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RAISING CAPITAL IN INDIAN COUNTRY

*Evan Way**

I. Introduction

This comment discusses improving economic development in Indian Country¹ by increasing capital investment using three avenues: (1) tribes should incorporate their business entity under Delaware law and issue securities, specifically common stock; (2) tribes should petition the Securities and Exchange Commission (SEC) to promulgate a final rule to amend Rule 501(d) of Regulation D of the Securities Act of 1933 to include section 17 corporations and tribal corporations as accredited investors; and (3) tribes should advocate legislative changes to section 17 of the Indian Reorganization Act (IRA) to allow direct non-tribal investment in the tribe's corporation.²

Because economic development of any sort will require a multi-faceted approach, this comment further advocates creating a tribal business entity framework as a primary goal and then expanding the tribal private sector with a portion of the capital raised from the tribe's business entity. In some circumstances, a private sector tribal business entity may be so advanced that it is ripe for investment immediately, while the tribe's business entities

* Third-year student, University of Oklahoma College of Law. This work received the Outstanding Comment award from the *American Indian Law Review* editorial board for the 2015-2016 academic year.

1. See 18 U.S.C. § 1151 (2012). As used in this comment, the term "Indian Country" at a minimum refers to the reservations of all federally recognized tribes. Congress has gone farther and defined "Indian Country" as

all land within the limits of any Indian reservation under the jurisdiction of the United States[,] . . . all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof [and] . . . all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.

2. For clarity in this comment: a "tribal corporation" is a corporation formed under the tribe's constitution and model rules of business; a "section 17 corporation" is a corporation formed under section 17 of the Indian Reorganization Act; "private sector business entity" refers to individual entrepreneurs and small businesses; and a business entity is an encompassing term to refer to all types of business structures, e.g., corporations, limited liability companies, partnerships. Where the words business or corporation are used and not preceded by the "tribe's" or "tribal", it is assumed that these business entities are controlled by non-Indians.

and structure are still developing. Clearly, if these circumstances are present, the private sector tribal business would be remiss not to capitalize on the opportunity.

Here, the proposition to increase capital investment in Indian Country will be controversial to some and downright rejected by others because some portions of this comment advocate allowing non-Indian ownership of tribal business entities. This is a valid concern given the historical treatment of Indian tribes and their people. The solution to assuage some of these concerns is to provide mechanisms that will retain tribal corporate autonomy and control. While some tribes have done notably well economically due to gaming and other industries, many tribes continue to stagnate. These struggling tribes need controversial and unique solutions to generate investment. Consequently, this comment provides a framework to take advantage of the economic environment, but it is by no means comprehensive. It will provide a starting point for tribes to implement all capital investment avenues suggested here or to simply choose the parts that work best for their particular situation.

This comment explores these issues in Part II by discussing the lack of capital in Indian Country, why changes are needed, and the current capital investment vehicles available to tribes. Part III addresses the advocated propositions that a tribe should raise capital investment through the issuance of common stock through a business entity incorporated in Delaware, petition for a final rule from the SEC including tribal corporations and section 17 corporations as accredited investors, and advocate for legislative changes to the IRA to allow non-Indian investment in section 17 corporations. Part IV illustrates how individual Indian entrepreneurs and Indian small businesses can benefit when tribes implement the capital investment avenues offered in Part III.

II. The Lack of Capital Available in Indian Country

“Many reservations lack access to capital, credit, and financial services, which stifles entrepreneurship and other economic development activities that lead to job creation.”³ The lack of access to capital is a significant and

3. ALGERNON AUSTIN, NATIVE AMERICANS AND JOBS: THE CHALLENGE AND THE PROMISE 21 (Econ. Policy Inst. Briefing Paper #370, Dec 17, 2013), <http://www.epi.org/files/2013/NATIVE-AMERICANS-AND-JOBS-The-Challenge-and-the-Promise.pdf>.

pressing problem for tribes and Indian entrepreneurs.⁴ A common misconception is that gaming operations provide a significant economic stimulus for tribal economies, but this is simply untrue.⁵ Economic stimulus for tribal business entities can be achieved through capital investment programs offered by the federal government, but many of these programs do little for Indian entrepreneurs and Indian small businesses.⁶ Additionally, government funds are often more restricted than already limited private equity financing. One estimate puts the private-equity deficit at \$44 billion,⁷ implying that “many successful businesses in Indian Country are starving for expansion capital.”⁸ A U.S. House Report stated the situation best:

Lacking their own capital, they must rely on the private money markets. Yet, these resources are practically closed to them. Indian tribes and individuals have been categorized as poor credit risks in the private market for reasons often beyond their control. As a consequence, private credit, if available at all, is only available at interest rates so high as to be prohibitive.⁹

One reason private money markets are prohibitive is that many financial options afforded to persons outside of Indian Country are unavailable to tribal members residing in Indian Country; such as leveraging real property as collateral. Many tribal members residing on their reservations are unable to leverage their real property as collateral because the title of real property

4. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 287 (2009) [hereinafter Clarkson, *Accredited Indians*].

5. *Id.* at 286 (“Most . . . tribes do not have any form of gaming operations, and . . . only a small handful generate significant revenues.”).

6. Brian Stockes, *Indian Business Looks Toward Future*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 18, 2000), <http://indiancountrytodaymedianetwork.com/2000/10/18/indian-business-looks-toward-future-86735> (quoting Pete Homer, President & CEO, Nat’l Indian Bus. Ass’n) (“The federal government puts . . . very little into tribal business development” and federal programs “don’t always work because there may not be any jobs”).

7. Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943, 945 (2008).

8. Clarkson, *Accredited Indians*, *supra* note 4, at 285.

9. H.R. REP. NO. 93-907 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2873, 2874, 1974 WL 11451.

on a reservation is often held in a trust, which cannot be transferred.¹⁰ Secured debt, as in the case of a mortgage, is backed by real property. The real property serves as collateral for the lending institution to collect if the borrower defaults on the loan. A typical loan for real property is “embodied in two separate instruments: a promissory note and a security instrument.”¹¹ “The promissory note is what creates the debt obligation, whereas the security instrument is what makes real property the collateral securing performance on the note.”¹² But it is the security instrument that allows a foreclosure upon default of the note.¹³ “The note is enforceable without the security instrument” whereas the security instrument “has little meaning without the note.”¹⁴ Thus, the inherent structure of real property loans prevents tribes owning reservation land along with tribal members living on reservations from securing loans with their real property. Even if a lending institution wanted to make a loan against the real property, there is a federal prohibition in place.¹⁵ Thus, one of the greatest financial assets in the form of real property¹⁶ that can be leveraged by other aspiring entrepreneurs is unavailable to those living on reservations.

This is not to suggest that ownership of real property is required to raise capital for a new business. Indeed, alternatives include small business loans, venture capitalists, and borrowing money from family and friends to supply capital for a business venture. But this capital may fail to

10. Carlos L. Rodriguez, Craig S. Galbraith & Curt H. Stiles, *American Indian Collectivism: Past Myth, Present Reality*, PERC REPS., Summer 2006, at 7, <http://www.perc.org/sites/default/files/june06.pdf>.

11. Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 652 (2013).

12. *Id.*

13. *Id.*

14. *Id.* at 652-53.

15. See 25 U.S.C.A. § 5105 (Westlaw through Pub. L. No. 114-244). *But see* 25 U.S.C.A. § 5140 (Westlaw through Pub. L. No. 114-244) (“Trust or restricted tribal or tribal corporation property mortgaged pursuant to sections 5136 to 5143 of this title shall be subject to foreclosure and sale or conveyance in lieu of foreclosure, free of such trust or restrictions, in accordance with the laws of the State in which the property is located.”); *see also* 25 U.S.C.A. § 5136(b)(2) (Westlaw through Pub. L. No. 114-244) (“Section 5140 of this title shall not apply to trust land, restricted tribal land, or tribal corporation land that is mortgaged in accordance with paragraph (1).”).

16. Rodriguez, Galbraith & Stiles, *supra* note 10; *see also* Molly Rose Goodman, *The Buck Stops Here: Toxic Titles and Title Insurance*, 42 REAL EST. L.J. 5, 6 (2013) (“For many homeowners, the equity in their residence—the difference between the market value and all of the debt encumbering the property—represents a substantial portion of their savings and net worth.”).

materialize, or the terms of the funding may be far from beneficial to a new business. Leveraging real property, however, usually gives an entrepreneur access to capital at interest rates lower than small business loans.¹⁷ Additionally, businesses that have real property are able to list it as an asset on financial statements and use it as collateral to secure additional capital investments.¹⁸ This dichotomy in the law between tribal real property and non-tribal real property causes an unnecessary friction: the United States is attempting to protect tribal lands, but doing so undermines an important avenue for basic economic development.

In the simplest terms, economic development and prosperity result from individuals and organizations creating value through the creation of goods and services. But economic development and growth rely on access to capital.¹⁹ Even the greatest products will never make it to the marketplace without adequate capital. So the question is: How do tribes and their members become competitive market players?

