



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1 and 301

### [REG-113628-21]

### RIN 1545-BQ13

### Entities Wholly Owned by Indian Tribal Governments

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations regarding the Federal tax classification of entities wholly owned by Indian Tribal governments (Tribes). The proposed regulations would provide that entities that are wholly owned by Tribes and organized or incorporated exclusively under the laws of the Tribes that own them generally are not recognized as separate entities for Federal tax purposes. The proposed regulations would also provide that, for purposes of making certain elective payment elections (including determining eligibility for and the consequences of such elections) for certain energy credits under the Inflation Reduction Act of 2022, these entities and certain Tribal corporations chartered by the Department of the Interior (DOI) are treated as an instrumentality of one or more Indian Tribal governments or subdivisions thereof. This document also requests comments and provides notice of a public hearing on the proposed regulations that will be in addition to Tribal consultation on the proposed regulations.

**DATES:** *Comments:* Electronic or written comments on this proposed rule from the public must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Public Hearing:* The public hearing on these proposed regulations is scheduled to be held on January 17, 2025, at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. If no outlines are received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-113628-21) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS's public docket. Send paper submissions to: CC:PA:01:PR (REG-113628-21), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, contact Amanda R. Markarian of the Office of Associate Chief Counsel (Passthroughs and Special Industries) at (202) 317-6850 (not a toll-free number); and concerning submissions of comments, the hearing, or any questions to attend the hearing by teleconferencing, contact Publications and Regulations Section at (202) 317-6901 (not a toll-free number) or preferably by email to [publichearings@irs.gov](mailto:publichearings@irs.gov). If emailing, please include the following information in the subject line: Attend, Testify, or Question and REG-113628-21.

**SUPPLEMENTARY INFORMATION:**

**Authority**

This notice of proposed rulemaking contains proposed amendments to provisions

of 26 CFR part 1 (Income Tax Regulations) under section 6417 of the Internal Revenue Code (Code) and 26 CFR part 301 (Procedure and Administration Regulations) under section 7701 of the Code that would address the Federal tax treatment of certain Tribal entities wholly owned by one or more Indian Tribal governments (proposed regulations).

Section 6417(h) provides an express delegation of authority to the Secretary of the Treasury or her delegate (Secretary) relating to elective payment elections under section 6417 (section 6417 elections), stating, “[t]he Secretary shall issue such regulations or other guidance as may be necessary to carry out the purposes of this section, including guidance to ensure that the amount of the payment or deemed payment made under this section is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).”

Section 7701(a)(40) provides an express delegation of authority to the Secretary related to identifying Indian Tribal governments for Federal tax purposes, stating, “[t]he term ‘Indian tribal government’ means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.”<sup>1</sup>

Finally, section 7805(a) of the Code authorizes the Secretary to “prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”

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<sup>1</sup> Under the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791 (List Act), the Secretary of the Interior is required to publish annually a list of all Federally-recognized Tribes. In Revenue Procedure 2008-55 (2008-39 I.R.B. 768), after consultation with the Department of Interior (DOI), the Treasury Department and the IRS determined that the Indian tribal entities that appear on the current or future lists of Federally-recognized Tribes published annually under the List Act by the DOI, Bureau of Indian Affairs, are designated as Indian tribal governments for purposes of section 7701(a)(40). See 89 FR 944 (January 8, 2024) for the most current list published by the DOI, Bureau of Indian Affairs.

## **Background**

### **I. Overview**

The proposed regulations under section 7701 would provide that an entity wholly owned by one or more Indian Tribal governments, within the meaning of section 7701(a)(40), that is organized or incorporated under the laws of the Tribe or Tribes that own it (wholly owned Tribal entity) is not recognized as a separate entity for Federal tax purposes. A single member limited liability company organized under the laws of the Tribe that owns it would be a wholly owned Tribal entity. Additionally, the proposed regulations would provide that wholly owned Tribal entities, as well as Tribes incorporated under section 17 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. 5124 (section 17 corporations), or under section 3 of the Oklahoma Indian Welfare Act, as amended, 25 U.S.C. 5203 (section 3 corporations), are treated, for purposes of making section 6417 elections (including determining eligibility for and the consequences of such elections), as instrumentalities of the Indian Tribal government(s) that wholly own them.

