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Transmitted Electronically
To tribal.consult@treasury.gov

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The Honorable Chief Lynn Malerba
Treasurer of the United States
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Chief Malerba,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments to Treasury in response to the Tribal consultations held on June 21, and 22, 2023 on the tax status of Tribally chartered corporations (TCCs). For well over two decades, Treasury and the Internal Revenue Service (IRS) have stated their intent to issue formal guidance on the tax status of TCCs but have not done so. USET SPF commends Treasury for finally seeking comments and launching this effort to clarify the tax status of TCCs as this issue has long stifled the economic progress of our Tribal Nations and our further pursuits and priorities of Nation rebuilding. This has also recently become a central issue in the consultations and discussions surrounding elective/direct payment of certain applicable tax credits authorized by the Inflation Reduction Act. As discussed in detail throughout our comments, USET SPF urges Treasury to issue guidance affirming that TCCs (whether wholly, jointly or majority owned) share the same tax status as the Tribal government, and therefore, are not subject to federal tax on earned income regardless of the location where that income is earned.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

^[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

Treasury Guidance Clarifying that TCCs Share the Tax Status of the Tribal Nation Would Remove an Important Barrier to Revenue Generation and Economic Development in Indian Country

Uncertainty regarding the tax status of TCCs is one of the federal policy barriers faced by Tribal Nations as we seek to build our economies and generate our own governmental revenues. As we stated in our 2022 USET Sovereignty Protection Fund publication, "Marshall Plan for Tribal Nations":

"Historic and modern federal policies have created barriers and inequities for Tribal Nations' attempts to rebuild and grow our own economies, as well as generate our own government revenues. Today's federal economic policies continue to fail to support Tribal Nations' modern efforts to revitalize our economies. The hampering of Tribal Nations' abilities to generate Tribal government revenues has compounded the harms done by the United States' failure to fully fund its trust and treaty obligations..."²

Most Tribal Nations in the United States continue to endure a long history of asset deprivation, colonization, forced removal, war, loss of our homelands, and restricted access to traditional lands and resources, which has pushed Tribal Nations "into a near-assetless state for at least a century."³ The many consequences of this sustained economic deprivation persist to this day. 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.⁴ Some Tribal Nations have succeeded in producing economic growth and improved per capita incomes in the past few decades by employing self-determined economic development approaches. Even so, estimates indicate that at current rates of growth the per capita income of Tribal citizens will not achieve parity with the rest of the United States for at least four more decades.

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, Tribal Nations lack the resources to invest in building the essential physical and human infrastructure necessary to attract the capital investment needed for Tribal economies to compete in the regional, national, and global marketplace. By clarifying the tax status of TCCs, Treasury would take a critical step in reversing some of the harms caused by the federal government's failure to adopt economic growth policies that enable Tribal Nations to create conditions to build our economies on a broader scale.

Tribal governments are different than other governments in the federal system in that they do not have a significant tax base. Given the United States' failure to fully fund its trust and treaty obligations, and reflecting Tribal Nations' commitment to self-determination, it is essential that Tribal governments generate revenues for programs and services by establishing corporations, limited liability companies, and other business structures to engage in economic development. Although these Tribally owned entities function like commercial enterprises in the marketplace, their purpose is to generate revenues to enable program and service delivery to Tribal citizens.

² United South and Eastern Tribes Sovereignty Protection Fund, *Marshall Plan for Tribal Nations: A Restorative Justice and Domestic Investment Plan*, 2022. <https://www.usetinc.org/wp-content/uploads/2022/11/USET-SPF-Marshall-Plan-for-Tribal-Nations.pdf>.

³ *Id.*, quoting Native Nations Inst., *Access to Capital and Credit in Native Communities* 5 (2016), https://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf.

⁴ BD. of Governors., Fed. Rsrv., *Growing Economies in Indian Country: Taking Stock of Progress and Partnerships* 3 (2012), <https://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>.

Existing Treasury Guidance Relating to Tribal Businesses is Limited and Ineffectual

Tribal Nations require new and authoritative guidance from Treasury that supports and promotes our sovereign authority, assists us in providing for our Tribal citizens, and helps us restore our economies. Tribal Nations should no longer be treated differently than state and local governments that regularly engage in business activities to fund their citizen programs and services (such as golf facilities, convention facilities, and the like) which the IRS deems exempt. Indeed, the unique government-to-government and trust relationship that Tribal Nations have with the federal government demands that the solution not limit, in any way, but rather expand the tax exemption for Tribal economic activity.

