



A wholly owned economic development arm of the Rosebud Sioux Tribe

The Honorable Jay Clayton
Chairman Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
VIA Email: rule-comments@sec.gov

**RE: File Number S7-08-19
Accredited Investor - 84 FR 30460, Document Number 2019-13255
Inclusion of Tribal Governments**

September 24, 2019

Dear Chairman Clayton:

BACKGROUND: THE ROSEBUD SIOUX TRIBE

The Rosebud Indian Reservation is the home of the federally recognized Sicangu Oyate (the Upper Brulé Sioux Nation) - also known as Sicangu Lakota, and the Rosebud Sioux Tribe (RST), a branch of the Lakota people. The Lakota name Sicangu Oyate translates into English as “Burnt Thigh Nation”; the French term “Brulé Sioux” is also used.

The Rosebud Reservation encompasses an area of 882,416 very rural isolated acres, covering four different counties. In total we own and control over 1 million acres spread across five counties, which comprise the original Rosebud Reservation. We still claim the original boundaries of the Rosebud Reservation and have official government representation in our Tribal Council from these areas. Four of the top poorest counties in the United States are Indian reservations in South Dakota, including the primary county in which Rosebud sits, Todd County. Rosebud has a tribal membership of just

ROSEBUD ECONOMIC DEVELOPMENT CORPORATION (REDCO)

over 34,000, with over 21,000 enrolled members living on the reservation, and a median income of less than \$19,000 each.

Created in 1868 by the Treaty of Fort Laramie, the Great Sioux Reservation originally covered all of the area west of the Missouri River in South Dakota, part of northern Nebraska, and part of eastern Montana. The Rosebud Indian Reservation was established in 1889 by the United States' unilateral partition of the Great Sioux Reservation. We have never relinquished our claim to the entire Great Sioux Reservation.

ECONOMIC DEVELOPMENT IS ESSENTIAL GOVERNMENTAL INCOME

Like any nation state, including federal, state, and local governments, tribal governments must also provide essential governmental services and economic development opportunities to its nation and citizens. Unlike federal, state and local governments, however, Tribal governments have no tax base to produce governmental revenue.

Tribal land is federal trust land and is non-taxable, thus no property taxes, and case law has awkwardly evolved to prohibit us from taxing fee lands even though within our own boundaries. It should be noted that this is a function of federal policy, where the federal government has failed to work with tribes on a nation-to-nation basis, or even a government-to-government basis.

The population base is small and impoverished and an income tax would be futile, thus no income taxes.

And even though all other sales, use, improvements, etc. taxes should solely be the purview of our nation, the state governments have litigated sales tax to the point of inaccessibility for most tribes. At a minimum they aggressively enforce a race-based tax for their citizens on *our* lands. Thus, we have no sales tax.

Therefore, to generate basic governmental revenue, tribal governments must compete in the open private commercial marketplace. *See* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004). As such, Rosebud created an economic development holding company, the Rosebud Economic Development Corporation ("REDCO").

REDCO is dedicated to serving the tribe by generating governmental revenue generated through private enterprise, and to serving the Lakota people by creating a self-sustaining, local economy through the creation of business opportunities, jobs, workplace training, positive role models, and resource development.

REDCO (ROSEBUD ECONOMIC DEVELOPMENT CORPORATION)

As a wholly owned arm and entity of the Rosebud Sioux Tribe, REDCO serves as the official development corporation of the Tribe. REDCO's primary mission is to generate revenue for the Tribe and promote economic development. Utilizing an integrated multi-faceted approach REDCO's concentrates its work in three areas:

- **Business Development.** REDCO serves as the primary holding and management company for the Tribe, managing numerous subsidiary companies to generate revenue and create jobs.
- **Policy Development.** REDCO works with the Tribal government to promote business friendly economic policies and regulations.
- **Community Development.** REDCO engages in specific community development projects aimed at strengthening the overall economy and improving quality of life.

PARITY FOR TRIBES & TRIBAL CORPORATIONS IN FEDERAL SECURITIES, FINANCE AND TAX LAWS

Regardless of which industry in which we are participating, raising capital in Indian Country is always a challenge. Many of these barriers are due to the federal government itself and the lack of parity for tribal governments and tribal corporations.