The Treasury Department and the IRS consulted with DOI on these proposed rules because of DOI's role in working with Federally-recognized Indian Tribes and administering a broad array of Federal laws that affect Federally-recognized Indian Tribes. 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.

The Treasury Department and the IRS 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.

### **II. Executive Order 14112**

In December 2023, the President issued an executive order titled "Reforming

Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination.” Executive Order 14112 (Dec. 6, 2023). Executive Order 14112 reaffirms the Executive Branch’s support for Tribal self-determination as the most effective policy for the economic growth of Tribal Nations and the economic well-being of Tribal citizens. Executive Order 14112 requires agency heads to take certain actions, consistent with applicable law and to the extent practicable, to increase access to “Federal funding and support programs for Tribal Nations”; provide Tribal Nations with the flexibility to improve economic growth and address the specific needs of their communities; and reduce administrative burdens. Section 2(b) of the Executive Order defines “Federal funding and support programs for Tribal Nations” as including “funding, programs, technical assistance, loans, grants, or other financial support or direct services that the Federal Government provides to Tribal Nations or Indians because of their status as Indians.” The Treasury Tribal Advisory Committee has advised that Tribes consider “financial support” in Executive Order 14112 to include tax matters that range from tax credits to Federal tax rules that regulate Tribal revenue.

Consistent with Executive Order 14112, the Treasury Department and the IRS recognize the importance of protecting and supporting Tribal sovereignty and self-determination. As the Executive Order explains, “As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.” These commitments build on a recognition of principles of sovereignty, sovereign immunity, and self-governance that have been repeatedly reaffirmed by the Supreme Court. *See, e.g., Three Affiliated Tribes of the Fort Berthold Reservation v.*

*Wold Engineering, P.C., et al.*, 476 U.S. 877, 890-91 (1986); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991).

### III. Prior Guidance

The Federal government has long recognized the unique aspects of Tribal sovereignty and Tribal sovereign immunity. Tribes themselves are not subject to Federal income tax under the Code.<sup>2</sup> IRS guidance on the issue in the 1960s raised questions about the extent to which section 17 corporations and section 3 corporations should share the Tribe's Federal income tax status. In response, the IRS published further guidance and issued proposed regulations in 1996 on the treatment of section 17 corporations and section 3 corporations for Federal tax purposes. See the notice of proposed rulemaking, *Simplification of Entity Classification Rules*, (PS-43-95) published in the *Federal Register* (61 FR 21989) on May 13, 1996 (explaining the basis for the proposed rule later adopted as §301.7701-1(a)(3)).

On December 18, 1996, the Treasury Department and the IRS published final regulations (TD 8697) in the *Federal Register* (61 FR 66584) under section 7701, known as the entity classification regulations. Those still-existing regulations at §301.7701-1(a)(3) make clear that entities formed under local laws are not always recognized as separate entities for Federal tax purposes. For example, an organization wholly owned by a State is not recognized as a separate entity for Federal tax purposes if it is an integral part of the State. Similarly, those regulations provide that section 17 corporations and section 3 corporations are not recognized as separate entities for Federal tax purposes. The entity classification regulations, however, do not specifically

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<sup>2</sup> See Rev. Rul. 67-284, 1967-2 C.B. 55. However, Tribes generally are subject to Federal employment taxes. Employment taxes refers to Federal Insurance Contributions Act (FICA) (consisting of both social security and Medicare taxes), Federal Unemployment Tax Act (FUTA), and Income Tax Withholding. Section 3306(c)(7) of the Code provides an exception from FUTA taxes under certain circumstances. Further, subject to applicable law, including statutes (such as section 7871 of the Code) and treaties or agreements with the United States, Tribes are subject to Federal excise taxes. See Rev. Rul. 94-81, 1994-2 C.B. 412.

address whether an organization formed under Tribal law and wholly owned by a Tribe (that is, a wholly owned Tribal entity) is recognized as a separate entity for Federal tax purposes.

