



Mille Lacs Band of Ojibwe Indians

*Executive Branch of Tribal Government
Office of the Chief Executive*

Transmittal via e-mail to tribal.consult@treasury.gov

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Fatima Abbas
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U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Mille Lacs Band of Ojibwe's Response to Dear Tribal Leader Letter Regarding "Entities Wholly Owned by Indian Tribal Governments" (REG-113628-21)

Dear Director Abbas:

On behalf of the Mille Lacs Band of Ojibwe (the "**Band**"), we thank you for the opportunity to provide written comments on the proposed regulations, "Entities Wholly Owned by Indian Tribal Governments (REG-113628-21)" (the "**Proposed Regulations**").

Overall, we commend the United States Department of the Treasury ("**Treasury**") and the Internal Revenue Service (the "**IRS**") for drafting Proposed Regulations that reflect feedback that Tribal governments shared during consultations held in summer 2023. As discussed below, we support the Proposed Regulations and believe they reflect Tribes' sovereignty and authority to generate governmental revenue and use such revenue to support their citizens. However, we also believe there are areas where the Proposed Regulations can be strengthened. Below we highlight a few of the provisions and aspects of the Proposed Regulations we find particularly important, and provide brief background on the Band and the importance of Tribally chartered entities. We then offer our responses to the questions posed in the "Dear Tribal Leader Letter" dated October 7, 2024, from Treasurer Malerba.

HIGHLIGHTS OF THE PROPOSED REGULATIONS

As discussed below, we support the Proposed Regulations as drafted, although we offer recommendations for how they can be further improved. Overall, the guidance confirms what many Tribes have believed for decades: that a Tribal government's business operations generally should be tax-exempt regardless of the form in which the Tribe chooses to do business. The Band thanks Treasury for holding Tribal consultations to gather input from Tribal leaders in

advance of drafting the Proposed Regulations and then for incorporating some of that feedback into the Notice of Proposed Rulemaking (“NPRM”). We highlight our support for the following features of the NPRM:

- The Proposed Regulations do not impose an integral part test or introduce new reporting requirements. Together, the absence of these features will improve clarity and reduce compliance burdens on Tribes.
- The Proposed Regulations apply retroactively, reflecting the understanding that these rules codify how many Tribal governments have operated over the years in the lack of guidance.
- The NPRM acknowledges the feedback received in Tribal consultations regarding the importance of Tribally chartered entities. These entities promote Tribal sovereignty, self-governance, and self-determination in Tribal economic development activities. We are pleased to see the Preamble to the Proposed Regulations (the “Preamble”) expressly acknowledge that the Proposed Regulations have been developed “[i]n light of the considerations of Tribal sovereignty and self-determination.”

BACKGROUND

Located in East Central Minnesota, the Band has approximately 5,000 members. The Band’s businesses have become a vital economic force in East Central Minnesota. When the Band had little money or support from state and federal governments, the Band’s members contributed to the economy by creating and selling crafts and food products like maple syrup and wild rice, and working in the logging, agriculture, and fishing/tourism industries. As the Band was able to develop and strengthen its sovereignty, it began to operate resorts, manufacturing programs, a bank, schools, and government and housing infrastructure. Moreover, the Band’s businesses are a critical source of revenue for the Band to provide important resources and infrastructure to members such as healthcare, public safety, land management, housing, and education on its 61-acre Reservation.

The Band’s use of Tribally owned businesses to raise revenue to support governmental functions is far from unique. As Tribes explained during the consultation process, and Treasury acknowledges in the NPRM, Tribally chartered entities are commonly used as a critical method to generate governmental revenue. While state governments have been able to fund a majority of their expenditures through state-levied taxes, Tribes are unable to do so because they do not have the same breadth of traditional tax bases as state governments.¹ Instead, Tribal governments such as the Band rely on Tribally owned businesses to generate revenue that is needed in order to provide important support to their citizens. For this reason, the Band—like other Tribal governments—relies on Tribally owned businesses to generate revenue.

¹ Professor Joseph P. Kalt, *Self-Government, Taxation, and Tribal Development: The Critical Role of American Indian Nation Business Enterprise*, Policy Brief No. 8, Harvard Kennedy School at 6-7 (<https://ash.harvard.edu/wp-content/uploads/2024/10/Policy-Brief-8-Taxation-Enterprises-10-07-24-vFIN-for-DIST.pdf>).