IRS guidance, to date, as it relates to Tribal government businesses has recognized exempt status only in limited and confining circumstances. In Revenue Ruling 81-295, the IRS ruled that Section 17 corporations shared the immunity from federal income tax enjoyed by Indian tribes themselves. That ruling was reiterated in Revenue Ruling 94-16, though in the ruling, the IRS also determined that a Tribally owned corporation chartered under state law was not exempt from federal corporate income tax. For Section 17 corporations, both rulings essentially applied the reasoning set out in 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 . . . tribes incorporated under Section 17 of the Indian Reorganization Act . . . are not recognized as separate entities for federal tax purposes." This reasoning is sound, and it should apply to TCCs that serve Tribal purposes; TCCs should not be treated as separate entities from the Tribal government for tax purposes.

The IRS appeared to recognize this logic when, after the 1994 revenue ruling, it 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 that created them, notwithstanding their separate corporate status, and were thus entitled to share in each Tribal government's tax immunity. For example, in IRS. Priv. Ltr. Rul. 200148020 (November 30, 2001), the IRS concluded that a Tribally chartered college was an integral part of the Indian tribe that created it. The ruling looked to "the Indian tribe's . . . degree of control over the enterprise and the Indian tribe's . . . financial commitment to the enterprise." It identified eight factors that it viewed as pertinent to its determination: (1) the Indian tribe's power to appoint and remove directors; (2) Tribal representation on the board; (3) Tribal action to establish the entity to conduct business on Tribal land, and Tribal control over its activities; (4) Tribal power to terminate the entity; (5) the Indian tribe having the sole proprietary interest in the entity; (6) the entity's obligation to remit profits to the Indian tribe; (7) the entity's obligation to submit financial reports to the Indian tribe; and (8) Tribal control over audits of the entity.⁵

The IRS, however, declared a moratorium on private letter rulings raising the "integral part" test in 2007. This moratorium has prevented Tribal governments from ensuring that a TCC is not considered a separate taxable entity. That said, USET SPF does not advocate for the resurrection of the integral part test for evaluating the tax status of TCCs. The integral part test is cumbersome and results in disparate and uneven results, and it does not go far enough to provide the certainty that Tribal governments require to secure revenue for the benefit of their citizenry. Tribal Nations require a categorical rule as to the tax status

⁵ See also I.R.S. Priv. Ltr. Rul. 200112013 (March 23, 2001); I.R.S. Priv. Ltr. Rul. 200409033 (February 27, 2004); I.R.S. Priv. Ltr. Rul. 199909013 (March 5, 1999) (in which the IRS upheld the "integral part" status of an enterprise created by a Tribal government for the purpose of managing Tribal property and acting as the Tribal government's business arm, on the grounds of the Tribal government's power to remove directors and terminate the existence of the enterprise, the Tribal government's substantial financial stake in the enterprise, and the substantial rights to its profits, and the absence of any private ownership of the enterprise).

of TCCs, and not a case-by-case determination. Without a categorical rule, there will be continuing uncertainty over the tax status of TCCs, which negatively impacts the ability of Tribal Nations to plan for and realize economic development opportunities.

Similarly, the tax-exempt status of Section 17 corporations does not provide Tribal governments with a productive vehicle for economic development. Although Revenue Rulings 81-295 and 94-16 and Treasury Regulations § 301.7701-1(a)(1)(3) provide clarity on the tax consequences for Section 17 corporations, these federally chartered entities lack the flexibility and agility needed when Tribal Nations seek to seize economic opportunities. The process of adopting and amending the charters of federally chartered Section 17 corporations is cumbersome, time consuming and often precludes Tribal Nations from nimbly capturing economic opportunities. Further, the structural limitations of Section 17 corporations 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.

We submit there is sound and sufficient legal authority and reasoning to align the tax treatment of TCCs with that of Section 17 corporations. The legal and policy underpinnings for exempting economic development corporations from tax under 26 U.S.C. § 501(c)(3) may also provide a rationale for exempting TCCs from tax. Further, there is constitutional and treaty support for exempting Tribal government economic development activity from taxation. More to the point, the sovereign authority of Tribal Nations to engage in whatever business necessary to provide for their citizens should not be undermined by either the lack of Treasury guidance or issuance of restrictive guidance. Further, outside of the context of Tribally chartered entities, the IRS has long recognized that sole proprietorships, partnerships, S-corporations, and limited liability companies are not to be taxed at the business entity level. Instead, these businesses possess “pass through” tax treatment and are taxed at the ownership level. The same principle should apply to Tribally chartered entities.