The preamble to TD 8697 states that the IRS received a number of comments asking for clarification of the tax treatment of wholly owned Tribal entities. 61 FR 66584. The preamble also indicated that the Treasury Department and the IRS continued to study the issue and would issue additional guidance, if necessary. *Id.* at 66585-86.

#### IV. Tribal Consultation

Over the past several decades, Tribes have sought clarity concerning the Federal tax status of Tribally chartered corporations that are wholly owned by Tribes, in part to provide certainty for Tribal economic development and to support the generation of revenue for Indian Tribal governments. In order to obtain Tribal input on the issue, and in accordance with Executive Order 13175 (November 6, 2000), “Consultation and Coordination with Indian Tribal Governments,” and the Treasury Department’s Tribal Consultation Policy (80 FR 57434, September 23, 2015), *superseded by* Treasury Order 112-04 (November 22, 2023), the Treasury Department and the IRS most recently held Tribal consultations on the issue on June 21 and June 22, 2023, October 8 and October 10, 2019, and a listening session on December 3, 2019.

During Tribal consultations, Tribes have explained that they view Tribally chartered corporations as an exercise of their inherent sovereign authority to generate governmental revenue, self-govern the use of that revenue according to their own laws, and self-determine the use of that revenue for their citizenry. Tribes highlighted that Tribally chartered corporations enable Tribes to create entities that meet their emerging revenue opportunities, establish guidelines for the operation of these entities that are culturally appropriate and protect Tribal assets, and dissolve them when they are

unnecessary. Tribes also highlighted that Tribally chartered corporations are consistent with recent Federal policy that promotes Tribal sovereignty, self-governance, and self-determination in economic development activities.

In contrast, Tribes highlighted that section 17 and section 3 corporations are not sufficient to meet their needs. The incorporation process for these entities is a lengthy multi-step Federal process that subjects Tribal authority to Federal oversight and approval, results in increased administrative costs to Tribes, and requires an act of Congress to dissolve the chartered entity.

This issue has taken on increased salience in recent years, particularly with the enactment of laws, such as Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022, that extend greater access to capital and new economic opportunities to certain governments (including Indian Tribal governments), tax-exempt organizations, and other entities. Tribes have reiterated their requests for guidance through meetings of the Treasury Tribal Advisory Committee and other Tribal consultations.

In light of the considerations of Tribal sovereignty and self-determination described previously, the Treasury Department and the IRS propose to amend the existing section 7701 regulations to make clear that entities wholly owned by Tribes and organized or incorporated under the laws of the Tribes that own them generally are not recognized as separate entities for Federal tax purposes. Accordingly, such entities generally would be viewed as one and the same as the Tribes that own them for Federal tax purposes and would therefore not be subject to Federal income tax. In addition, the Treasury Department and the IRS are proposing to amend the existing regulations under section 6417 to provide that such entities and section 17 and section 3 corporations are treated as instrumentalities of the Indian Tribal governments that own them for purposes of making an elective payment election under section 6417 (including



determining eligibility for and the consequences of the election). This would mean that the wholly owned Tribal entity itself, rather than the Indian Tribal government(s) owning the entity, would make a section 6417 election for an applicable credit determined with respect to any applicable credit property held directly by the wholly owned Tribal entity.

The Treasury Department and the IRS will conduct Tribal consultation before finalizing these regulations to obtain additional input on questions involving these proposed regulations. The content of these consultations will be published in a Tribal consultation summary.