Federally chartered corporations under Section 17 of the Indian Reorganization Act of 1934 (“**Section 17 Corporations**”) and Section 3 of the Oklahoma Indian Welfare Act (“**Section 3 Corporations**”) are business entities that Tribes have utilized for decades. The IRS has previously confirmed that these entities are not separate from the Tribe for federal tax purposes and are not subject to federal income tax on income earned in the conduct of commercial business on or off the Tribe’s reservation. However, forming a Section 17 or Section 3 Corporation often does not meet a Tribe’s needs due to the multistep formation process, federal oversight, increased costs, and difficulty involved in dissolving such an entity. Tribally chartered entities are typically a preferred business structure for Tribes to engage in economic activity to generate revenue and more easily support their citizens. For example, Tribes can form Tribally chartered entities more easily and quickly than they can form Section 17 Corporations, allowing Tribes such as the Band to be more immediately responsive to the needs in our communities. In addition, it is easier to amend Tribally chartered entities’ organizational documents or scope, and to dissolve the entity when it is no longer needed. Therefore, Tribally chartered entities have become a preferred business structure to Section 3 and Section 17 Corporations.

FEEDBACK ON PROPOSED REGULATIONS

Below we respond to each of the questions posed in the Dear Tribal Leader Letter. Although we offer recommendations for how to strengthen the Proposed Regulations, we want to reiterate our appreciation to Treasury and the IRS for drafting rules that are consistent with promoting Tribal sovereignty, self-governance, and self-determination in Tribal economic development activities.

1. The NPRM provides Tribally chartered entities parity with federally chartered Tribal corporations. What questions or comments do you have regarding this proposed rule?

We support the Proposed Regulations and thank Treasury for providing long-awaited guidance on this topic. In addition to other items discussed below, we generally note that, while the Dear Tribal Leader Letter states that the proposed changes to the entity classification regulations do not impose any new reporting requirements, the Proposed Regulations do not provide similar confirmation. Because the Dear Tribal Leader Letter is not part of the regulatory package, we request that Treasury and the IRS expressly confirm in the Preamble to the Final Regulations that the amendments do not impose any new reporting requirements.

2. The NPRM recognizes that Tribally chartered entities are not recognized as separate from their owning Tribe(s) for Federal tax purposes.

a. How should this impact employment and excise tax? Should Tribally chartered entities remain separate for excise and employment tax liability?

We believe Tribally chartered entities should be treated as separate entities for employment and excise tax purposes. Our recommendation is consistent with federal tax law because this is how disregarded entities such as single-member limited liability companies are

treated under current regulations. We also make this recommendation based on our own experience and our understanding that Tribes are familiar with—and generally prefer—separateness for excise and employment taxes. One of the purposes for which Tribes form Tribally chartered entities is to minimize liability for the Tribe itself while engaging in activities for the purpose of generating revenue to fund governmental programs. If Tribally chartered entities’ employment and excise tax liabilities flowed up to the Tribe, then forming such entities would create more risk for Tribes. The possibility of increased risk of liability may discourage Tribes from forming Tribally chartered entities, and therefore, reduce critical streams of revenue that Tribes rely on in order to fund governmental programs.

Below we have proposed technical amendments to the entity classification regulations that would preserve the separateness of wholly owned, Tribally chartered entities for employment and excise tax liability purposes. Our proposed amendments would also apply to Federally chartered Section 17 Corporations and Section 3 Corporations. Without these amendments, we are concerned that entities wholly owned by Tribal governments would not be clearly covered by the existing regulatory language that treats certain wholly owned entities as separate for employment tax and excise purposes. Specifically, the existing language in the relevant sections of the entity classification regulations (§§ 301.7701-2(c)(2)(i), iv, and v) applies to a “business entity” with a single owner. Because § 301.7701-2(a) defines a “business entity” as an entity *recognized for federal tax purposes*, these sections would not be clearly applicable to a wholly owned, Tribally chartered entity, Section 17 Corporation, or Section 3 Corporation, which are not recognized as separate entities for federal tax purposes under § 301.7701-1(a)(4). Accordingly, we have proposed adding references to § 301.7701-1(a)(4) in appropriate sections of the entity classification regulations:

Section 301.7701-2(c)(2)(iv)

(iv) Special rule for employment tax purposes—

(A) In general. Except as provided in paragraph (c)(2)(iv)(C) of this section, paragraph (c)(2)(i) of this section (relating to certain wholly owned entities) and Section 301.7701-1(a)(4)(i) (relating to certain Tribal entities) does not apply to taxes imposed under Subtitle C—Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24, and 25 of the Internal Revenue Code).