Unfortunately, most federal securities, finance, and tax laws have been written without any understanding of Tribal nations. As a result, many key laws and regulations exclude tribal nations from the benefits of both governments and corporations. The SEC Accredited Investor regulations is guilty of this offense.

ACCREDITED INVESTOR FIX: GRANT TRIBAL GOVERNMENTS PARITY WITH STATE GOVERNMENTS

State governments are included in the definition of “accredited investor,” tribal governments are not.

States: “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” 17 C.F.R. §§ 230.501 (a)(1)

REDCO has participated in the Native American Financial Officers Association (NAFOA) consultations on this issue and supports NAFOA’s recommendation for tribal government parity. REDCO requests that the SEC amend the eligible entities excluded under Regulation D (17 C.F.R. §§ 230.501 (a)(1) of the Securities Act to include:

Tribal: “any plan established and maintained by a tribal government, its political subdivisions, or any agency or instrumentality of a tribal government or its political subdivisions, for the benefit of its citizens (members), if such plan has total assets in excess of \$5,000,000 in non-trust assets.”

It is the generally accepted interpretation of federal Indian law, and REDCO’s intention that the SEC would also interpret in this language, that tribal government owned economic development arms/corporations are included in the definition of “any agency or instrumentality of a tribal government.” Many tribal nations run their economic development decisions including investment decisions from their economic development/corporate arms.

Additionally, we support NAFOA’s position that the term “non-trust asset” should be defined as “an asset that is under the direct control of a tribe or tribal entity, and which is not held in trust by the United States for the benefit of the tribe” to provide clarity. Tribal governments have land and

investment assets that are managed and held in trust by the federal government for the benefit of the tribal government and its members. The recommended fix protects these assets from consideration while excluding them from being considered for suitability purposes in meeting the \$5,000,000 threshold.

ACCREDITED INVESTOR FIX: EXPAND OPPORTUNITIES FOR CO-INVESTMENT

Most Americans are excluded from direct investments due to Rule 506(b). The onerous requirements for disclosure to non-Accredited Investors results in no non-Accredited Investors being able to participate in most offerings.

As previously discussed, capital in Indian Country is very difficult to access. Some of the most interested capital comes from “impact investors,” and many of these investors are younger, and more regionally based. Most of these investors will not qualify as accredited investors under the current definition.

We urge the SEC to reconsider Rule 506(b) to allow more flexibility to accommodate for co-investing. Perhaps defining a subset or percentage of accredited investors that are more likely complete extensive due diligence and de-risk the investment for the non-accredited investors, thus allowing for decrease in the disclosure requirements and an increase in the number of or percentage of co-investors/non-accredited investors.

ACCREDITED INVESTOR FIX: ADJUST NET-WORTH REQUIREMENTS TO ACCOUNT FOR REGIONAL DIFFERENCES

The current definition of individuals deemed “accredited investors” is biased towards the higher incomes on the coasts and often excludes well educated, financially stable, sophisticated investors in much of rural American, including many places with large tribal populations.

In many of our tribal regions, the net worth individuals as measured by income and assets may well be under \$1,000,000 (17 C.F.R. §§ 230.501 (a)(5)). Yet many of these individuals are high net worth for our areas and regions and would be very interested in participating in tribal projects as accredited investors. In drafting the new rule, we urge the SEC to adopt a more flexible definition of individual net worth which considers regional variations.

ADDITIONAL SEC REQUIRED FIX: MAKE GOVERNMENT SECURITIES REGISTRATION EXEMPTIONS THE SAME FOR TRIBAL GOVERNMENTS.

While not an accredited investor issue, another issue where the SEC treats tribal governments different than state governments is regarding registration. State and local government are exempt from securities registration and reporting. Tribal government are not. Registration can add an extra \$2 million in costs. Tribes must incur the extra costs or issue debt to limited qualified buyers, which makes the debt less liquid. Tribes must be included with state and local governments in the security registration exemptions.