## **Explanation of Provisions**

### **I. In General**

These proposed regulations would address the Federal tax treatment of wholly owned Tribal entities (that is, entities wholly owned by Tribes and organized or incorporated exclusively under the laws of the Tribes that own them). Specifically, these proposed regulations would provide that such entities are not recognized as separate entities for Federal tax purposes (other than for purposes related to section 6417 elections described in part III of this Explanation of Provisions). The proposed regulations recognize that these entities share core characteristics with section 17 corporations and section 3 corporations, including that they are wholly owned by Tribes and benefit the Tribes by facilitating economic growth and Tribal rebuilding. Accordingly, just as section 17 corporations and section 3 corporations are not recognized as separate entities for Federal tax purposes and are thus not subject to Federal income tax on income earned in the conduct of commercial business on or off the organizing Tribe's reservation, the proposed regulations would confirm that wholly owned Tribal entities would not be recognized as separate entities for Federal tax purposes and 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.

## II. Requirements

### A. Tribal law

The proposed regulations would recognize that Tribal law is established by each individual Tribe. 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.

### B. Wholly owned

As is the case for determining the ownership of all corporations (including a corporation wholly owned by a State or other government), the determination of whether an outside investor (a person other than a Tribe) holds stock in a Tribal entity, such that it would fail to be wholly owned by one or more Indian Tribal governments for Federal tax purposes, 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.

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. Elective Pay

The proposed regulations would revise the elective pay regulations to provide that, for purposes of making a section 6417 election (including determining eligibility for and the consequences of such election), entities described in proposed §301.7701-1(a)(4)(i) (that is, section 17 corporations, section 3 corporations, and wholly owned Tribal entities), would be treated as instrumentalities of Indian Tribal governments. Under existing §1.6417-1(f), section 17 corporations and section 3 corporations are treated as "disregarded entities" for purposes of section 6417, and the applicable-entity

owner of a disregarded entity that directly holds applicable credit property must make a section 6417 election for applicable credits determined with respect to such property pursuant to §1.6417-2(a)(1)(ii). Treatment as instrumentalities under these proposed regulations would mean that an entity described in proposed §301.7701-1(a)(4)(i) that directly owns applicable credit property would make the section 6417 election itself, rather than its owner or owners. Such an entity generally would do so by filing a Form 990-T, *Exempt Organization Business Income Tax Return*, as described in §1.6417-1(b)(2), using its own name and employer identification number.

The Treasury Department and the IRS are proposing this rule pursuant to the Secretary's authority under section 6417(h) to issue such regulations or other guidance as may be necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment or deemed payment made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c) of the Code). Given that proposed §301.7701-1(a)(4)(i) would generally provide that an entity owned by multiple Tribes is not recognized as a separate entity from those Tribes for Federal tax purposes, treating the entity as a "disregarded entity" for section 6417 purposes would have required each of the entity's owners to make a section 6417 election with respect to an applicable credit determined with respect to an applicable credit property owned directly by the entity. That approach would have been administratively burdensome and complex for the Tribes that own the entity as well as for the IRS. Given the need for coordination among these Tribes in making consistent tax filings, it could also have resulted in cases in which the amount of the total payments or deemed payments claimed under section 6417 may not be commensurate with the amount of the underlying credit. In addition, even for an entity owned by a single Tribe, the entity directly owning the applicable credit property may be better positioned to fulfill the pre-filing registration and other

requirements to make the section 6417 election. Accordingly, the proposed regulations are intended to simplify the 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.

In general, the determination of whether an entity is an agency or instrumentality is analyzed on a facts and circumstances basis. In determining whether an entity is an agency or instrumentality for Federal tax purposes, Federal courts have applied a test similar to the six-factor test in Rev. Rul. 57-128, 1957-1 C.B. 311, which generally provides guidance on whether an entity is an instrumentality for purposes of the exemptions from employment taxes under sections 3121(b)(7) and 3306(c)(7). See, e.g., *Berini v. Federal Reserve Bank of St. Louis, Eighth District*, 420 F. Supp. 2d 1021 (E.D. Mo. 2005) and *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987), *cert. denied*, 485 U.S. 936 (1988).