A. The Effects of Access to Capital Investment in Indian Country

Tribes need to incorporate economic prosperity into tribal business entities so that they can invest in Indian entrepreneurs and Indian small businesses. To meet this goal now, some tribes are investing in hotels, golf courses, manufacturing, entertainment, tourism, energy, and health care; but growing these investments requires access to capital.²⁰ Access to capital is

17. Scott Shane, *Small Loans Are More Expensive*, FORBES, (June 25, 2012), <http://www.forbes.com/sites/scottshane/2012/06/25/small-loans-are-more-expensive/> (stating that a second mortgage used to finance a business is available at 3.88% to 4.15% compared to a small business loan at 7%, and that obtaining a 4.3% loan requires a small business loan in the amount of at least \$500,000).

18. See David L. Funk, *Real Estate Takes Its Place as the Fourth Asset Class*, COM. REAL EST. DEV. MAG., Spring 2015, <http://www.naiop.org/en/Magazine/2015/Spring-2015/Development-Ownership/Real-Estate-Takes-Its-Place-as-the-Fourth-Asset-Class.aspx> (“The Standard & Poor’s Dow Jones Indices recently concluded that real estate is due an upgrade and will elevate it from a subsector under ‘financials’ to one of 11 sectors within its Global Industry Classification Standard (GICS), effective with the market close on August 31, 2016.”).

19. ALICIA ROBB, OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., ACCESS TO CAPITAL AMONG YOUNG FIRMS, MINORITY-OWNED FIRMS, WOMEN-OWNED FIRMS, AND HIGH-TECH FIRMS (Apr. 2013), <https://www.sba.gov/sites/default/files/files/rs403tot%282%29.pdf>.

20. Annette Alvarez, *Native American Tribes and Economic Development*, URB. LAND MAG., Apr. 19, 2011, <http://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/>.

critical to develop new products, services, and respond to market demands²¹ because “[c]apital spurs future growth through investment opportunities, maximizes shareholder value, and is necessary to run a business.”²² Even when “Indian reservations do have valuable economic resources, these resources either go undeveloped or are developed by outside, non-Indian promoters with only minimal economic return to the tribe and its members in the form of rentals or royalties.”²³ Tribes need to develop their business entities and economic structures in order to provide the financial resources to Indian entrepreneurs and Indian small businesses. If tribes are unable to provide access to capital, it will become very difficult to stimulate tribal economic growth in Indian Country.

There are two primary forms of corporate capital available to business entities: debt and equity.²⁴ While debt financing is accomplished by borrowing from a lending institution or by issuing bonds, equity financing is accomplished by issuing securities. The two forms of raising capital are not mutually exclusive; a corporation can engage in both depending upon its financial strategy. Regardless of the form of capital, tribal business entities with greater access to capital often out-perform other tribes.²⁵ As a result, these tribes are able to reinvest in their people and stimulate tribal

21. Susan Coleman, *Access to Capital and Terms of Credit: A Comparison of Men- and Women-Owned Small Businesses*, 38 J. SMALL BUS. MGMT. 37 (2000).

22. CHUCK WILLIAMS, *PRINCIPLES OF MANAGEMENT* 343 (7th ed. 2015).

23. H.R. REP. NO. 93-907 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2873, 2874, 1974 WL 11451.

24. WILLIAMS, *supra* note 22, at 344.

25. *Honoring Nations: 2006 Honoree: Citizen Potawatomi Community Development Corporation*, HARVARD PROJECT ON AM. INDIAN ECON. DEV. 1-2, 3, <http://hpaied.org/sites/default/files/publications/Citizen%20Potawatomi%20Comm%20Dev%20Corp.pdf> (last visited Dec. 5, 2016) (“In 2003, the Citizen Potawatomi Community Development Corporation (CPCDC) was created to stimulate small businesses and entrepreneurs. Its mission is to provide access to capital through loan fund support and business development services to members of the Citizen Potawatomi Nation and other Native Americans. . . . The CPCDC has provided over 74 loans totaling more than \$5.1 million in Native business loans, 90% going to CPN citizens. Loans have been granted to businesses in Oklahoma, Kansas, Oregon, Mississippi, Kentucky, California, Missouri, Montana, and Texas. From 2003 to 2006, it is estimated that CPCDC clients created or retained 288 jobs. It has also provided over 600 hours of business development training and consulting to 267 Native people and 122 hours of financial education and credit counseling to 238 clients. CPN employees received 405 loans totaling more than \$319,000—only three loans went to the tribal court system, a step that precedes default status. Net assets grew to \$2.78 million in 2006, with support coming in from private and federal grants, loan investment income, and loans and other fees.”).

development both on and off the reservation, leading to a higher standard of living for tribal members.²⁶

B. Avenues Currently Available for Generation of Tribal Capital

Some vehicles for capital generation are available to tribes and Indian entrepreneurs, but they are not particularly effective. To assist tribes and their members, Congress enacted legislation “to provide Indian tribes and individuals capital in the form of loans and grants to promote economic and other development.”²⁷ Examples of these government programs include Tribal Economic Development Bonds and the issuance of municipal debt, but these programs often limit the use of capital to “essential government functions.”²⁸

1. Tribal Economic Development Bonds

For example, tribes can issue Tribal Economic Development Bonds under a provision in the American Recovery and Reinvestment Act of 2009.²⁹ The total volume for this program is capped at roughly \$2 billion, but there are some restrictions on the use of funds, especially related to gaming operations.³⁰ Furthermore, tribes must still find investors to buy this tax-exempt bond once they are approved to issue it.³¹ Even with investors, these bonds are primarily limited to “essential government functions” and will do little to stimulate tribal economic growth and development in the Indian private sector beyond the erection of governmental infrastructure in Indian Country.³²

26. See *About CNI*, CHICKASAW NATION INDUS., <http://www.chickasaw.com/cni> (last visited Jan. 2, 2016) (finding a portion of Chickasaw Nation Industries’ profits are used “to support Chickasaw citizens through a multitude of programs and services such as education, health care, nutrition services, housing programs, legal services, elder and child care and community support programs”).

27. H.R. REP. NO. 93-907 (1974), as reprinted in 1974 U.S.C.C.A.N. 2873, 2874, 1974 WL 11451.

28. 26 U.S.C. § 7871(e) (2012) (“[F]or purposes of this section, the term ‘essential governmental function’ shall not include any function which is not customarily performed by State and local governments with general taxing powers.”).

29. *Tribal Bonds Financing: The Basics*, INTERNAL REVENUE SERV., <http://www.irsvideos.gov/Governments/Tribes/TribalBondsFinancingTheBasics> (last visited Oct. 2, 2015).

30. *Id.*

31. *Id.*

32. *Id.* (recognizing that tribal economic development bonds are not available to individuals or privately owned small businesses).

2. *Municipal Debt*

A second capital investment vehicle available to tribes is the issuance of municipal debt, which can be issued in the forms of tax exempt and non-tax exempt municipal bonds.³³ Tribes have the option to issue tribal tax-exempt bonds under the Internal Revenue Service (IRS) tax code.³⁴ Investors will often purchase tax-exempt municipal bonds even though they offer lower returns compared to other investments because all returns are federally tax-exempt.³⁵ This type of funding, however, has strict use requirements, again limited to “essential government functions” within the reservation.³⁶ Additionally, tax-exempt bonds carry the onerous burden of SEC reporting and registration compliance.³⁷ Non-exempt bonds are without the burden of SEC compliance but may fail to attract investors.³⁸

C. Using Capital Beyond Essential Government Functions

To use capital for non-government functions, a tribe can form a limited liability company (LLC) or corporation by filing formation documents in most states. This allows capital to be used for economic growth and expansion without the “essential government functions” limitation. A tribal business entity incorporated under state law will be treated the same as other business entities in the state. This means that the formation of an LLC or corporation under state law will most likely result in the loss of sovereign immunity³⁹ and subject the newly formed business entity to state and federal taxes.⁴⁰ Tribes incorporating in the state where they are

33. *Municipal Bonds: What Are Municipal Bonds?*, INVESTOR.GOV: U.S. SEC. & EXCH. COMM’N, <http://investor.gov/investing-basics/investment-products/municipal-bonds> (last visited Oct. 2, 2015).

34. 26 U.S.C. § 7871 (2012).

35. *See id.*

36. *Id.*; *see also* 26 U.S.C. § 141 (2012).

37. *Office of Municipal Securities*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/municipal> (last updated June 14, 2016).

38. U.S. SEC. & EXCH. COMM’N, REPORT ON THE MUNICIPAL SECURITIES MARKET (July 31, 2012), <http://www.sec.gov/news/studies/2012/munireport073112.pdf> (recognizing that investors will usually choose tax-exempt over non-tax-exempt when investing in municipal bonds).

39. *See* *Airvator, Inc. v. Turtle Mountain Mfg.*, 329 N.W. 2d 596, 603 (N.D. 1983) (“The state has plenary power and authority over corporations [incorporated in the state].”).