Tribal governments have become increasingly sophisticated in the structuring of business operations and transactions. Some Tribal governments have created not just corporations and limited liability companies, but general codes allowing the general public to obtain such a corporate entity for purchase.⁶ Other Tribal governments have utilized Section 17 corporations in conjunction with TCCs, with Tribal entities as subsidiaries, and others have utilized Tribally chartered entities as pooled investment instruments with non-Indians to share equity participation and corresponding economic benefit. Policy must favor maximum flexibility and support for Tribal Nations through the utilization of Tribally chartered entities. Treasury and IRS must uphold its trust and treaty obligations and align the tax treatment of our TCCs in a manner that empowers and supports the advancement of our economic development priorities. Tribal Nations have established TCCs for the sole purpose of rebuilding our Tribal economies and advancing our economic priorities for Nation rebuilding to support the economic and social well-being of our citizens and communities.

Responses to Treasury's Tribal Leader Letter Questions

USET SPF provides the following responses to questions 1, 3, and 11 in Treasury's Dear Tribal Leader Letter—

⁶ See *e.g.*, MILLE LACS BAND STATUTES ANNOTATED, Title 16 Corporations, § 1102 (“One or more natural persons of full age may act as incorporators of a corporation by filing with the Commissioner articles of incorporation for the corporation.”).

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

Federal, state, and local governments impose taxes to generate the revenues needed to fund operations and provide services. Income and property taxes are major sources of tax revenue for other governments. Indian tribes, however, generally cannot or do not impose either income or property taxes for various reasons. Instead, most Tribal governments establish TCCs generate revenue to fund operations and provide services to our Tribal citizens through the business activities of TCCs and other Tribally owned business entities. Even so, Tribal Nations have unmet capital requirements in excess of \$44 billion each year.⁷ Further, we constantly have to contend with issues of dual taxation where state and local governments attempt to impose taxes on certain business operations on Tribal Lands. This can often deter outside investment in business and economic development ventures on Tribal Lands.

It is important to also recognize that Tribal Nations play increasingly important roles as drivers of regional and rural economies. For example, the Seneca Nation of Indians has reported an annual economic impact in New York state of \$1.1 billion and has created nearly 5,600 jobs and paid \$313.4 million in wages.⁸ Additionally, the Nation's 6,052 vendors have contributed an annual spending of \$498.5 million overall, with \$216.4 million going to western New York, \$33.6 million outside western New York, and \$248.5 million outside of New York state.⁹

USET SPF urges Treasury to recognize that the economic activity of these TCCs directly influences our ability to govern and to provide for our citizens' well-being. Uncertainty as to the tax status of TCCs, however, undermines their utility and effectiveness. Clarification that TCCs share the same tax status as the Tribal government would be of great benefit to Indian country at large.

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

Non-government owned businesses are conducted to generate a profit for the owners. At least one business theory, the Friedman Doctrine,¹⁰ holds that the goal of a business entity is to increase profits and maximize shareholder returns. If successful, this will generate individual or family wealth for a relatively small number of individuals. TCCs, however, generate revenue to fund necessary Tribal government operations and advance the economic progress and Nation rebuilding efforts of our Tribal Nations. Revenue generated from business operations help address the unfilled trust and treaty obligations of the federal government to fully fund Indian programs and services. Although TCCs have been established to generate revenues to meet these federal funding shortfalls, they should not replace the federal government's trust and treaty obligations to Tribal Nations and should instead complement our efforts to rebuild our Tribal economies and contribute to the betterment and well-being of our Tribal Nations and citizens.

⁷ Serena Loftus, Sarah Shonka McCoy, & R.Z. Zhang, *Native American Governments' Borrowing Costs: Evidence from Municipal Bond Markets*, The Brookings Institution, page 3, (July 2022) www.brookings.edu/wp-content/uploads/2022/06/Loftus-et-al_2022-7-10-LMZ.pdf.

⁸ See Stand with Seneca, <https://standwithseneca.com/>.