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. The special rule in proposed §1.6417-1(c)(7) is informed in part by administrative considerations and would be issued under the express delegation of authority in section 6417(h) to promulgate rules that carry out the purposes of section 6417 and ensure that the amount of the payment or deemed payment made thereunder is commensurate with the amount of the underlying credit.

### **Proposed Applicability Dates**

These proposed regulations would, upon finalization, apply to taxable years ending after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The proposed regulations would also, upon finalization, generally allow an entity the option to apply proposed §301.7701-1(a)(4), including the option to apply proposed §1.6417-

1(c)(7) and (f), to taxable years ending on or before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, provided that the Indian Tribal government(s) that own the entity also apply §301.7701-1(a)(4), and §1.6417-1(c)(7) and (f) as applicable, consistently with such entity for all such taxable years. 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, as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, a party to any administrative or judicial proceeding.

Until the date final regulations are published in the *Federal Register*, an entity described in proposed §301.7701-1(a)(4)(i) generally may rely on the proposed regulations for taxable years ending on or before that date, provided that the Indian Tribal government(s) that own the entity do so consistently with such entity for all such taxable years. However, an entity described in proposed §301.7701-1(a)(4)(i) may not rely on the proposed regulations for any taxable period for a Federal excise tax or employment tax with respect to which the entity was, as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, a party to any administrative or judicial proceeding.

Reliance and the proposed option to apply the regulations retroactively are not provided for any taxable period for a Federal excise or employment tax subject to pending administrative or judicial proceedings as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, because reliance and retroactive application of these regulations in that context could create certain unintended and technical procedural questions. This exception to reliance on the proposed regulations and the proposed option to retroactively apply these regulations is limited to the Federal excise and employment tax context because these questions would not arise in the context of a Federal income tax administrative or judicial proceeding.

## **Special Analyses**

## I. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian Tribal governments and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. This proposed rule would neither impose substantial, direct compliance costs on Indian Tribal governments nor preempt Tribal law within the meaning of the Executive order.

## II. Executive Order 14112: Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination

Consistent with Executive Order 14112 (described previously in the Background section), these proposed regulations would further Tribal self-determination and self-governance and reduce administrative burdens by providing entities wholly owned by Tribes and organized or incorporated under the laws of the Tribes that own them with the same Federal tax treatment that applies to section 17 corporations and section 3 corporations.

## III. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

## IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency

may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in these regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these final regulations are considered general tax records under §1.6001-1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election and to verify the Federal tax classification of entities described in these proposed regulations. For PRA purposes, general tax records are already approved by OMB under 1545-0047 for tax-exempt organizations and government entities.

These regulations also mention reporting requirements related to making elections under section 6417. These elections will be made by taxpayers on Forms 990-T, and credit calculations will be made on Form 3800 and supporting forms. These forms are approved under 1545-0047 for tax-exempt organizations and governmental entities.

#### V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), the Secretary of the Treasury hereby certifies that the proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). These proposed regulations would affect entities that are wholly owned by Tribes. Additionally, no added burden is created through these proposed regulations; rather, these proposed regulations would expand the definition of an eligible entity for section 6417 of the Code but does not expand the requirements for entities to make the elective pay election. Although data is not readily available about the number of small entities that are potentially affected by this rule, it is possible that a substantial number of small entities may be affected.

To the extent the entities described in these regulations make elections under section 6417, the Treasury Department and the IRS certify the final regulatory flexibility analysis undertaken in TD 9988.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of the proposed regulations on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

#### VI. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandate Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). These proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Indian Tribal governments or by the private sector in excess of that threshold.

#### VII. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the executive order. These proposed regulations do not have Federalism implications and do not impose substantial, direct compliance costs on State and local governments or preempt State law within the meaning of the executive order.