40. *Baraga Prods. v. Comm’r of Revenue*, 971 F. Supp. 294, 297-98 (W.D. Mich. 1997); *see also* *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006) (“[A] tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law.”); *Uniband, Inc. v. Comm’r*, 140 T.C. 230, 248-49 (2013)

federally recognized also have the option to issue securities without the cost and compliance of SEC registration through an intrastate offering.⁴¹

This is a cost efficient method to raise capital, but is limited to investors located in the same state where the tribe is incorporated.⁴² This could be an issue for tribes located in states with small populations and thus a smaller potential investor pool. Tribes can avoid sovereignty and tax issues if they instead choose to incorporate as a section 17 corporation under the IRA or incorporate as a tribal corporation under the laws of their tribe. Further, these tribal business entities give tribes the option to raise capital investment through joint ventures.

1. Incorporating under Section 17 of the Indian Reorganization Act of 1934

A section 17 corporation must be wholly owned by the tribe, which precludes any capital investment into the corporation from potential non-tribal investors.⁴³ A section 17 corporation, however, can still engage in joint ventures with non-Indian investors.⁴⁴ Although sovereign immunity for the section 17 corporation is usually waived in order to engage in business transactions, tribal government immunity almost always remains intact and separate from the section 17 corporation's functions and liabilities.⁴⁵ Incorporation as a section 17 corporation also allows the tribe to avoid state and federal taxes.⁴⁶ An additional benefit for a tribe

(finding that a state chartered corporation is a commercial venture and does not perform a government function and is thus not an integral part of the tribe, which prohibits the corporation from sharing in the tribe's exemption from federal income tax).

41. *Small Business and the SEC: Intrastate Offering Exemption*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/info/smallbus/qasbsec.htm#intrastate> (last visited Oct. 2, 2015).

42. *Id.*

43. 25 U.S.C.A. § 5124 (Westlaw through Pub. L. No. 114-244).

44. *Id.*

45. *Id.*; *Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 901 (N.D. Iowa 1994) (quoting *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 715-16 n.9 (10th Cir. 1989) ("The corporate charters usually include a 'sue or be sued' clause to enable the tribes to engage in commercial activity as corporations without losing their sovereign immunity as tribes. This court has held that the presence of such a clause in a tribal corporate charter does not waive the tribe's immunity as a tribe."); *Am. Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002).

46. *See* Rev. Rul. 81-295, 1981-2 C.B. 15 ("[A section 17] corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation."); *see also* Rev. Rul. 94-16, 1994-1 C.B. 19 ("[A section 17 corporation] is not subject to federal income tax on the income earned in the conduct of

organizing under section 17 is that the Secretary of the Interior may expend up to \$250,000 each fiscal year “in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.”⁴⁷

2. *Incorporating Under Tribal Law*

Finally, a tribe may also incorporate under tribal law, which allows the tribe to regulate all business in Indian Country under its own laws.⁴⁸ Tribal constitutions and the adopted model business rules dictate how the tribal corporation will be organized and managed.⁴⁹ Similar to a section 17 corporation, a tribal corporation separates the assets, obligations, and decision-making authority from the tribal government.⁵⁰ A state usually views a tribal corporation as a foreign corporation.⁵¹ There is still some ambiguity, however, in some jurisdictions about the tax and immunity treatment of tribal corporations. With this type of business entity, the greatest causes of concern for outside investors are the uncertain tax implications and questions of sovereign immunity.⁵²

3. *Joint Venture Opportunities*

Joint ventures will allow joint ownership and control of a newly formed business entity that can be used for economic advancement without exposing the tribe to unnecessary risk or loss of control of the tribal business entity. Many non-Indian businesses will be willing to partner with tribes and their members because “[i]n recognition of both the sovereign status of Indian tribes and historical economic hardships, tribes and Indian-owned . . . businesses today enjoy a variety of opportunities that are

commercial business on or off the tribe's reservation. However, a corporation organized by an Indian tribe under state law is subject to federal income tax on the income earned in the conduct of the commercial business on and off the tribe's reservation.”).

47. 25 U.S.C.A. § 5112 (Westlaw through Pub. L. No. 114-244).

48. *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (“A tribe may also charter a corporation pursuant to its own tribal laws . . .”).

49. *Id.* (“The tribe's constitution provides the tribal council authority to charter tribal corporations.”).

50. MICH. ECON. DEV. CORP., TRIBAL BUSINESS STRUCTURES: A GUIDEBOOK ON DIFFERENT STRUCTURES FOR TRIBAL BUSINESS ENTITIES 1-11 (Sep. 14, 2011), http://www.michiganbusiness.org/cm/files/tribal_business_development/tribal%20business%20structure%20guidebook.pdf.

51. *Id.* at 12 n.24 (stating that, depending on a state's requirements, a tribe may also need to file as a foreign corporation).

52. *Id.* at 5.

generally unavailable to non-Indian businesses.”⁵³ Also, many tribes possess needed assets in the form of an available labor force,⁵⁴ water rights,⁵⁵ and a strategic location. Non-Indian businesses can benefit from joint ventures with tribes and their members while the tribe can benefit as a whole from having a new business on the reservation. Three illustrative programs that tribal business entities and tribal members may be able to take advantage of to gain access to capital and stimulate economic development are: (1) the Small Business Administration’s (SBA) Historically Underutilized Business Zones (HUBZone) program; (2) the Indian Incentive Program (IIP); and (3) the Rural Business Development Grants (RBDG) program, created by the United States Department of Agriculture (USDA).

a) Small Business Administration’s Historically Underutilized Business Zones Program

One opportunity is to engage in a joint venture under the SBA’s HUBZone program. The HUBZone program gives qualified participants preference when competing for federal contracts.⁵⁶ To qualify for the program, a tribal business entity must meet certain criteria: (1) it must be a small business by SBA standards; (2) at least 51% of the business must be owned and controlled by an Indian tribe; (3) its principal office must be located within land that is considered Indian Country; and (4) at least 35% of its employees must reside in Indian Country.⁵⁷ This program is a perfect fit for tribes that desperately need economic development on Indian lands as well as Indian business owners. The program can be used to capitalize on

53. MICH. ECON. DEV. CORP., INCENTIVES FOR JOINT VENTURES BETWEEN MICHIGAN’S TRIBES AND NON-INDIAN BUSINESSES 32-40 (Sept. 14, 2011) http://www.michiganbusiness.org/cm/files/tribal_business_development/guide_on_incentives_for_joint_ventures_with_tribes.pdf.

54. See Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, U.S. NEWS & WORLD REP. (Nov. 27, 2014), <http://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery> (making the assumption that with an unemployment rate of 11% and the lowest labor force participation rate of all race and ethnicity groups, there is a labor force available).

55. See generally *Winters v. United States*, 207 U.S. 564 (1908) (finding water rights will vary by tribal location and are often subject to compact arrangements, treaties, and litigation, but there is a general presumption that tribes possess water rights on their reservations).

56. 15 U.S.C. § 631 (2012).

57. *Id.* § 632.

the specific skills and industry that the non-Indian investor may possess while providing much-needed investment in Indian Country.

b) Indian Incentive Program

Tribes also have access to the IIP, which “is a congressionally sponsored program that provides a . . . rebate back to the prime contractor on the total amount subcontracted to an . . . Indian Organization” for defense contracts.⁵⁸ Under the IIP, contractors still pay subcontractors the full rate for subcontracted services. Thus, tribal subcontractors are more competitive than their non-Indian competitors because the federal government will pay the prime contractor a rebate on all services subcontracted to tribal business entities. The amount of the work subcontracted to the tribal business entity, however, needs to be at least \$500,000.⁵⁹

A tribal business entity can reap the economic benefits of this program by performing subcontracting work either on or off the reservation. Since the tribe wholly owns the section 17 corporation and tribal corporation, it can hire tribal members from the reservation to perform the subcontracting work. This will benefit both the tribe and its members and stimulate economic growth. This means the tribal business entity can funnel more capital into Indian Country to support individual Indian entrepreneurs and Indian small businesses.

c) U.S. Department of Agriculture’s Rural Business Development Grants Program

Remotely located tribes may face additional obstacles in implementing the prior two programs because of their distance from urban areas and technical industrial complexes, making it impractical for them to support defense contracts. These tribes could turn to the USDA’s RBDG program for which federally recognized tribes qualify.⁶⁰ The funds from this program are intended for small and emerging businesses with less than fifty employees and less than \$1 million in gross revenues located outside the urban periphery of any city with a population of 50,000 or more.⁶¹ The USDA reports that grants typically range from \$10,000 up to \$500,000 with

58. *Indian Incentive Program*, U.S. DEP’T OF DEFENSE: OFF. OF SMALL BUS. PROGRAMS, <http://www.acq.osd.mil/osbp/sb/programs/iip/> (last visited Jan. 1, 2016).

59. FAR § 252.226-7001 (2015).

60. 7 C.F.R. § 4280.416 (2015).

