the tribal council has adopted a resolution authorizing the tribally chartered corporation with no further details, organizers of the corporation must create their own articles of incorporation and by-laws. In most cases, the tribal government will issue a "certificate of incorporation" to the organizers of the tribally chartered corporation it has approved.

## **What are the major advantages of a tribally chartered corporation?**

- 1) Avoidance of state regulation and taxation: A tribally chartered corporation doing business on Indian land whose stock is owned by Indians will not be subject to state control or taxation.<sup>15</sup> However, if the tribally chartered corporation conducts business outside of the reservation, it should be aware that some states may require it to register with them as a "foreign corporation" as they do for all other out-of-state corporations operating within them.
- 2) Easy to form: This kind of corporation is formed by the tribal government, the same body that enacted the ordinance, business corporation code or resolution that authorized its formation. No approvals need be obtained from the federal government or state authorities.

<sup>15</sup> *Cohen's Handbook of Federal Indian Law* §8.06 (2012 edition).

## What are the major disadvantages of a tribally -chartered corporation?

- 1) Potential lack of transparency for lenders and potential partners: Lenders and potential business partners conducting due diligence research on a business incorporated in a state can easily obtain information about it online or from other sources. This is due to the fact that a state-chartered corporation is required to regularly disclose and update operational information to be displayed on the state’s secretary of state website. However, since a tribal business corporation code may not have a similar requirement, tribally chartered corporations may find that they have more trouble accessing capital and attracting joint venture partners as a result.

One possible solution is for a tribe to set up its own business corporation website and impose on its tribally chartered corporations the same disclosure requirements states impose on the corporations they charter.

- 2) Potential federal tax liability: The IRS has not promulgated precise guidance on the limits of federal tax immunity for tribally chartered corporations. However, because tribes are exempt from federal taxation, the IRS will exempt from taxation tribally chartered corporations that operate as an “integral part” of the tribe. Factors it will consider in making this determination may include the extent to which the tribe controls, funds and shares in the profits of the corporation; selects its board of directors; enacts uniform rules to govern the corporation; requires the corporation to provide regular financial reports to the tribe; chooses an independent accounting firm to audit the corporation; and whether it can revoke the corporation’s charter and/or fire its board members at will.<sup>16</sup>

## Who manages a tribally chartered corporation?

The tribe’s business corporation code, if one has been adopted, should identify what forms of corporate management are possible. The corporate charter will specify the management structure to be employed by the corporation. Generally, tribally chartered corporations are run by a board of directors elected by the corporation’s shareholders and, often, the sole shareholder is the tribe. The board, in turn, selects an executive to oversee the corporation’s day-to-day operations.

<sup>16</sup> PLR 200112013 (December 14, 2000).



## May a tribally chartered corporation issue tax-exempt bonds?

Only tribal governments can issue tax-exempt bonds in order to fund facilities that fulfill an essential governmental function.<sup>17</sup> Therefore, a tribally chartered corporation may only be allowed to issue these instruments where the IRS can find that it operates as an “integral part” of the tribal government and where these debt obligations are only used to finance government-related facilities.<sup>18</sup>

## What is a state-chartered tribal corporation?

A “state-chartered” tribal corporation is a corporation wholly or partially owned by a tribe and that is organized under state law.

## What are the advantages of a state-chartered tribal corporation?

- 1) Easy to form: Organizers of the corporation need only follow formation procedures detailed by the state in which they wish to incorporate. Usually, this involves filing articles of incorporation, though requirements may differ from state to state.
- 2) Transparent: Creditors and potential partners can easily conduct due diligence research on a state-chartered corporation because filing information and updates can be obtained online or from other sources.

## What are the disadvantages of a state-chartered tribal corporation?

- 1) No presumption of sovereign immunity: Tribes enjoy sovereign immunity, i.e., they cannot be sued in federal court without their permission. However, this is not generally the case for tribal corporations chartered by states. Only under narrow circumstances – where the state-chartered tribal corporation is clearly an alter ego (or arm) of the tribe and operating exclusively on the reservation – is it likely to be accorded sovereign immunity.<sup>19</sup>
- 2) Must pay federal taxes: Tribes are not liable for federal taxes, but state-chartered tribal corporations *are* liable, “regardless of the location of the activities that produced the income.”<sup>20</sup>
- 3) May not issue tax-exempt bonds: This kind of corporation is not an “integral part” of the tribe and, therefore, cannot issue or use these debt instruments.<sup>21</sup>

<sup>17</sup> 26 U.S.C. §7871 (c)

<sup>18</sup> PLR 9826005 (June 26, 1998).

<sup>19</sup> See *Uniband, Inc. v. Comm'r*, 140 T.C. No. 13; 2013 U.S. Tax Ct. LEXIS 14 at \*37.

<sup>20</sup> Rev. Rul. 94-16, 1994-1 C.B. 19.

<sup>21</sup> *Id.*

## **Must a state-chartered tribal corporation pay state taxes?**

It is difficult to generalize with respect to a state-chartered tribal corporation's immunity from state taxation. Courts have ruled, variously, that state law will less likely be permitted to apply to on-reservation conduct involving only Indians and where the state's regulatory interest is minimal<sup>22</sup>; while other courts have ruled that, even on reservations, state laws may apply unless doing so would interfere with tribal self-governance or a right conferred or reserved by federal law.<sup>23</sup> Still others have determined that a state may tax state-chartered corporations because they are entities separate from tribes.<sup>24</sup>

## **What is a state-law limited liability tribal company (“state-chartered tribal LLC”)?**

State-chartered Limited Liability Corporations are generally similar to state-chartered C Corporations. Consult your attorney for guidance on which corporate form better suits your tribe's needs and circumstances.

<sup>22</sup> See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

<sup>23</sup> See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

<sup>24</sup> See *United States v. Tax Commission of Mississippi*, 535 F.2d 300 (5th Cir. 1974).



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