## Comments and Public Hearing

Consideration will be given to comments received in Tribal consultation and comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in the preamble under the “ADDRESSES” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations, including the application of the proposed regulations in the context of federal employment and excise taxes. All commenters are strongly encouraged to submit comments electronically. All comments will be made available at <https://www.regulations.gov>. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing will be held on January 17, 2025, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Pursuant to Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), the public hearing is scheduled to be conducted in person, but the IRS will provide a telephonic option for individuals who wish to attend or testify at the hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed as well as the time to be devoted to each topic by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge at the hearing.

If no outlines of the topics to be discussed at the hearing are received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the ***Federal Register***.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG-113628-21 and the language TESTIFY In Person. For example, the subject line may say: "Request to TESTIFY In Person at Hearing for REG-113628-21."

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-113628-21 and the language TESTIFY Telephonically. For example, the subject line may say: "Request to TESTIFY Telephonically at Hearing for REG-113628-21."

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number (REG-113628-21) and the language ATTEND In Person. For example, the subject line may say: "Request to ATTEND Hearing In Person for REG-113628-21." Requests to attend the public hearing must be received by 5 p.m. ET on January 15, 2025.

Individuals who want to attend the public hearing telephonically without testifying must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number (REG-113628-21) and the language ATTEND Hearing Telephonically. For example, the subject line may say: "Request to ATTEND Hearing Telephonically for REG-113628-21." Requests to attend the public hearing must be received by 5 p.m. ET

on January 15, 2025.

The hearing will be made accessible to people with disabilities. To request special assistance during the hearing, contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by 5 p.m. ET on January 14, 2025.

### **Statement of Availability of IRS Documents**

Rev. Rul. 94-81, Rev. Rul. 94-65, Rev. Rul. 94-16, Rev. Rul. 67-284, and Rev. Rul. 57-128 are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

### **Drafting Information**

The principal authors of these proposed regulations are attorneys in the Office of Associate Chief Counsel (Passthroughs and Special Industries), Branch 1. However, other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects**

#### **26 CFR Part 1**

Income taxes, Reporting and record keeping requirements.

#### **26 CFR Part 301**

Procedure and Administration

### **Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR parts 1 and 301 as follows:

#### **PART 1--INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 continues to read in part as

follows:

Authority: 26 U.S.C. 7805 \* \* \* \*

**Par. 2.** Section 1.6417-1 is amended by:

1. Revising paragraph (c) introductory text;
2. Removing the semicolon from the end of paragraphs (c)(1)(ii) and (c)(2)

through (5) and adding a period in their places;

3. Removing “; and” from the end of paragraph (c)(6) and adding the text a period in its place; and

4. Revising paragraphs (c)(7), (f), and (q).

The revisions read as follows:

**§1.6417-1 Elective payment election of applicable credits.**

\* \* \* \* \*

(c) *Applicable entity.* The term *applicable entity* means any entity described in paragraph (c)(1) through (7) of this section.

\* \* \* \* \*

(7) An agency or instrumentality of any applicable entity described in paragraph (c)(1)(ii) or (c)(2) or (3) of this section. For purposes of making a section 6417 election (including determining eligibility for and the consequences of such election), an entity described in §301.7701-1(a)(4)(i) of this chapter is treated as an instrumentality of the Indian Tribal government(s) or subdivision(s) thereof that own(s) it.

\* \* \* \* \*

(f) *Disregarded entity.* The term *disregarded entity* means an entity that is disregarded as, or not recognized as, an entity separate from its owner for Federal income tax purposes under §301.7701-1(a)(3) or §§301.7701-2 and 301.7701-3 of this chapter. See paragraph (c)(7) of this section regarding entities described in §301.7701-1(a)(4)(i) of this chapter.