61. *Rural Business Development Grants*, U.S. DEP’T OF AGRIC.: RURAL DEV., <http://www.rd.usda.gov/programs-services/rural-business-development-grants> (last visited Jan. 1, 2016).

very few use restrictions on the funds.⁶² Again, a tribal business entity could partner with a local non-Indian business entity to take advantage of this program and stimulate economic development and growth in Indian Country.

d) The Benefits and Downfalls of Engaging in Joint Ventures

The three above listed joint ventures represent some available options for tribal business entities. Indeed, some tribes have already benefited from these programs. There are programs continuously developed at the federal, state, and local level from which tribes could reap the benefits. Joint ventures are a great mechanism for tribes to use to reduce risk, and for when the tribe is ready to exploit an economic opportunity, but lacks the technical or business resources to do so. Non-Indian businesses and investors should be eager to partner with tribes and their members because it allows them to share in the benefits of the listed programs. Tribal business entities and tribal members can use these programs to their advantage to attract investors and to gain much needed capital investment to stimulate economic development in Indian Country. With any joint venture, the tribe needs to clarify jurisdiction, venue, and waivers of immunity before engaging in a joint venture. As tribal business entities grow, they will need to develop a competent court system within their business structure to adjudicate disputes.⁶³

While the above capital vehicles are available, they are not ideal for every tribe and can fail to give tribes the flexibility non-tribal corporations enjoy. Also, many of the joint venture opportunities listed above are intrinsically tied to government programs. Government programs are susceptible to being circumscribed or eliminated with each change in the political wind or budgetary shortfall. There are additional shortcomings for tribal members under the above capital vehicles: (1) not all tribes distribute tribal earnings (per caps limitation); (2) some earnings are not that much money; and (3) if distributed as a “bonus” then the money is subject to a

62. *Id.*

63. *See* Ho-Chunk Nation v. B & K Builders, Inc., No. CV00-91, 2001 WL 36153791 (Ho-Chunk Trial Ct. June 20, 2001) (arbitration clause in agreement represented a clear waiver of sovereign immunity); *see also* Ho-Chunk Nation v. Olsen, No. CV99-81, 2000 WL 35716348 (Ho-Chunk Trial Ct. Sept. 18, 2000) (tribal court had jurisdiction over tribe and non-Indian over a disputed purchase agreement); Ho-Chunk Nation Hous. Auth. v. Cont'l Flooring Co., No. CV01-76, 2002 WL 34432646 (Ho-Chunk Trial Ct. Feb. 19, 2002) (tribe is required to submit to arbitration for its contract claims with non-Indian owed business).

higher IRS individual tax rate.⁶⁴ While the options above do not constitute an exhaustive list, as some states may have additional programs and economic initiatives, the fact remains that tribes need to develop a robust economic structure and business entity in order to be able to stimulate the private equity growth that Indian entrepreneurs and Indian small businesses require. Even with government programs in place, more needs to be done to stimulate private capital investment in Indian Country and place tribal business entities on equal footing with their non-Indian counterparts.

III. How a Tribe Should Go About Increasing Capital Flows

This comment advocates that a lucrative avenue to improve tribal economic development is to pursue capital investment in Indian Country⁶⁵ using three approaches: (1) tribes should incorporate their business entity under Delaware law and issue securities, specifically common stock; (2) tribes should petition the SEC to promulgate a final rule to amend Rule 501(d) of Regulation D of the Securities Act of 1933 to include section 17 corporations and tribal corporations as accredited investors; and (3) tribes should advocate legislative changes to section 17 of the IRA to allow direct non-tribal investment in the tribe's corporation.

A. Approach Number One: Tribes Should Incorporate Under Delaware Law and Issue Common Stock

The approach advocated here, that tribes incorporate under state law and then issue common stock, is not a novel method to raise capital. But of the 567 federally recognized tribes, not one has yet sold shares on the U.S. public stock exchange. The Ute Tribe's business entity, Ute Energy Corporation, came close in 2012,⁶⁶ but was purchased by another firm before the initial public offering (IPO).⁶⁷ Some tribes may not engage as publically traded companies because they desire to pursue a different capital strategy. It is essential, however, that tribes explore capital

64. INTERNAL REVENUE SERV., PUB. 15, CIRCULAR E, EMPLOYER'S TAX GUIDE 18-22 (Dec. 23, 2015) (stating that bonuses are considered supplemental wages and automatically taxed at 25%).

65. *See supra* note 1.

66. Mark Fogarty, *Ute IPO Will Finance Oil/Gas Exploration, Debt Reduction*, INDIAN COUNTRY TODAY MEDIA NETWORK, (Jan. 19, 2012), <http://indiancountrytodaymedianet.com/2012/01/19/ute-ipo-will-finance-oilgas-exploration-debt-reduction-73244>.

67. *Ute Energy Upstream Holdings LLC Company Information*, HOOVERS, http://www.hoovers.com/company-information/cs/company-profile.Ute_Energy_Upstream_Holdings_LLC.2ed5a2b94e6200a5.html (last visited Jan. 8, 2016).

investments through all available avenues, including a publically traded tribal business entity, to stimulate economic growth in Indian Country. This portion of this comment describes how a tribe could incorporate under Delaware state law and then issue shares of common stock.

1. How to Incorporate Under Delaware Law and Issues to Avoid

A majority of businesses choose to incorporate in Delaware because it has familiarity with corporate law, is considered business friendly, offers a quick and inexpensive incorporation, has a low corporate tax burden, and allows flexibility in key corporate structural issues.⁶⁸ Delaware's Court of Chancery is especially attractive to corporations. This very effective and competent court system has "the most knowledgeable judiciary in the nation" and the ability to adjudicate disputes "frequently within . . . a few months."⁶⁹ Moreover, incorporating in Delaware can increase the value of a business by as much as 5%.⁷⁰

It is no small wonder that over half of all U.S. corporations and 70% of venture capitalists choose to incorporate in Delaware.⁷¹ Incorporation in Delaware will also allow tribes to use the "internal affairs" rule.⁷² This rule will allow tribes to decide which "state's law will govern their corporate affairs, whether or not the corporation has ties to that state."⁷³ This rule will give tribes great flexibility in choosing which state's law best suits their needs. Tribes should incorporate their business entities in Delaware because of all the benefits incorporating in Delaware offers.

Tribal business entities can quickly and inexpensively incorporate in Delaware by filing a certificate of incorporation with the state.⁷⁴ The statutory formation requirements are the first actions a tribal business entity needs to undertake to be a publically traded company and sell shares of stock through its IPO. Before an IPO, the tribal business entity must register

68. See LEWIS S. BLACK, JR., *WHY CORPORATIONS CHOOSE DELAWARE* 1 (2007), https://corp.delaware.gov/pdfs/whycorporations_english.pdf (stating that Delaware law is "one of the most advanced and flexible corporation statutes in the nation").

69. John L. Reed & Frank E. Noyes, *Incorporate in Delaware? Yes*, *DIRECTORS & BOARDS*, Winter 2001, at 33.

70. *Id.*

71. *Id.*

72. Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 *SAN DIEGO L. REV.* 273, 275 (2015).

73. *Id.*

74. DEL. CODE ANN. tit. 8, § 101 (West 2015).

with the SEC by filing a registration statement.⁷⁵ The tribal corporation will use an underwriter to file the registration statement with the SEC.⁷⁶ Underwriters are usually investment banks that will work with the tribal business entity to determine the amount of capital that might be raised, initial share price, and underwriting fees.⁷⁷ One of the most important parts of the registration statement is the prospectus.

The prospectus is a document describing the corporation, the IPO terms, disclosure about the corporation's business, financial condition, management, and other key investor information.⁷⁸ The SEC reviews the registration statement for IPOs and once the review is complete, the SEC issues an order declaring the registration statement effective.⁷⁹ Even though the SEC approves the registration statement, the tribal business entity could still be exposed to liability. This is especially relevant in light of the Supreme Court's recent opinion in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.⁸⁰

Tribal business entities can avoid potential liability described in *Omnicare* by working closely with their underwriter when developing the registration statement. Following full disclosure required in the registration statement, the SEC will allow the tribal business entity to consummate its IPO⁸¹ by working with the tribe to set a date for the IPO.⁸² Next, the underwriter will use the IPO date and prospectus to approach prospective investors.⁸³ This IPO "road show"⁸⁴ can be one-on-one presentations, video

75. OFFICE OF INV'R EDUC. & ADVOCACY, U.S. SEC. & EXCH. COMM'N, PUB. NO. 133, INVESTOR BULLETIN: INVESTING IN AN IPO 1 (Feb. 2013), <http://www.sec.gov/investor/alerts/ipo-investorbulletin.pdf> [hereinafter INVESTING IN AN IPO].

76. Mark Koba, *Initial Public Offering: CNBC Explains*, CNBC (Sept. 13, 2013), <http://www.cnbc.com/id/47099278>.

77. *Id.*

78. INVESTING IN AN IPO, *supra* note 75.

79. *Id.*

80. 135 S. Ct. 1318, 1322-33 (2015) (analyzing two issues regarding § 11 of the Securities Act of 1933 after investors (Funds) brought a class action lawsuit against Omnicare Inc. alleging fraud in a registration statement). "[Liability will arise] if a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor reading the statement fairly and in context, would take from the statement itself." *Id.* at 1329.