⁹ *Id.*

¹⁰ *Friedman doctrine*, Wikipedia, (July 24, 2023, 11:50 AM), https://en.wikipedia.org/wiki/Friedman_doctrine.

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.

This question underscores the concerns we raise above in our opening comments. Tribal Nations should not be required to form businesses in such a way that they will be considered an instrumentality or arm of the Tribal government. There are sound financial, governance, and operational reasons NOT to set them up that way. Therefore, TCCs are typically established as distinct from the Tribal government but should share the same tax status as the Tribal government for reasons described previously.

Question #3. Tribal governments may charter a business under federal, state, or Tribal law and subject to such laws Tribal governments may consider a variety of structures, including but not limited to wholly owned, majority owned, and jointly owned corporations?

3(a)(1). What advantages and disadvantages exist for corporations chartered under Tribal law (TCCs)?

An important advantage of TCCs is that they can be quickly and easily created by the Tribal Council. This allows for the opportunity to seize business opportunities quickly and thereby promotes the Tribal Nation's economic growth. The primary disadvantage is that the tax status of such entities is not clear, which further necessitates that guidance be issued to ideally address.

3(a)(2). What are the advantages and disadvantages of corporations chartered under State law?

The primary disadvantage of a state corporate entity owned by a Tribal government is the prior IRS guidance that the income of such an entity is subject to income tax. This guidance is in error and should be withdrawn. If a state chartered entity is wholly owned by a Tribal Nation, then the entity should have "pass through" tax treatment.

3(a)(3). What are the advantages and disadvantages of limited liability companies organized under Tribal or State law?

Limited liability companies are a superior business development tool, and the IRS should develop clear guidance governing their tax immunity if wholly owned by a Tribal government. The primary disadvantage is the concern that a wholly owned state LLC may somehow be subject to federal income tax, even though by definition such entities are not taxable at the entity level. The prior guidance relating to the taxability of state chartered corporations should be withdrawn or amended to clarify that there is no income tax on wholly owned state chartered LLCs.

3(a)(4). What are the advantages and disadvantages of partnerships organized under Tribal or State law (e.g., joint venture partnerships)?

Joint venture partnerships are another important tool available to Tribal governments to promote Tribal economies and creation of governmental revenue. The IRS should clarify the tax immunity of such partnerships to strengthen this advantage.

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

The same factors that influence entity formation in non-Tribal business ventures are the same factors influencing entity formation of Tribal business ventures. Tribal Nations are the best situated to prioritize the economic goals of our 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.

Question #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?

a. Tribally chartered corporation awareness

Tribal governments have encountered potential partners or investors who were reluctant to do business with TCCs due to a lack of awareness of how our businesses are structured and related tax implications. This is one of the reasons for their reduced usage. In addition to clarifying the tax status of TCCs, we also ask Treasury and the IRS develop a searchable public database where third parties can verify the Tribal business. A model is the IRS's Tax-Exempt Organizations Search (or TEOS). Members of the public can input information about an organization and confirm it is a nonprofit entity. Treasury and the IRS could make a system like TEOS work for Tribal Nations.

In addition, and potentially related to a TEOS-type system for Tribal businesses, box 9a of IRS Form SS-4 should be modified, so a Tribal government applying for an employer identification number (EIN) not only selects the box "Indian tribal governments/enterprises" but also has a line to identify the affiliated Tribal Nation. This modification will help ensure Tribal businesses are properly classified within the IRS and could be used for a searchable database.

USET SPF has one last recommendation on the Form SS-4. 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.

b. Brightline Rule

USET SPF encourages Treasury to adopt a bright line rule that TCCs, in which the Tribal government has at least a majority ownership, share the Tribal government's tax status. Any multiple part test will result in unnecessary litigation.

Conclusion

TCCs have been established by our Tribal Nations to advance our economic priorities in pursuit of Nation rebuilding. They are essential components in our effort to rebuild our Tribal economies, create jobs for our citizens, and improve the public well-being and economic self-sufficiency of our citizens and communities. TCC operations can have a multiplier effect on dollars within our communities and increase generational wealth, which has long been problematic for our Tribal Nations and citizens. We appreciate the opportunity to comment on this important topic and we thank Treasury for its essential work. The proposed guidance rule should clear up a source of much confusion and distress in Indian country and substantially improve the functioning, integration, and benefits of TCCs. We urge Treasury to incorporate additional Tribal consultation feedback as it develops the proposed guidance. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director