\* \* \* \* \*

(q) *Applicability dates--(1) In general.* Except as provided in paragraph (q)(2) of this section, this section applies to taxable years ending on or after March 11, 2024. For taxable years ending before March 11, 2024, taxpayers may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

(2) *Paragraphs (c)(7) and (f) of this section.* Paragraphs (c)(7) and (f) of this section apply to taxable years ending after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For taxable years ending on or before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, an entity described in §301.7701-1(a)(4)(i) of this chapter may choose to apply paragraphs (c)(7) and (f) of this section as contained in 26 CFR part 1, revised **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** by following the Federal tax reporting requirements in a manner consistent with those provisions for all such years, but only if the Indian Tribal government(s) that own the entity also apply paragraphs (c)(7) and (f) of this section consistently with such entity for all such taxable years.

## **PART 301--PROCEDURE AND ADMINISTRATION**

**Par. 3.** The authority citation for part 301 is amended by adding an entry for §301.7701-1(a)(4) in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \* \*

\* \* \* \* \*

Section 301.7701-1(a)(4) also issued under 26 U.S.C. 7701(a)(40).

\* \* \* \* \*

**Par. 4.** Section 301.7701-1 is amended by:

1. Revising paragraph (a)(3);
2. Redesignating paragraph (a)(4) as paragraph (a)(5);

3. Adding new paragraph (a)(4); and

4. Revising paragraph (f).

The revisions and addition read as follows:

**§301.7701-1 Classification of organizations for federal tax purposes.**

(a) \* \* \*

(3) *Certain State and local law entities not recognized.* An entity formed under State or local law is not always recognized as a separate entity for Federal tax purposes. For example, an organization wholly owned by a State is not recognized as a separate entity for Federal tax purposes if it is an integral part of the State.

(4) *Certain Tribal entities--(i) In general.* Except as provided in paragraph (a)(4)(ii) of this section, 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, 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.

(ii) *Elections under section 6417.* See §1.6417-1(c)(7) of this chapter for the treatment of section 17 corporations, section 3 corporations, and wholly owned Tribal entities described in paragraph (a)(4)(i) of this section for the purposes of making an elective payment election under section 6417 of the Code (section 6417 election), including determining eligibility for and the consequences of such election.

(iii) *Examples.* The following examples illustrate the application of paragraph (a)(4)(i) and (ii) of this section. For purposes of these examples, all references to a

Tribe are references to an Indian Tribal government within the meaning of section 7701(a)(40).

(A) *Example 1.* Tribe B incorporates Corporation X pursuant to Tribe B's Corporations Ordinance, which governs the purpose, formation, and operation of commercial entities. Tribe B owns all the shares of Corporation X. Corporation X is therefore wholly owned by Tribe B and organized or incorporated exclusively under the laws of Tribe B. As a result, Corporation X is not recognized as a separate entity from Tribe B for Federal tax purposes, except for the purposes described in §1.6417-1(c)(7) of this chapter. Accordingly, Corporation X is not subject to Federal income tax. Under §1.6417-1(c)(7) of this chapter, Corporation X is treated as an instrumentality of Tribe B for the purposes of making a section 6417 election (including determining eligibility for and the consequences of such election). Thus, Corporation X, rather than Tribe B, would be the applicable entity for purposes of making a section 6417 election for any applicable credit (as defined in section 6417(b)) relating to property held or activities conducted by Corporation X.

(B) *Example 2.* Same facts as in paragraph (a)(4)(iii)(A) of this section (*Example 1*), except that the board of Corporation X, pursuant to Tribe B's Corporations Ordinance, organizes a subsidiary, Corporation Z, to pursue a limited line of new business. Corporation X owns all the shares of Corporation Z. Corporation Z is therefore wholly owned by Tribe B and organized or incorporated exclusively under the laws of Tribe B. As a result, neither Corporation X nor Corporation Z is recognized as an entity separate from Tribe B for Federal tax purposes, except for the purposes described in §1.6417-1(c)(7) of this chapter. Accordingly, Corporation Z is not subject to Federal income tax. Under §1.6417-1(c)(7) of this chapter, Corporation X and Corporation Z are each treated as an instrumentality of Tribe B for the purposes of making a section 6417 election (including determining eligibility for and the consequences of such election). Thus, Corporation Z, rather than Corporation X or Tribe B, would be the applicable entity for purposes of making a section 6417 election for any applicable credit relating to property held or activities conducted by Corporation Z. As in Example 1, Corporation X would continue to be the applicable entity for purposes of making a section 6417 election for any applicable credit relating to property held or activities conducted by Corporation X.