81. INVESTING IN AN IPO, *supra* note 75.

82. Koba, *supra* note 76.

83. *Id.*

84. *Id.* ("Road shows are usually for the bigger institutional investors like pension funds, rather than an individual investor.")

and Internet conferences, or any other marketing avenues the underwriter wants to pursue.⁸⁵ The underwriter can sell shares to the prospective investors before the IPO date through IPO allocation.⁸⁶ Following the IPO allocation, stock exchanges will compete to list the company on its stock exchange.⁸⁷ This entire process is relatively short, comprising three to four months from the beginning of filing the required documents to the first day of trading on the stock exchange.⁸⁸ Following the IPO, the tribal business entity will be a publically traded company subject to SEC reporting requirements.⁸⁹

2. The Benefits of Issuing Common Stock from a Tribal Business Entity

Issuing common stock will allow tribal business entities to develop resources and expand current businesses.⁹⁰ Creating a corporation under Delaware state law and then issuing common stock will possibly allow the tribes to compete with other national and international corporations. This business structure will also allow tribal members to invest directly in their tribe's business entity. Tribal members could benefit by gaining an investment asset in the form of common stock. Owning certificate shares of common stock will allow individual tribal members direct ownership and voting rights in the publically traded tribal corporation.⁹¹

As a publically traded company, non-Indian members will also be able to invest in the tribal corporation as well. In addition to the capital raised through common stock, non-Indian investment will have lasting "soft effects" for the tribe. Non-Indian investors will have direct financial buy-in for the continued growth and development of the tribe. They will want the

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Companies, Going Public*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/answers/comppublic.htm> (last modified Oct. 14, 2014); *see The Laws That Govern the Security Industry: Securities Act of 1933*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/about/laws.shtml#secact1933> (last modified Oct. 1, 2013) ("Corporations with more than \$10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports. These reports are available to the public through the SEC's EDGAR database.").

90. *See Alvarez, supra* note 20 (stating that American tribes have an estimated fifty million acres of land and are involved in a variety of business ventures).

91. *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2016) (management of a corporation is vested the Board of Directors); *see also* DEL. CODE ANN. tit. 8, § 212 (West 2016) (owning stock permits stockholders to elect these individuals).

tribal business entity to succeed as a way to maximize shareholder wealth. This may result in non-Indians gaining a stake in the political and legislative treatment of indigenous peoples as a whole because many people are much more likely to care about—and be involved with—issues affecting a group of people if they feel connected to that group of people.

Not only will tribes gain new financial capital through issuing shares of stock, this model will also allow them to attract top management candidates by offering stock option plans.⁹² Tribal business entities will be on equal footing with other corporations to compete for the best talent because they will also be able to offer similar benefit packages. This will give the tribes access to executives with industry experience, who will provide benefit and value to the tribes. This business entity will foster a symbiotic relationship by providing the tribe with management expertise and newly hired executives with the unique experience of working for a tribal business entity.

Attracting non-Indian investors during the IPO allocation and IPO may create some difficulties because a tribal business entity has never been publically traded. It is likely, however, that many tribal business entities will be able to attract investment because they will be able to offer investors a sustained competitive advantage.⁹³ This is likely because there are few investment options that allow investors to capitalize on the benefits of nationwide casinos that will be available through tribal business entities.⁹⁴ Additionally, the vast amounts of tribal land open an array of natural resource development. Both legalized gambling and natural resource development industries have a high consumer demand with a limited supply.

In addition to exploiting the competitive advantages above, investors can capitalize by viewing Indian Country as an emerging market because “Native American-owned businesses proliferate at seven times the growth rate of all firms in the U.S. and grow sales at more than double the U.S.

92. Koba, *supra* note 76.

93. Jay Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. MGMT. 99, 102 (1991) (“[A] firm is said to have a *competitive advantage* when it is implementing a value creating strategy not simultaneously being implemented by any current or potential competitors. A firm is said to have a *sustained competitive advantage* when it is implementing a value creating strategy not simultaneously being implemented by any current or potential competitors *and* when these other firms are unable to duplicate the benefits of this strategy.”).

94. While this comment recognizes legalized gambling is not financially feasible for all tribes, investors may nonetheless be able to recognize and develop other sustained competitive advantages the tribe can exploit.

rate.”⁹⁵ The buying power of American Indians was estimated at \$35 billion in 2001 with \$17 billion of that share attributed to Indians on reservations.⁹⁶ An additional \$25 billion in revenue from Indian Country businesses and trust assets was also estimated for the same year.⁹⁷ Investors are in a unique situation to capitalize on this emerging market in Indian Country as the Treasury Department stated that the first \$10 billion of equity investment would produce an additional \$16 billion in gross domestic product (GDP).⁹⁸ Thus, it is important for investors to recognize that a lucrative emerging market exists right in their backyard, prime for capital investment.

3. *The Downsides of Issuing Securities from a Tribal Business Entity*

Issuing securities to the public is not a small undertaking and could be quite costly.⁹⁹ A tribe must carefully consider all the ramifications of issuing stock, such as: (1) waiver of sovereign immunity;¹⁰⁰ (2) payment of federal corporate taxes;¹⁰¹ (3) loss of tribal control over the corporation;¹⁰² and (4) the possible failure of the IPO to attract investors.

95. Clarkson, *Accredited Indians*, *supra* note 4, at 300.

96. *Id.* at 301.

97. *Id.*

98. *Id.*

99. See William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private"*, 55 EMORY L.J. 141, 154 (2006) (citing advantages of going private as opposed to a publically traded company, “which can amount to several million dollars annually, plus the litigation risks associated with being public”).

100. See, e.g., *Baraga Prod., Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 296 (W.D. Mich. 1997) (“[A] corporation has been held to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes.”) *aff'd sub nom.* *Baraga Prod., Inc. v. Mich. Comm'r of Revenue*, No. 97-1449, 1998 WL 449674, at *1-3 (6th Cir. July 23, 1998); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. Ct. App. 1996) (“[A] corporation organized under tribal laws, controlled by the tribe, and operated for governmental purposes can assert the tribe's immunity as a defense.”) *aff'd mem.*, 561 N.W.2d 889 (Minn. 1997); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006) (“[A] tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law.”).

101. See Aparna Mathur, *The Bad and the Bad of U.S. Corporate Income Taxes*, FORBES (May 28, 2015, 11:22 AM), <http://www.forbes.com/sites/aparnamathur/2015/05/28/the-bad-and-the-bad-of-u-s-corporate-income-taxes/> (stating the United States corporate tax rate stands at 35%, which is higher than the average 23% for OECD countries).

102. Daniel T. Webster, *Pros and Cons: A Wall Street Analyst Outlines the Criteria for Determining Whether Going Public Is Right for your Company*, H&MM, Nov. 18, 1996, at 48, 48 (“The amount of control ceded depends on the amount of stock sold. Selling shares to

While section 17 corporations and tribal corporations are not subject to federal taxes,¹⁰³ a tribal business entity issuing securities waives sovereign immunity once incorporated in a state.¹⁰⁴ This loss of sovereign immunity only applies to the tribal business entity and not the tribe.¹⁰⁵ While this could be considered a potential downside, many investors and other businesses will be more willing to engage with a corporation that is unable to assert sovereign immunity. This is because assets will be available as well as individuals to hold responsible should the corporation fail. This may incentivize a tribal business entity to pursue other formation options; however, none afford the opportunity to raise capital as a publically traded company through the issuance of common stock. Thus, a tribal business entity that wishes to be publically traded will be subject to taxes and waiver of sovereign immunity.¹⁰⁶

Loss of a tribe's control over the business entity is a distinct possibility if the tribe issues shares of stock to the public. Individual investors, hedge funds, banks, and other institutions will be able to buy shares of stock and thus have a vote for each of those shares. There are many corporations, however, where control and direction of the corporation is closely managed by ensuring a controlling share of available corporate stock. An example is Berkshire Hathaway Inc., which is a publically traded corporation.¹⁰⁷ Managing this corporation since 1965, Warren Buffet continues to closely control and manage the strategic direction and purpose of this corporation.¹⁰⁸ Tribes could exert this same amount of influence in their corporations by employing corporate takeover defenses.

new owners obviously means that the ownership percentage of existing owners will be diluted.”).

103. Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 8 (2008) (“The tribes themselves, and their federally chartered corporations, are exempt from federal and state income taxation . . .”).

104. *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W. 2d 596, 603 (N.D. 1983).

105. *Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 901 (N.D. Iowa 1994).

106. DEL. CODE ANN. tit. 30, § 1902 (West 2015) (proposing the use of Delaware as the state of incorporation because “[e]very domestic or foreign corporation that is not exempt . . . shall annually pay a tax of 8.7 percent on its [federal] taxable income . . . which shall be deemed to be its net income derived from business activities carried on and property located within the State during the income year.”).

107. See BERKSHIRE HATHAWAY, 2014 ANNUAL REPORT (2014), <http://www.berkshirehathaway.com/2014ar/2014ar.pdf>.

108. See *id.*

Tribes can use a shareholders-rights plan, commonly called a poison pill, to retain control of their publically traded company.¹⁰⁹ There are various forms¹¹⁰ and provisions¹¹¹ of a poison pill, but the basic premise is that it curtails the possibility that the individuals who formed the business entity will lose control of it. Poison pills and their various provisions are quite commonly employed in the corporate industry.¹¹² Additionally, poison pills are not as controversial as other corporate defense mechanisms such as stichting.¹¹³ Since the tribe is incorporating the business entity, it can also reserve a controlling interest in the boardroom and retain a majority of the shares. The tribe should incorporate some of these provisions, such as a shareholders-rights plan, into the formation documents so that it can retain control of the newly formed public corporation.