(B) Treatment of entity. Except as provided in paragraph (c)(2)(iv)(C) of this section, an entity described in section 301.7701-1(a)(4)(i) or that is disregarded as an entity separate from its owner for any purpose under this section is treated as a corporation with respect to taxes imposed under Subtitle C—Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24, and 25 of the Internal Revenue Code). For special rules regarding the application of certain employment tax exceptions, see

§§ 31.3121(b)(3)–1(d), 31.3127–1(b), and 31.3306(c)(5)–1(d) of this chapter.

Section 301.7701-2(c)(2)(v)

(v) Special rule for certain excise tax purposes—(A) In general. Paragraph (c)(2)(i) of this section (relating to certain wholly owned entities) and Section 301.7701-1(a)(4)(i) (relating to certain Tribal entities) does not apply for purposes of—

(1) Federal tax liabilities imposed by Chapters 31, 32 (other than section 4181), 33, 34, 35, 36 (other than section 4461), 38, and 49 of the Internal Revenue Code, or any floor stocks tax imposed on articles subject to any of these taxes;

(2) Collection of tax imposed by Chapters 33 and 49 of the Internal Revenue Code;

(3) Registration under sections 4101, 4222, and 4412;

(4) Claims of a credit (other than a credit under section 34), refund, or payment related to a tax described in paragraph (c)(2)(v)(A)(1) of this section or under section 6426 or 6427; and

(5) Assessment and collection of an assessable payment imposed by section 4980H and reporting required by section 6056.

(B) Treatment of entity. An entity described in section 301.7701-1(a)(4)(i) or that is disregarded as an entity separate from its owner for any purpose under this section is treated as a corporation with respect to items described in paragraph (c)(2)(v)(A) of this section.

In order to harmonize the Proposed Regulations with these minor administrative amendments, we recommend the following change to proposed Section 301.7701-1(a)(4)(i):

Except as provided in paragraph (a)(4)(ii) of this section and in section 301.7701-2(c)(2)(iv)-(v), Tribes incorporated under section 17 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. 5124 (section 17 corporation), or under section 3 of the Oklahoma Indian Welfare Act, as amended, 25 U.S.C. 5203 (section 3 corporation), are not recognized as separate entities for Federal tax purposes. Also, except as provided in paragraph (a)(4)(ii) of this section and in section 301.7701-2(c)(2)(iv)-(v), entities wholly owned by one or more Indian Tribal governments (within the

meaning of section 7701(a)(40) of the Code) and organized or incorporated exclusively under the laws of the Indian Tribal government(s) that own them (wholly owned Tribal entity) are not recognized as separate entities for Federal tax purposes.

b. Should Tribally chartered entities be able to assert the excise tax benefits of their owning Tribes?

Yes, a Tribally chartered entity should be able to assert the excise tax benefits of its owning Tribe(s). We believe this is consistent with the purpose for which these entities are formed and operate. As discussed above, and as the Preamble to the Proposed Regulations acknowledges, Tribally chartered entities serve as an important source of revenue for Tribal governments to provide critical services to members. To avoid confusion on the topic, we recommend including clarifying language in the Treasury regulations, and offer an example of such language below.

We propose the following language to be added as a new section 301.7701-1(a)(4)(iii):

Special Rule – An entity described in § 301.7701-1(a)(4)(i) with one or more owners shall be treated as a disregarded entity with a single owner for the purpose of classification of such entity for Federal tax purposes under §§ 301.7701-1-301.7701-3 and shall be treated as an “Indian tribal government” for the purpose of determining an exemption from certain excise taxes as set forth in § 305.7871-1.