(C) *Example 3.* Tribe B incorporates a section 17 corporation. The section 17 corporation subsequently incorporates Corporation J pursuant to Tribe B's Corporations Ordinance, which governs the purpose, formation, and operation of commercial entities. The section 17 corporation owns all the shares of Corporation J. Corporation J is therefore treated as wholly owned by Tribe B and organized or incorporated exclusively under the laws of Tribe B. As a result, Corporation J is not recognized as a separate entity from Tribe B for Federal tax purposes, except for the purposes described in §1.6417-1(c)(7) of this chapter. Accordingly, neither the section 17 corporation nor Corporation J is subject to Federal income tax. Under §1.6417-1(c)(7) of this chapter, the section 17 corporation and Corporation J are each treated as an instrumentality of Tribe B for the purposes of making a section 6417 election (including determining eligibility for and the consequences of such election). Thus, the section 17 corporation, rather than Tribe B, would be the applicable entity for purposes of making a section 6417 election for any applicable credit relating to property held or activities conducted by the section 17 corporation. In addition, Corporation J, rather than Tribe B or the section 17 corporation, would be the applicable entity for purposes of making a section

6417 election for any applicable credit relating to property held or activities conducted by Corporation J. The analysis would be the same if Tribe B had organized its business as a single member limited liability company pursuant to the Tribe's business code instead of incorporating Corporation J.

(D) *Example 4.* Pursuant to their respective Tribal laws, Tribe A, Tribe B, Tribe C, and Tribe D organize Corporation K via a resolution approved by their respective Indian Tribal governments. Each Tribe owns 25% of the shares of Corporation K. Corporation K is therefore wholly owned by Indian Tribal governments and organized or incorporated exclusively under the laws of each Indian Tribal government that owns it. As a result, Corporation K is not recognized as a separate entity from the Tribes for Federal tax purposes, except for the purposes described in §1.6417-1(c)(7) of this chapter. Accordingly, Corporation K is not subject to Federal income tax. Under §1.6417-1(c)(7) of this chapter, Corporation K is treated as an instrumentality of Tribe A, Tribe B, Tribe C, and Tribe D for the purposes of making a section 6417 election (including determining eligibility for and the consequences of such election). Thus, Corporation K, rather than Tribe A, Tribe B, Tribe C, or Tribe D, would be the applicable entity for purposes of making a section 6417 election for any applicable credit relating to property held or activities conducted by Corporation K.

\* \* \* \* \*

(f) *Applicability dates--(1) In general.* Except as provided in paragraph (f)(2) of this section, the rules of this section are applicable as of January 1, 1997.

(2) *Exceptions--(i) Paragraph (a)(4) of this section.* The rules of paragraph (a)(4) of this section apply to taxable years ending after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. In general, an entity may choose to apply paragraph (a)(4) of this section to taxable years ending on or before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** if the Indian Tribal government(s) that own the entity also apply paragraph (a)(4) of this section consistently with such entity for all such taxable years. However, an entity may not choose to apply paragraph (a)(4) of this section to any taxable period for a Federal excise tax or Federal employment tax with respect to which the entity was, as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, a party to any administrative or judicial proceeding.



(ii) *Paragraph (c) of this section.* The rules of paragraph (c) of this section are applicable on January 5, 2009.

**Douglas W. O'Donnell,**

*Deputy Commissioner.*

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