The last consideration is the possibility that an IPO may fail to attract investors and the resulting business may fail. The competitive nature of business requires a competitive advantage, the right people, and access to capital to succeed. Even then, some corporations will still fail because a competitive advantage is a short-run gain, governmental regulations may curtail businesses' activities, and technology may render a product or service obsolete.

109. CORPORATE ANTI-TAKEOVER DEFENSES: THE POISON PILL DEVICE § 1:1, Westlaw (database updated June 2016) ("A dividend distribution of rights or securities that have redemption or conversion provisions which, once activated by a hostile takeover attempt or a party acquiring a specified percentage of a class of the target's outstanding voting equity securities, makes the issuer excessively or prohibitively expensive to buy. The poison pill makes the target corporation an unattractive target by financially ruinous redemption provisions or dividends, or by allowing the poison pill holder to purchase at a substantial discount from market price.").

110. *Id.* (e.g., fair value poison pills and suicide poison pills).

111. *Id.* (e.g., flip-in provisions and flip-over provisions).

112. *See Mylan Laboratories Inc.: Board Adopts 'Poison Pill' Involving Preferred Stock*, WALL ST. J., Aug. 26, 1996, at B4.

113. *See Shayndi Raice & Margot Patrick, The Rise of 'Stichting,' an Obscure Takeover Defense*, WALL ST. J. (Apr. 22, 2015, 12:15 PM), <http://www.wsj.com/articles/the-rise-of-the-stichting-an-obscure-takeover-defense-1429716204> (defining a stichting as a legal entity formed under Dutch law that has no members, is governed exclusively by the board of directors, and can hold legal title) ("All sorts of underhanded and nefarious activity goes on through these kinds of structures.") (quoting Joshua Simmons, policy counsel at Global Financial Integrity).

4. Balancing the Benefits and Obstacles of Issuing Common Stock

Some tribes may be leery if not outright suspicious of issuing stock to non-tribal members. The same is most likely true of investors buying tribal stock. Both of these concerns, however, can be managed through the framework of investor relations. A tribe can retain a controlling share of stock in the corporation to ensure that the values and vision of the tribe remain intact. Similarly, investors receive numerous protections through SEC reporting requirements.¹¹⁴ For instance, one such requirement is the prospectus, in which the tribe will detail assets, liabilities, investments, and future opportunities.¹¹⁵ A prospectus by itself will not assuage all investors, but it is a first step toward corporate transparency. Corporate transparency will benefit the tribes and their members alike because all shareholders will know exactly how corporate funds are used and dispersed. This is not to imply there will never be a disagreement or litigation, but, again, the SEC has built a framework that protects both the corporation and investor.¹¹⁶

B. Approach Number Two: Change Regulation D of the Securities Exchange Act of 1933 to Include Section 17 Corporations and Tribal Corporations as Accredited Investors

In response to the market crash of 1929 and the ensuing Great Depression,¹¹⁷ the Securities Act of 1933 (the Securities Act) was established to regulate securities transactions.¹¹⁸ The Securities Act has two basic objectives: (1) ensuring investors are informed about a security being offered for public sale; and (2) “prohibit[ing] deceit, misrepresentation, and other fraud in the sale of securities.”¹¹⁹ Security is defined as “an interest based on an investment in a common enterprise rather than direct participation in the enterprise” and includes financial instruments such as a “note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, [or]

114. DIV. OF CORP. FIN., U.S. SEC. & EXCH. COMM’N, FINANCIAL REPORTING MANUAL (updated Nov. 9, 2016), <https://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.shtml>.

115. See Securities Act of 1933, § 10, ch. 38, 48 Stat. 74, 81.

116. See 15 U.S.C. §§ 77a-77aa (2012), 78; *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015).

117. Clarkson, *Accredited Indians*, *supra* note 4, at 315; *What We Do*, U.S. SEC. & EXCH. COMM’N (last modified June 10, 2013), <http://www.sec.gov/about/whatwedo.shtml>.

118. 48 Stat. at 74; 15 U.S.C. § 78b (2012).

119. *The Laws That Govern the Security Industry: Securities Act of 1933*, *supra* note 89.

collateral trust certificate.”¹²⁰ Only one year after the adoption of the Securities Act, Congress created the SEC¹²¹ through the Securities Exchange Act of 1934 (the Exchange Act) to regulate these securities.¹²² While the SEC derives power to enforce the law through these two enabling statutes, it has also been given additional power through others.¹²³ Currently, the SEC is charged with interpreting and enforcing federal securities laws.¹²⁴

1. Overview Rule 501(d) of Regulation D

While the SEC has broad authority granted by numerous statutes, the focus of this comment is the SEC’s promulgation of Rule 501(d) of Regulation D of the Securities Act. The SEC recognizes that many businesses and sophisticated investors could benefit from access to capital without satisfying every regulatory requirement.¹²⁵ Regulation D was designed to facilitate capital formation, protect investors, and simplify state and federal exemptions.¹²⁶ Specifically, “Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act.”¹²⁷ This allows organizations and individuals deemed

120. *Security*, BLACK’S LAW DICTIONARY (10th ed. 2014).

121. Ch. 404, 48 Stat. 881, 885 (codified as amended at 15 U.S.C.A. § 78d). The SEC is comprised of a five-member board of commissioners who serve five year staggered terms. *Id.* The President, with the advice and consent of the Senate, appoints the SEC commissioners. *Id.* The Exchange Act requires that no more than three commissioners be of the same political party. *Id.* One of the five commissioners is appointed the Chairman of the SEC and is responsible for overseeing the operations of the SEC. *Id.*

122. 15 U.S.C.A. § 78d.

123. *See The Laws That Govern the Security Industry* U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/about/laws.shtml#secact1933> (last modified Oct. 1, 2013) (stating that Congress grants the SEC additional power through the Trust Indenture Act of 1939, Investment Company Act of 1940, Investment Advisors Act of 1940, Sarbanes-Oxley Act of 2002, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Jumpstart Our Business Startups Act of 2012).

124. *What We Do*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/about/whatwedo.shtml> (last modified June 10, 2013) (stating that the agency interprets and enforces these acts of Congress by issuing new rules and amending prior rules; overseeing the inspection of security firms, brokers, investment advisers, and ratings agencies; overseeing private regulatory organizations in the securities, accounting, and auditing fields; and coordinating U.S. securities regulation with federal, state, and foreign authorities).

125. 17 C.F.R. § 230.501 (2013).

126. Revision of Certain Exemption from Registration for Transactions Involving Limited Offers and Sales, 47 Fed. Reg. 11251 (Mar. 16, 1982) (Securities Act of 1933 Release No. 33-6389, Mar. 8, 1982).

127. 17 C.F.R. § 230.500 (2013).

“accredited investors” to be exempted from onerous federal and state security registration requirements and participate in the private-equity market.¹²⁸ The main impediment to qualify as an accredited investor is having a net-worth in excess of \$5 million.¹²⁹

In 1982, the SEC adopted final Rule 501(d), which created a list of qualifying individuals and organizations under Regulation D of the Securities Act.¹³⁰ Unfortunately, Rule 501(d) does not specifically allow for tribes or their corporations to be considered accredited investors¹³¹ and thus denies tribes the ability to participate in the private-equity market by offering exempt private offerings. This is detrimental to raising capital, as one report estimated that “[c]apital raised through Regulation D offerings continues to be large—\$863 billion reported in 2011 and \$903 billion in 2012.”¹³² Regrettably, this capital opportunity is unavailable to tribes

128. *Id.* § 230.501.

129. *Id.* § 230.501(a) (noting that natural persons may qualify if their net worth is in excess of \$1 million, but their residence is not included in this equity valuation).

130. *Id.*

131. *Id.* The regulation defines accredited investor as:

Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors.

Id.

132. Vladimir Ivanov & Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012*, SEC DIV. OF ECON. & RISK ANALYSIS (July 2013), <http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf>.

because of a simple agency oversight to include tribal corporations or section 17 corporations on a list of accredited investors.¹³³

2. Why Tribal Corporations and Section 17 Corporations Need to be Considered Accredited Investors

Not allowing tribal corporations or section 17 corporations to qualify as accredited investors is completely inconsistent with Regulation D because it states, “[a]ny organization . . . not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000” qualifies to issue exempt offerings under Regulation D.¹³⁴ It seems logical that section 17 corporations and tribal corporations with assets in excess of \$5 million should be considered “accredited investors” and thus be able to benefit from this provision in the statute. The SEC needs to amend Regulation D to include these business entities as accredited investors if they meet the \$5 million in assets threshold. This would allow the tribe’s business entities the same investment opportunities as other small business investment companies (SBIC). Indeed, a SBIC could be a firm that competes directly with a tribal corporation or section 17 corporation, yet a SBIC can receive capital investment through Regulation D offerings.¹³⁵ Further, a tribal corporation or section 17 corporation is prohibited from registering as a SBIC because they are not incorporated under state law.¹³⁶ It seems that tribal corporations and section 17 corporations would be able to qualify as accredited investors if they had not been formed through the tribe. It is conceded that a tribal corporation or section 17 corporation could possibly qualify as an accredited investor by registering as a foreign bank; however, this would require the tribal business entity to own and invest \$100 million in securities and have net worth of \$25 million.¹³⁷ This is a needless argument because capital investment would not be required if every tribe had minimum assets in these amounts. The ramifications of prohibiting tribal business entities from equal access to Regulation D investment offerings create a severe injustice.

