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Memorandum**

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subject: Eligibility of Federal Credit Unions to Claim Credits Under the Families First
Coronavirus Response Act and the American Rescue Plan Act

This Chief Counsel Advice responds to your request for non-taxpayer specific assistance. This advice may not be used or cited as precedent.

ISSUES

1. May federal credit unions claim the tax credits for paid sick and expanded family and medical leave under the Families First Coronavirus Response Act (“FFCRA”)?
2. May federal credit unions claim the tax credits for paid sick and expanded family and medical leave under the American Rescue Plan Act (“ARP”)?

CONCLUSIONS

1. No. Federal credit unions may not claim the tax credits for paid sick and expanded family and medical leave under the FFCRA because they are instrumentalities of the United States government.
2. Yes. Federal credit unions may claim the tax credits for paid sick and expanded family and medical leave under the ARP because, although they are instrumentalities of the United States government, they are also organizations described in section

501(c)(1) of the Internal Revenue Code (Code) and are exempt from tax section 501(a) of the Code.

FACTS

Certain federal credit unions organized under the provisions of the Federal Credit Union Act, 12 USC §§ 1751-1795k (2018 and Supplement II 2020), have claimed tax credits for paid sick and expanded family and medical leave under the FFCRA and ARP for leave provided during certain quarters of 2020 and 2021. You have asked whether such federal credit unions are eligible to claim these tax credits.

LAW AND ANALYSIS

Background

1. COVID-19 Related Expanded Family Leave and Paid Sick Leave Credits

Divisions C and E of the Families First Coronavirus Response Act (Pub. L. No. 116-127, 134 Stat. 178 (March 18, 2020)) (“FFCRA”), generally required private entities or individuals employing fewer than 500 employees, or a public agency or any entity that is not a private entity or individual that employs one or more employees, to provide paid sick leave and expanded family and medical leave for periods of leave beginning April 1, 2020, through December 31, 2020, up to specified limits, to employees unable to work or telework due to certain circumstances related to COVID-19. Sections 7001 and 7003 of Division G of the FFCRA provided certain employers with fully refundable tax credits to cover the cost of providing this leave. The requirement to provide paid leave under Divisions C and E of the FFCRA does not apply to leave provided after December 31, 2020. However, the COVID-Related Tax Relief Act of 2020 (Subtitle B of Title II of Division N of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020)), extended the availability of the tax credits for paid sick and expanded family and medical leave for paid leave voluntarily provided by employers, that would otherwise have satisfied the requirements of the FFCRA, for periods of leave beginning January 1, 2021, through March 31, 2021.

Generally, under the FFCRA, certain employers required to provide paid sick and expanded family and medical leave under Divisions C and E may claim the tax credits under Division G. However, sections 7001(e)(4) (with respect to credits for paid sick leave) and 7003(e)(4) (with respect to credits for expanded family and medical leave) of the FFCRA provide that the credit “shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.” (emphasis added)

Section 9641 of the American Rescue Plan Act of 2021 (Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021)) (“ARP”), added sections 3131 through 3133 to the Internal Revenue Code (“Code”), which extended the availability of the tax credits for paid sick and expanded family and medical leave for paid leave voluntarily provided by employers, if

the paid leave would otherwise have satisfied the requirements of the FFCRA, to employees for periods of leave beginning April 1, 2021, through September 30, 2021. Sections 3131(f)(5) and 3132(f)(5) of the Code each provide that no tax credits for paid sick leave and expanded family and medical leave, respectively, “shall be allowed under this section to the Government of the United States or to any agency or instrumentality thereof.” However, sections 3131(f)(5) and 3132(f)(5) also state that this limitation “shall not apply to any organization described in section 501(c)(1) and exempt from tax under section 501(a).”

2. Federal Credit Unions

The Federal Credit Union Act, 12 USC §§ 1751-1795k (2018 and Supplement II 2020) (“Act”), first enacted in 1934, provides for the establishment of cooperative associations organized in accordance with the provisions of the Act for purposes of promoting thrift among their members and creating a source of credit for provident or productive purposes.¹ Federal credit unions were intended to combat scarce credit and high interest rates by encouraging and enabling average citizens to pool their resources.² Thus, the Act defines the scope and purpose of federal credit unions.

Each federal credit union organized under the Act, when requested by the Secretary of the Treasury, acts as a fiscal agent of the United States, and performs such services as the Secretary of the Treasury may require in connection with the collection of taxes and other obligations due the United States and the lending, borrowing, and repayment of money by the United States. To facilitate these purposes, the National Credit Union Administration Board furnishes to the Secretary of the Treasury the names and addresses of all federal credit unions with such other information as may be requested by the Secretary of the Treasury. Any federal credit union organized under the Act, when designated for that purpose by the Secretary of the Treasury, is a depository of public money, except receipts from customs, under such regulations that may be prescribed by the Secretary of the Treasury.³

The organization certificates of federal credit unions organized under the Act must satisfy certain specific requirements provided by the Act and must be presented to the National Credit Union Administration Board for investigation and approval.⁴

¹ 12 USC § 1752(1).

