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Choosing a Tribal Business Structure

Learn about the three common types of corporations that tribes can establish

A tribally owned business is different than a business owned by a member of a tribe.

There are specific forms of tribal business structures that tribes can take advantage of when establishing their business under tribal, federal, or state law.

When a tribe incorporates, it will need to determine the structure that their tribally owned business adopts and under whose laws it will be organized.

A tribally owned business can be formed as an Indian Reorganization Act (IRA) Section 17 corporation, a tribally chartered corporation, or a state-chartered tribal corporation.

Each structure has different consequences in terms of tax liability, preservation of tribal assets, and corporate transparency requirements for potential creditors, investors, partners, regulators, and customers.

We advise that tribes consult an attorney for specific legal guidance on which corporate structure will best suits their needs and circumstances.

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IRA Section 17 Corporation

Congress created this tribal business structure when it passed the Indian Reorganization Act of 1934 (IRA).

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."

Advantages

- *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.
- *No federal income taxes:* Guided by federal court decisions, the IRS has ruled that Section 17 corporations aren't required to pay federal income taxes whether they are operated on or off the reservation.
- *Can issue tax-exempt bonds:* Section 17 corporations can issue these debt instruments if the proceeds are used to finance essential governmental services.

Disadvantages

- *Inflexibility:* 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.

- *Minimal statutory definition:* States promulgate laws governing all aspects of the formation, management, operations, and dissolution of state-chartered corporations. 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 the risk of litigation and make prospective business partners hesitant to enter into contracts with Section 17 corporations.

Setup Process

In order to establish a Section 17 corporation, a tribe must submit a resolution adopted by its tribal council petitioning for the issuance of a Federal Charter of Incorporation to the appropriate Bureau of Indian Affairs (BIA) regional office.

The resolution should be 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 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 a Certificate of Approval to the tribe.

The tribal council must then pass another resolution to ratify the charter. When that resolution is enacted, the corporation will officially come into being.

Tribally Chartered Corporation

A tribally chartered corporation is an entity organized by a tribal government that's pursuant to a tribal code or resolution.

Advantages

- *Avoid state regulation and taxation:* A tribally chartered corporation doing business on tribal land whose stock is owned by American Indians and Alaska Natives (AI/AN) isn't subject to state control or taxation. However, if a tribally chartered corporation conducts business outside of the reservation, some states may require "foreign corporation" registration to operate within the state.
- *Easy to form:* No approval is needed from the federal government or state authorities to establish this kind of corporation because it's formed entirely by a tribal government, which enacted the ordinance, business corporation code or resolution that authorized the corporation's formation.

Disadvantages

- *Transparency concerns for lenders and partners:* Lenders and potential business partners can easily obtain information about a corporation within a state because state-chartered corporations are required to regularly disclose and update operational information on a state's official website. Tribally chartered corporations may not have this requirement and may find it harder to access capital and attract joint venture partners as a result. One possible solution for a tribe is to set up its own corporate website and impose its own stringent disclosure requirements.
- *Potential federal tax liability:* The IRS doesn't provide precise guidance on the limits of federal tax immunity for tribally chartered corporations. However, because tribes are exempt from federal taxation, tribally chartered corporations that operate as an "integral part" of the tribe are exempt from taxation. The IRS will consider many factors in determining how "integral" a tribally chartered corporation is to a tribe.

Setup Process

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

simply adopted a resolution authorizing the tribally chartered corporation without providing more details, organizers of the corporation must create their own articles of incorporation and by-laws.

State-Chartered Tribal Corporation

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

Advantages

- *Easy to form:* Organizers of the corporation need only follow formation procedures detailed by the state in which they wish to incorporate. This usually involves filing articles of incorporation, though requirements may differ from state to state. There is no separate setup process.
- *Transparent:* Creditors and potential partners can easily conduct research on a state-chartered corporation because filing information and updates can be obtained online from a state's official website or from other sources.

Disadvantages

- *No presumption of sovereign immunity:* Tribes themselves will still have sovereign immunity (i.e., they cannot be sued in federal court without their permission). However, tribal corporations chartered by states are subject to litigation in most cases.
- *Must pay federal taxes:* Tribes are not liable for federal taxes, but state-chartered tribal corporations must pay taxes regardless of where they do business.
- *May not issue tax-exempt bonds:* This kind of corporation isn't an “integral part” of a tribe, and therefore cannot issue or use these debt instruments.
- *Unclear rules about state taxes:* Some courts have ruled that state tax law is less likely to apply to on-reservation activities involving only AI/AN individuals and where the state's regulatory interest is minimal. Yet other courts have ruled that, even on tribal lands, state tax laws may apply unless doing so would interfere with tribal self-governance or a right conferred or reserved by federal law.

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