133. 17 C.F.R. § 230.501.

134. *Id.* § 230.501(a)(3) (emphasis added).

135. *Id.*

136. *See* 15 U.S.C. § 681 (2012).

137. 17 C.F.R. § 230.144(a) (2012) (stating that foreign banks can issue exempt private offerings if they meet the requirements of a qualified institutional buyer).

It is ironic that the Securities Act, the Exchange Act, and the IRA were all enacted almost simultaneously, but “it appears that those involved in the IRA had little or no substantive interaction with those involved in the [other Acts].”¹³⁸ Indeed, the IRA specifically grants tribes the authority to form corporations thus indicating that the Legislature did not intend specifically to prohibit tribes from participating in corporate economic activity.¹³⁹ This may have been simple oversight on behalf of the drafters of the Securities Acts not to include tribal corporations or section 17 corporations as accredited investors, but the SEC has the power to amend Regulation D through its rulemaking power and correct this shortcoming.

3. Accredited Investor Rule Change Proposed and Then Inexplicably Abandoned

It seems the SEC eventually recognized that the list of accredited investors from 1982 created an injustice by omitting tribal corporations and section 17 corporations. So in 2007, the SEC proposed amending Rule 501(d) of Regulation D to include Indian tribes as accredited investors.¹⁴⁰ Including Indian tribes as accredited investors may have extended this definition to the tribe’s business entities as well. Without a final rule, however, the status of tribal corporations and section 17 corporations as accredited investors is unknown.

The SEC proposal to amend the rule was through informal rulemaking, more commonly known as “notice and comment.”¹⁴¹ The public comment period for this new rule¹⁴² was open for sixty days and received numerous public comments.¹⁴³ The final rule, however, was never promulgated. This is an issue that is not uncommon in the federal agency context because agencies have discretion whether to promulgate rules at all. The Administrative Procedures Act (APA) requires any final rule to be published in the Code of Federal Regulations thirty days before it is effective,¹⁴⁴ but there is no requirement for an agency to justify or provide explanation for abandoning a rule. The abandonment of the rule may have

138. Clarkson, *Accredited Indians*, *supra* note 4, at 305.

139. 25 U.S.C.A. § 5124 (Westlaw through Pub. L. No. 114-244).

140. Revisions of Limited Offering Exemptions in Regulation D, 72 Fed. Reg. 45116-01 (Aug. 10, 2007).

141. *Id.* at 45116.

142. *Id.*

143. *Revisions of Limited Offering Exemptions in Regulation D [Received Public Comments]*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/comments/s7-18-07/s71807.shtml> (last modified Oct. 16, 2014).

144. *See* 5 U.S.C. § 553 (2012).

been as simple as a change in political will or loss of SEC resources following the subprime mortgage crash. The failure of this rule to be promulgated may simply be a result of poor economic timing because the rule was proposed at the end of 2007, a new U.S. President took office in 2008, and disasters of the banking industry came to light with Lehman Brothers falling in 2009.

4. It Is the Right Time to Petition the Securities and Exchange Commission to Consider Promulgating a Rule Change to Regulation D

The economy has since recovered from the Great Recession¹⁴⁵ and it seems the time is ripe for the SEC to reconsider proposing a final rule to amend Regulation D to include tribal corporations and section 17 corporations as accredited investors. Indeed, in 2012 the SEC proposed amending Rule 506 of Regulation D to remove an advertising restriction that was also included as a proposal in the 2007 failed rule.¹⁴⁶ It seems logical that if the advertising amendment can be proposed a second time, the amendment to include tribal corporations and section 17 corporations as accredited investors should be considered as well. To ensure this amendment is indeed proposed a second time, Indian tribes as a solitary unit need to submit a comprehensive proposal to the SEC with the language of the proposed rule and support for this proposal including, but not limited to, economic data, analysis, and other supporting documentation.

As an administrative agency, the SEC is required to comply with the rulemaking petition provisions of the APA.¹⁴⁷ The SEC specifically allows petitions by allowing any person to request that the SEC issue, amend or repeal a rule of general application.¹⁴⁸ It is essential that the SEC again consider Indian tribes as accredited investors; at the very least, completing the petition will require the SEC to deny the petition in the Federal Register (FR).¹⁴⁹

145. *See At Last, a Proper Recovery*, ECONOMIST (Feb. 14, 2015), <http://www.economist.com/news/united-states/21643196-all-sorts-americans-are-feeling-more-prosperous-last-proper-recovery> (“The American Economy has technically been out of recession for six years.”).

146. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 77 Fed. Reg. 54464-01 (Sept. 5, 2012).

147. 5 U.S.C. §§ 500-599 (2012).

148. 17 C.F.R. § 201.192(a) (2011).

149. 5 U.S.C. § 553.

C. Approach Number Three: Section 17 of the Indian Reorganization Act Needs to Be Amended to Allow Investments from Outside the Tribe

Congress passed the IRA so that tribes could compete in the private business world.¹⁵⁰

Pursuant to the [IRA], an Indian Tribe may organize simultaneously in two ways: first, it may organize as a tribal governmental entity governed by a constitution and bylaws . . . (a so-called Section 16 organization); second, it may incorporate as a federal corporation governed by the terms of its charter . . . (a so-called Section 17 corporation).¹⁵¹

Section 16 organizations and section 17 corporations are separate, distinct legal entities.¹⁵² Section 16 entities serve as the tribe's governmental unit and retain sovereign immunity.¹⁵³ A section 17 tribal corporation has the ability to waive sovereign immunity to foster economic development and facilitate business transactions.¹⁵⁴ Congress purposefully gave tribes this power because it recognized that the "perception, if not the reality, of tribal sovereign immunity could impede a tribe's economic growth and participation in the business world."¹⁵⁵ The focus of this comment's proposal is in section 17 corporations.

Amending section 17 of the IRA to allow outside ownership of a tribe's section 17 corporation would allow a tribe to raise much needed capital, by increasing the pool of eligible investors. This option would be ideal for both tribes and investors because the tribal government would retain sovereign immunity and the section 17 corporation would retain its tax-exempt status.¹⁵⁶ This change would require the U.S. Department of the Interior¹⁵⁷

150. KAREN ATKINSON & KATHLEEN M. NILLES, OFFICE OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK III-10 (2008), https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf.

151. *Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 898 (N.D. Iowa 1994).

152. *See id.* (stating that section 16 are governmental entities whereas section 17 are corporate entities); *see also* *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235, 1237 (Fla. 1993) ("It is clear that section 16 prescribes how tribes are to operate as a government and that section 17 prescribes their authority to operate as a business entity.").

153. ATKINSON & NILLES, *supra* note 150, at I-4.

154. *Id.*

155. *Id.* at III-10.

156. Assuming the only amended change to the Act was the inclusion of direct capital from outside investors.

157. *Bureaus and Offices*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/bureaus> (last visited Jan. 1, 2016) (noting that the U.S. Department of the Interior was created by

to promulgate a new rule¹⁵⁸ and thus carve out an ownership exception for section 17 corporations formed under the IRA.¹⁵⁹

Currently section 17 of the IRA states that “[t]he Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe.”¹⁶⁰ The purpose of the IRA as described by Congress when adopted was “[t]o conserve and develop Indian lands and resources; [and] to extend to Indians the right to form business[es] and other organizations.”¹⁶¹ There is no explicit discussion as to how the development of lands and resources is to be accomplished. It seems reasonable that Congress intended to allow non-Indians to invest in section 17 corporations as long as the goal to develop lands and resources was not disturbed. The text of the IRA itself provides support for this proposition because

[s]uch charter may convey to the incorporated tribe the power to purchase . . . own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law.¹⁶²

The crucial language above is “in exchange therefor interests in corporate property” which seems to suggest that an individual or entity could contract for the sale of corporate property, i.e., a corporation’s common or preferred stock and options.¹⁶³

The Secretary of the Interior has interpreted section 17 corporations to apply only to tribes and not any individual tribal member.¹⁶⁴ Further, non-tribal ownership of shares of tribal corporations are prohibited without the

federal legislation in 1849 and is a presidential cabinet-level administrative agency; and further noting that the Department of the Interior is further divided into nine technical bureaus, which includes the Bureau of Indian Affairs).

158. See 25 U.S.C. § 1a (2012); see also 25 C.F.R. § 1.3 (1983) (noting that the Bureau of Indian Affairs is similar to other administrative agencies in that the Bureau of Indian Affairs, through the Department of the Interior, is able to promulgate rules).

159. See 25 U.S.C. §§ 1-2 (2012) (expressing that the President, with advice and consent from the Senate, appoints a commissioner to “have the management of all Indian affairs and of all matters arising out of Indian relations”).

160. 25 U.S.C. § 5124 (Westlaw through Pub. L. No. 114-244).