² *U.S. v. St. of Mich.*, 851 F.2d 803, 806 (6th Cir. 1988) (citing S. Rep. No. 555, 73d. Cong., 2d Sess. (1934)). “Through federal credit unions, therefore, the federal government makes credit available on liberal terms and at low rates of interest to middle-class Americans who, because they frequently lack adequate security, might otherwise have to turn to small loan financiers who can extort excessive interest rates in times of unexpected need.” *Id.*

³ 12 USC § 1767(a).

⁴ 12 USC § 1754.

The National Credit Union Administration Board has authority to suspend or revoke the charters of federal credit unions organized under the Act or place them into involuntary liquidation.⁵

Federal credit unions organized under the Act, their property, franchises, capital, reserves, surpluses, and other funds, and their income are exempt from all taxation imposed by the United States, any state, territorial, or local taxing authority, except that real property and tangible personal property shall be subject to federal, state, territorial and local taxation.⁶

Section 501(a) of the Code provides in part that an organization described in section 501(c) of the Code shall be exempt from taxation under subtitle A of the Code. Section 501(c)(1) of the Code provides that any corporation organized under an Act of Congress which is an instrumentality of the United States is exempt from tax under section 501(a) of the Code if it is exempt from federal income taxes under the Act of Congress as amended and supplemented before July 18, 1984.

The Service considers the following factors when determining whether an entity is an instrumentality of one or more governmental units: (1) Whether is it used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) whether express or implied statutory or other authority is necessary or exists for the creation and use of the organization; and (6) the degree of financial autonomy and the source of its operating funds. See Rev. Rul. 57-128, 1957-1 C.B. 311.

We conclude that federal credit unions are instrumentalities of the United States government under the factors enumerated in Rev. Rul. 57-128. In particular, federal credit unions are created by federal statute. They further governmental purposes by promoting the economic health of underserved populations. They perform governmental functions in that they act as fiscal agents and as depositories of public money, and they perform such services as the Secretary of the Treasury may require in connection with the collection of taxes and other obligations as well as lending, borrowing, and repayment of money by government. These functions are performed on behalf of the United States.

Further, control and supervision of federal credit unions is vested in public authority. The Court of Appeals for the Sixth Circuit observed to this end the "sweeping regulatory supervision" to which federal credit unions are subject, such as their scope and purpose being defined by federal law, their organizing documents being subject to investigation

⁵ 12 USC § 1766(b)(1).

⁶ 12 USC § 1768.

and approval by the National Credit Union Administration Board, and that the National Credit Union Administration Board has the power to suspend or revoke their charters or place them into involuntary liquidation.⁷

This holding conforms to previous rulings that federal credit unions are instrumentalities of the United States government. See Rev. Rul. 89-94, 1989-2 C.B. 233; Rev. Rul. 69-283, 1969-1 C.B. 156; Rev. Rul. 60-169, 1960-1 C.B. 621, (obsoleted by Rev. Rul. 89-94); Rev. Rul. 55-133, 1955-1 C.B. 138 (superseded by Rev. Rul. 60-169); Office Decision, 1937-1 C.B. 428; Notice 2005-58, 2005-33 I.R.B. 295.

Because they are instrumentalities, and because they are exempt from tax, federal credit unions are organizations described in section 501(c)(1) of the Code and exempt from tax under section 501(a) of the Code. See Rev. Rul. 89-94.

Analysis

In light of the foregoing, for periods of leave provided beginning April 1, 2020, through March 31, 2021, federal credit unions may not claim the tax credits for paid sick and expanded family and medical leave under the FFCRA. Sections 7001(e)(4) and 7003(e)(4) of the FFCRA prohibit instrumentalities of the United States government from claiming the tax credits for paid sick and expanded family and medical leave, respectively.

However, for periods of leave beginning April 1, 2021, through September 30, 2021, federal credit unions may claim the tax credits for paid sick and expanded family and medical leave under the ARP. Although sections 3131(f)(5) and 3132(f)(5) of the Code prohibit instrumentalities of the United States government from claiming the tax credits for paid sick and expanded family and medical leave, respectively, these provisions also specify that this prohibition does not apply to organizations described in section 501(c)(1) of the Code and exempt from tax under section 501(a) of the Code. Federal credit unions are such organizations.

Under section 6110(k)(3) of the Internal Revenue Code, this document may not be used or cited as precedent.

Please call (202) 317-6798 if you have any further questions.

⁷ See U.S. v. St. of Mich., 851 F.2d at 806-807.