Our proposed amendment above would also make an additional clarifying change to the entity classification regulations consistent with the Proposed Regulations. Specifically, to avoid confusion with other parts of the entity classification regulations, including provisions that treat multi-member, non-corporate entities as a partnership, we suggest Treasury and the IRS treat an entity wholly owned by multiple tribes not only as a disregarded entity, but also as an entity with *a single owner*. Alternatively, we suggest Treasury and the IRS clarify that, **except as explicitly provided in the entity classifications**, the regulations do not apply to entities described in new Section 301.7701-1(a)(4) of the Treasury Regulations. If making this alternative change, we suggest Treasury and the IRS also clarify the separateness of entities wholly owned by Tribal governments for employment and excise tax purposes directly in § 301.7701-1(a)(4) in lieu of the technical amendments we proposed in 2(a) above.

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?

The examples provided are helpful and we believe each of them should remain in the final rule. For example, we thank Treasury and the IRS for incorporating examples that demonstrate a Tribally chartered entity may be formed through various methods such as a

Corporation’s Ordinance (Example 1) and a resolution approved by an Indian Tribal government (Example 4). We do, however, offer recommendations for additional examples to incorporate into the final rules to further clarify the guidance.

We believe it would be helpful to include examples related to the treatment of Tribally chartered entities and Federally chartered corporations with respect to excise taxes. For example, one example could illustrate how either a Tribally chartered entity shares an excise tax exemption under Section 7871 of the Code with the Tribe or Tribes wholly owning such entity.

Because many Tribes have corporate structures where an entity wholly owned by the Tribe may wholly own another entity (and so forth), we also suggest an example to demonstrate how the rules would apply under these facts. One such example would be to illustrate a scenario where a Tribally chartered entity has an employment tax liability and neither its parent with one hundred (100) percent ownership, also a Tribally chartered entity, nor the Tribe wholly owning the parent, has such employment tax liability.

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?

The Band believes the Proposed Regulations are consistent with how Tribal governments have been operating. Accordingly, we support this statement and recommend that the Regulations confirm that Tribes may rely on them for tax years that precede the date of the NPRM.

We also request Treasury and the IRS to expand on the explanation of this part of the NPRM. Specifically, we request that Treasury and the IRS describe circumstances under which a Tribal entity may benefit from this provision. We further request that Treasury and the IRS develop a streamlined refund process for wholly owned, Tribally chartered entities in the event they paid income taxes for a period before the NPRM’s publication date. We recommend that any such refund claims be routed to the Indian Tribal Governments division at the IRS or another office within the IRS that has an understanding of Tribally chartered entities and the newly issued guidance.

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?

Although we support the Proposed Regulations, we further encourage Treasury to provide Indian country with the much-needed guidance on this topic and promulgate rules on partially owned businesses as soon as possible. In developing this guidance, the Band urges Treasury and the IRS to work with the Tribal Treasury Advisory Committee (“TTAC”), TTAC’s Tribal Economics Subcommittee, and Indian Country. Clear guidance on this topic will allow

Tribal governments to better plan their business structures and the tax consequences for entering into certain partnerships. For instance, Tribes have been forming an increasing number of joint ventures with non-Tribal partners who may bring more expertise or necessary capital to a project. Tribes may also be the investor in a project with a non-Tribal partner. These partnerships open up greater business opportunities for Tribes and, thus, methods of generating revenue for governmental programs. Whether the ownership of such an entity is wholly Tribal or only partially owned by a Tribal government, the business serves the same purpose for the Tribe. Therefore, given the purpose of these entities and the impact on the Tribal government’s ability to help members, we urge Treasury to promulgate rules that confirm Tribally chartered corporations that are partially owned by persons other than Tribes share the Tribe’s exemption from federal tax.

- 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?**

The Band supports the eligibility of Tribally chartered entities for certain clean energy tax credits through elective pay. This rule will be less administratively burdensome for Tribes and their entities while promoting energy projects in Indian Country.

- 7. What other questions or comments do Tribes have regarding this NPRM?**

We appreciate that Treasury and the IRS have created a clear rule that would apply to entities wholly owned by more than one Tribal government. However, we do not understand why the Proposed Regulations require the entity to be organized or incorporated under the laws of each Tribal government that owns it. This seems unnecessarily burdensome. In our view, it should be sufficient for the entity to be organized or incorporated under the laws of one of the Tribal governments that owns it. Accordingly, the Band respectfully requests that Treasury and the IRS remove this requirement in the Final Regulations.

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Thank you for taking the time to consider our recommendations and the needs of the Band and all other Tribes. Should you have further questions, please contact Adam Candler by e-mail at adam.candler@millelacsband.com.

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