TRIBAL PARITY ECONOMIC DEVELOPMENT RECOMMENDATIONS IN OTHER ARENAS:

REDCO has submitted comments on dozens of occasions, to Congress, Federal Agencies, the White House, anyone who will listen, about the numerous areas of federal law that disparately treat tribal governments and tribal corporations. We recognize that the Accredited Investor parity issue is the primary issue under the SEC and these remaining issues are under the purview of other agencies. However, the federal government in its entirety has a treaty and trust responsibility to Tribal nations and to the support of our economies. We specifically traded land for these rights. That responsibility is not partitioned. Thus, we submit, yet again, a list to the federal government of some of the many areas of disparate tax, finance and economic development treatment for tribal nations and tribal people:

TAX & REGULATORY JURISDICTION: ELIMINATE DUAL STATE TAXATION & REGULATION

- **ERADICATE DUAL TAXATION – UPDATE INDIAN TRADE & COMMERCE REGULATIONS. [DOI].** Dual taxation continues to be the most significant impediment to economic growth in Indian Country. Despite the constitution and Congress (Indian Trader Act) having clearly indicated tribal trade and commerce are exclusively the domain of tribes and the federal government, state governments continue to aggressively encroach on both tribal tax and regulatory jurisdiction. While states believe they are enhancing their revenue in the short term, the long effect is a landscape of investment uncertainty that causes permanent impoverishment. The uncertainty of balancing three jurisdictions, and constantly moving application of tax and regulatory jurisdiction, leads to millions of dollars in litigation annually and is the biggest impediment to investors feeling confident in investing in Indian Country. The federal Indian Trader regulations must be updated to clarify the strict constitutional structure separating tribal governmental tax and regulatory jurisdiction.
- **ACKNOWLEDGE TRIBAL E-COMMERCE REGULATORY AUTHORITY [CFPB/DOJ].** Tribal governmental regulatory authority extends not just to bricks-and-mortar commerce but to more modern tribal e-commerce as well. Federal agencies must acknowledge the federal treaty and trust responsibility to respect and empower tribal sovereignty and jurisdiction, which applies to the entire federal government.

ACCESS TO CAPITAL: REPAIR STATUTORY OMISSIONS OF TRIBAL GOVERNMENTS TO GIVE TRIBES PARITY IN ACCESSING CAPITAL

- **REPAIR STATUTE FOR TRIBES/TRIBAL CORPORATIONS TO BE S-CORPORATION SHAREHOLDERS [IRS].** Under *IRS Revenue Ruling 2004-50*, federally recognized Indian Tribes are not able to make an election to be an S corporation shareholder for the purposes of Section 1361. The current IRS revenue ruling is inconsistent with other federal Indian policies encouraging Tribes to increase governmental revenue through private enterprise. Allowing Indian Tribes to have ownership in and/or create S corporations would align the IRS Code with existing federal tax policy and promote Indian economic development.

- **REPAIR STATUTE TO TAX INVESTMENTS IN TRIBES/TRIBAL CORPORATIONS SAME AS OTHER C-CORP INVESTMENTS [IRS].** Congress must repair the IRS' inconsistent rulings in its *Consultation letter of September 18, 2008* and *Public Letter Ruling of April 9, 2013 (PLR-143876)* and clarify that investments in Tribal corporations are treated the same for tax purposes as investments in any C-Corp, and with the rest of the tax code. The current IRS revenue ruling is inconsistent with other federal Indian policies encouraging Tribes to increase governmental revenue through private investment. Without this parity there is no incentive to invest in a Tribal corporation as investors will be taxed at higher personal tax rates rather than the normal investment capital gains rates.
- **MAKE GOVERNMENT BOND REGULATIONS SAME FOR TRIBAL GOVERNMENTS [IRS].** No state or local government has a statutory restriction requiring they prove their bonds are issued for an "essential government function." Tribal tax-exempt issuances are 30 times more likely to be audited by the IRS (within four years of issue) than those issued by city and state governments. This disparate treatment makes bonding more expensive than for any other government and must be equalized.
- **MAKE GOVERNMENT "ACCREDITED INVESTOR" STATUS SAME FOR TRIBAL GOVERNMENTS [SEC].** State governments are already defined as "Accredited Investors," tribal governments are not. Some tribes can serve as an important source of capital. However, private equity funds usually only sell to "Accredited Investors," for ease of securities law compliance. The statute must be amended to include tribes as "Accredited Investors." In 2007 the SEC already proposed to make this change. *SEC Proposed Rule: 72 FR 45126, 2007*
- **MAKE GOVERNMENT SECURITIES REGISTRATION EXEMPTIONS THE SAME FOR TRIBAL GOVERNMENTS [SEC].** State and local government are exempt from securities registration and reporting. Tribal government are not. Registration can add an extra \$2 million in costs. Tribes have to incur the extra costs or issue debt to limited qualified buyers, which makes the debt less liquid. Tribes must be included with state and local governments in the security registration exemptions. *Wall Street Indians: Barriers to Tribal Capital Market Access,* Lewis & Clark Law Review, Dr. Gavin Clarkson (Vol 12:4 - 2008)