161. Act of June 18, 1934, ch. 576, preface, 48 Stat. 984, 984.

162. 25 U.S.C. § 5124.

163. *Id.*

164. 25 U.S.C. § 5107 (2012).

Department of the Interior specifically approving the transfer of corporate assets.¹⁶⁵ So under current law, only the tribe may charter and subsequently invest in section 17 corporations. Legislative change is needed to remove this restriction so that tribes may fully “form business[es] and other organizations”¹⁶⁶ that can truly be competitive in the marketplace.

Advocating investment in tribal corporations by non-tribal members will not be without resistance and well-deserved skepticism. Non-tribal investors may very well lack the bond and connectedness to the tribe. These investors would be true outsiders in every sense of the word’s meaning. The tribe’s skeptical concern should not be dismissed simply because there is a lucrative investment opportunity. Indeed, a tribe should seek to implement internal control mechanisms to prevent the loss of control over the tribal corporation. Internal controls could be as straightforward as monetary investment limits by a single person, a limit on the number of corporate shares any individual could own, or a combination thereof. Additionally, the Department of the Interior and Bureau of Indian Affairs could make this quite easy by promulgating a rule allowing non-tribal members to invest in section 17 corporations, but severely constraining the ability of these investors to ever fully control or take away the corporation from the tribe.

IV. Developing the Tribal Corporation to Support Individual Tribal Entrepreneurs and Small Businesses

There are numerous success stories on television specials, the Internet, in books, and word of mouth about how a young programmer made millions selling a computer application to Silicon Valley. But the truth remains that most of the time, an investor is unwilling to provide investment capital. The SBA reports approximately 600,000 new businesses are started in the United States each year.¹⁶⁷ Only 300 of these new businesses are funded by a venture capitalist,¹⁶⁸ which means that a new business has 300 in 600,000, or 0.05% probability, of receiving venture capital to spur the business.¹⁶⁹ Assuming an individual entrepreneur on the reservation has the next “big idea” but requires an investment to make it a reality, this new business may never see the light of day. Therefore, it is the duty of the tribes to create a

165. *Id.*

166. 48 Stat. at 984.

167. Dileep Rao, *Why 99.95% of Entrepreneurs Should Stop Wasting Time Seeking Venture Capital*, FORBES (Jul. 22, 2003), <http://www.forbes.com/sites/dileeprao/2013/07/22/why-99-95-of-entrepreneurs-should-stop-wasting-time-seeking-venture-capital/>.

168. *Id.*

169. *Id.*

tribal corporation and economic structure that can support Indian entrepreneurs. Tribes have a special duty in this regard because the average gross receipts of Indian businesses are still significantly below non-Indian businesses.¹⁷⁰ Tribes can satisfy the lack of private equity available to Indian entrepreneurs and small businesses and consequently increase economic development through a robust training and development program, implementing an effective legal system, enacting a model business code, and sharing best practices throughout the Native American community. The two anecdotes below are prime examples of how a tribal business entity can use non-Indian investors and expertise to its advantage and exploit competitive advantages in the marketplace.

A. Creating an Ideal Business Environment to Foster Economic Growth

The Winnebago Tribe accomplished this goal by creating a comprehensive tribal business code, which allowed the formation of wholly owned tribal businesses.¹⁷¹ With the economic structure in place, the Winnebago tribe then chartered Ho-Chunk Inc. (HCI), an economic development tribal corporation.¹⁷² Beginning with initial cash flows from gaming operations, HCI was able to invest in and acquire hotels, apartments, grocery and convenience stores, websites, and numerous other business ventures.¹⁷³ Now HCI's revenue, operating cash flow, and net income are in the millions of dollars.¹⁷⁴ HCI succeeded because the tribe made a conscious effort to create a tribal corporation with a robust economic framework in place.¹⁷⁵ HCI can now use the rewards of hard work and sound investment strategies to invest in Indian entrepreneurs and member-owned small businesses.

170. See David Hinson, *A Call to Action to Grow the Size, Scale and Capacity of Small and Minority-Owned Firms*, MINORITY BUS. DEV. AGENCY: U.S. DEP'T OF COMMERCE (Mar. 15, 2016), <http://www.mbda.gov/blogger/director/call-action-grow-size-scale-and-capacity-small-and-minority-owned-firms> (indicating that Indian businesses generated \$145,000 while non-Indian businesses generated \$490,000 in annual gross revenues).

171. *Honoring Nations: 2000 Honoree: Economic Development Corporation: Ho-Chunk Inc., Winnebago Tribe of Nebraska*, HARVARD PROJECT ON AM. INDIAN ECON. DEV. 1 (last visited Dec. 5, 2016), <http://hpaied.org/sites/default/files/publications/Economic%20Development%20Corporation.pdf>.

172. *Id.*

173. *Id.* at 2.

174. *Id.* ("In 2000, the company's revenue was \$25 million, operating cash flow was \$1.5 million, and net income was \$1.2 million.")

175. *Id.* at 3.

It is important to note that HCI did not immediately thrust itself into any business opportunities. The corporation began by using a form of joint venture: franchising.¹⁷⁶ Through franchising, HCI was able to develop managerial talent under the tutelage of an experienced franchiser before eventually moving to more sophisticated business activities.¹⁷⁷

B. Developing a Business Structure from within the Tribe to Foster Economic Growth

One tribe, the Citizen Potawatomi Nation (Nation), developed an ingenious way to fund individual tribal members by creating a Citizen Potawatomi Community Development Corporation (CPCDC).¹⁷⁸ This corporation provides the necessary capital to tribal members and other Native Americans to stimulate small businesses.¹⁷⁹ The Nation accomplished this by chartering the CPCDC as a Community Development Financial Institution (CDFI).¹⁸⁰ A CDFI is a “specialized financial institution[] that work[s] in market niches underserved by mainstream financial institutions” and is certified by the U.S. Department of the Treasury.¹⁸¹ The CPCDC was chartered under the Nation’s tribal laws and funded with an initial investment of \$500,000 from the Nation and \$1.15 million from the U.S. Department of Housing and Urban Development.¹⁸² From 2003 to 2006, the “CPCDC has provided over 74 loans totaling more than \$5.1 million in Native business loans” and net assets increased to \$2.78 million.¹⁸³ This is an impressive project that has spurred numerous tribal businesses and given much needed capital to tribal entrepreneurs.¹⁸⁴ The success of the CPCDC, however, would not have been possible had the Nation not first developed a tribal structure and economy that could support tribal private sector development.

Creating the ideal environment for business to flourish is only the first step. Greater access to capital will result if tribes are willing to pursue the three approaches detailed in this comment. While the two tribes listed above provide impressive revenues, growth rates, and employment figures,

176. *Id.*

177. *Id.* at 4.

178. *Honoring Nations: 2006 Honoree: Citizen Potawatomi Community Development Corporation*, *supra* note 25.

179. *Id.*

180. *Id.* at 2.

181. *Id.*

182. *Id.*

183. *Id.* at 3.

184. *Id.*

they also provide a blueprint for other tribes to use. Other tribes can use lessons from these tribal economic powerhouses to their advantage by applying best practices and avoiding the same mistakes. The above tribes are also illustrative of economic development that does not rely primarily on the gaming industry—these are economically developed and diversified corporations. Tribes that are beginning to develop economic growth should mirror the tribes with best practices in place and begin to develop their own environment that fosters economic growth. Once the structure is in place and the tribe is economically developed, it can then invest in tribal entrepreneurs and tribal small businesses and build on successes to increase capital investment in Indian Country.

V. Conclusion

Indian Country is in desperate need of capital investment to improve quality of life by spurring economic development. This comment advocates that a lucrative avenue to improve tribal economic development is to pursue capital investment in Indian Country using three approaches: (1) tribes should incorporate their business entity under Delaware law and issue securities, specifically common stock; (2) tribes should petition the Securities and Exchange Commission to promulgate a final rule to amend Rule 501(d) of Regulation D of the Securities Act of 1933 to include section 17 corporations and tribal corporations as accredited investors; and (3) tribes should advocate legislative changes to section 17 of the Indian Reorganization Act to allow direct non-tribal investment in the tribe's corporation. There will be benefits and pitfalls in implementing any of these proposals, but tribal loss of control and ownership of corporations can be tempered by implementation of internal controls to corporate ownership (i.e., not allowing a single individual or entity to obtain a controlling interest in the business entity).

After a tribe is able to develop and sustain a tribal corporation, it needs to ensure it builds the necessary requirements to foster internal economic growth in Indian Country because there is a daunting private equity investment gap in Indian Country for aspiring Indian entrepreneurs and small businesses. Tribes need to seek to fill this gap by creating a robust training and development program, implementing an effective legal system, enacting a model business code, and sharing best practices not only among the tribe, but also with all tribes.

Any investment carries inherent risks. By engaging in business, tribes are exposed to the increased possibility of litigation and financial losses. But

the future of all tribes is inherently dependent on economic prosperity, and reliance on the U.S. government to satisfy this need will always fall short. Thus, tribes are called upon to implement unique investment strategies and take chances to secure tribal finances for future generations because the failure to do so is a cost too great.