

If my private nonprofit organization is a party to a 28E agreement, does that make it a “government affiliate” for tax purposes?

Iowa Code section 28E.4 provides that:

Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.

This description of the relationship does not resolve the issue of tax exemption as a government affiliate.

The entities parties to a 28E agreement will not be a “government affiliate” per se by entering such an agreement, but must meet the required factors in Rev. Proc. 95-48 (as set forth in the above definition of “government affiliate”)

When the organization has an I.R.S. determination letter granting exemption under 501(c)(3) as a government affiliate, the 28E agreement may provide additional documentary evidence that the appropriate charitable ends are being accomplished. If, on the other hand, the organization is a true “private entity” without an I.R.S. determination letter, the organization is probably not an “affiliate of a government unit” under the affiliation factors (i.e., it was not created by a government entity, doesn’t receive its principal revenue from government appropriations, is not overseen by a government unit, etc.)

Helpful Sources

Guthry, Peter. Dealing with government related entities – A brave new world. ALI-ABA CLE (1991)

Aprill, Ellen P. The Integral, the essential and the instrumental: Federal Income tax treatment of governmental affiliates, 23 J. Corp. L. 803 (1998)

McCray, Richard A. Sr. and Marvin Fridlander, “Organizations closely affiliated with state or Indian tribal governments reference guide”, IRS Exempt Organizations CPE TIP FY 2004

Internal Revenue Service
Exempt Organizations Continuing Professional Education (CPE)
Technical Instruction Program FY 2004

**ORGANIZATIONS CLOSELY AFFILIATED
WITH STATE OR INDIAN TRIBAL
GOVERNMENTS REFERENCE GUIDE**

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**GUIDE SHEET FOR SECTION 501(c)(3) ORGANIZATIONS CLOSELY
AFFILIATED WITH STATE OR INDIAN TRIBAL GOVERNMENTS**

INSTRUCTIONS -- This guide sheet is designed to assist in the processing of an IRC 501(c)(3) exemption application submitted by an organization that is closely affiliated with state government (including federally recognized Indian tribal governments). See the Reference Guide for assistance in completing this guide sheet. Contact EO Technical for additional help.

Yes No

1. Is the applicant a corporation, association, or trust? (A "Yes" response is favorable. A "No" response indicates that a problem exists.)

2. Does the organization meet the organizational test? (A "Yes" response is favorable. A "No" response indicates that a problem exists.)

3. Is the organization a wholly owned integral part of a State or local government? (A "Yes" response indicates that a problem exists. A "No" response is favorable.)

4. Is the organization a federally recognized Indian tribal government or a political subdivision of a federally recognized Indian tribal government? (A "Yes" response indicates that a problem exists. A "No" response is favorable.)

5. Does the organization have substantial regulatory or enforcement powers (sovereign powers)? (A "Yes" response indicates that a problem exists. A "No" response is favorable.)

If "Yes," are they regulatory or enforcement powers that are specifically excepted from disqualifying an organization under IRC 501(c)(3)?

- Determining a tax rate (Rev. Rul. 74-15)
- Conducting campus policing (Rev. Rul. 177-165)

(A "Yes" response is favorable. A "No" response indicates that a problem exists.)

6. Has the organization requested an exception from the Form 990 filing requirement under Rev. Proc. 98-45? If "Yes," continue.

7. Has the organization requested an exception from filing Form 990 because it is a governmental unit under Section 4.01 of Rev. Proc. 95-48, or because it is an affiliate of a governmental unit under either Section 4.02(a) or Section 4.02(b) of Rev. Proc. 95-48? (If "Yes," must meet a, b or c below.)

a. Does the organization meet Section 4.01 because it a governmental unit (1) as defined in Reg. 1.103-1(b), (2) an organization described in IRC 170(c)(1), or (3) an Indian tribal government or a political subdivision of an Indian tribal government under IRC 7701(a)(40) and 7871?

b. Does the organization meet Section 4.02(a) because it possesses a ruling or determination from the Service that (1) its income is excluded from gross income under IRC 115, (2) it is entitled to receive deductible contributions under IRC 170(c)(1), or (3) it is a wholly owned instrumentality of a State or political subdivision of a State for employment tax purposes under sections 3121(b)(7) and 3306(c)(7)?

c. Does the organization meet Section 4.02(b) because (1) the organization is controlled by a governmental unit, (2) it satisfies at least two of the five affiliation factors listed in Section 4.03, and (3) its filing of Form 990 is not otherwise necessary for efficient tax administration.