TAX CREDITS: INCENTIVIZE INVESTMENT IN INDIAN COUNTRY

- **PERMANENTLY AUTHORIZE INDIAN EMPLOYMENT TAX CREDIT [CONGRESS].** This tax incentive has only been authorized in short increments. Without permanent authorizations, no business can effectively build them into their business and financing plans. They must be permanently authorized to be effective.
- **PERMANENTLY AUTHORIZE ACCELERATED DEPRECIATION ON INDIAN RESERVATIONS [CONGRESS].** This tax incentive has only been authorized in short increments. Without permanent authorizations, no business can effectively build them into their business and financing plans and so they are rarely used. They must be permanently authorized to be effective.
- **CREATE INDIAN COUNTRY SET-ASIDE FOR NEW MARKET TAX CREDITS ("NMTC") [CONGRESS].** Despite current efforts, NMTC allocations continue to be difficult to access in

Indian Country. Indian Country must be permanently categorized as a “disadvantaged state,” and there must be a specific set aside at 49% to reflect the unique federal trust responsibility and the disproportionate lack of access to capital.

- **CREATE INDIAN COUNTRY SET-ASIDE FOR LOW-INCOME HOUSING TAX CREDITS (“LIHTC”) [CONGRESS].** The current structure of using states as the pass through for LIHTC allocations for tribes does not work. The tax credits are not making it to Indian Country in a meaningful way. There must be an allocation from existing funds for states to draw from for tribal housing projects.

FEDERAL CONTRACTING PREFERENCES: IMPLEMENT EXISTING FEDERAL PURCHASING POWERS

- **IMPLEMENT FEDERAL PURCHASE PREFERENCES FOR TRIBAL ENERGY & CLOSE ACCESS TO GRID GAP. (ALL FEDERAL AGENCIES).** Indian Country has extensive wind, solar, tidal, bio, and geothermal resources, but little access to the grid. The Energy Policy Act of 2005 requires the government to buy renewable energy and gives a significant preference for renewable energy purchased from tribal lands (42 U.S. Code § 15852). Yet, only DOE has issued guidelines, and GAO is the only agency that has ever made a tribal energy purchase. The federal purchase agreements will open the flood gates for private investment in Indian Country renewable energy and assist in closing the access to grid gap.
- **ENFORCE THE BUY INDIAN ACT. [BIA/IHS].** Many treaties have specific provisions requiring the federal government to purchase their goods and services, in return for agreeing to be moved to very remote locations. Both the BIA and the IHS are failing at implementing the Buy Indian Act. The IHS has refused to enforce any consistent national “Buy Indian” policies. The BIA has created policies but has significant room for improving implementation.
- **IMPLEMENT THE USDA’S “TRADITIONAL FOODS” FUND. [USDA/CONGRESS].** The Tribes worked for decades to get traditional foods included in the USDA commodities food packages. Congress has not funded the program consistently. The USDA continues to buying in bulk rather than locally. Once implemented locally, this program will provide a consistent demand for local Indian entrepreneurs to raise traditional meats and grow traditional foods.
- **SUPPORT THE 8(A) PROGRAM. [SBA/DOD].** The 8(a) program creates an avenue for tribal owned companies to compete for federal contracts. It has been a great success in Alaska, but it needs to be protected and expanded to promote participation by the tribes in the lower 48.

CONCLUSION

Thank you for taking time to consider the tribal perspective while updating and streamlining the SEC rules. Please do not hesitate to contact me for any additional questions.

Wizipan Little Elk
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