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Internal Revenue Service
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subject: Eligibility of Federal Credit Unions to Claim Credits Under Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act and Section 3134 of the Internal Revenue Code

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 employee retention credit provided by section 2301 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), as amended by section 206 of the Taxpayer Certain and Disaster Tax Relief Act of 2020 ("Relief Act"), for wages paid after March 12, 2020, and before January 1, 2021?

2. May federal credit unions claim the employee retention credit provided by section 2301 of the CARES Act, as amended by section 207 of the Relief Act, for wages paid after December 31, 2020, and before July 1, 2021?

3. May federal credit unions claim the employee retention credit provided by section 3134 of the Internal Revenue Code ("Code") for wages paid after June 30, 2021, and before October 1, 2021 (or in the case of wages paid by a federal credit union which is a recovery startup business, January 1, 2022)?

CONCLUSIONS

1. No. Federal credit unions may not claim the employee retention credit under section 2301 of the CARES Act, as amended by section 206 of the Relief Act, for wages paid after March 12, 2020, and before January 1, 2021, because they are instrumentalities of the United States government.

2. Yes. Federal credit unions may claim the employee retention credit under section 2301 of the CARES Act, as amended by section 207 of the Relief Act, for wages paid after December 31, 2020, and before July 1, 2021, because, although they are instrumentalities of the United States government, they are also organizations described in section 501(c)(1) of the Code and are exempt from tax under section 501(a) of the Code.

3. Yes. Federal credit unions may claim the employee retention credit under section 3134 of the Code for wages paid after June 30, 2021, and before October 1, 2021 (or in the case of wages paid by a federal credit union which is a recovery startup business, January 1, 2022), because, although they are instrumentalities of the United States government, they are also organizations described in section 501(c)(1) of the Code and are exempt from tax under 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 the employee retention credit under section 2301 of the CARES Act and section 3134 of the Code during certain quarters of 2020 and 2021. You have asked whether such federal credit unions are eligible to claim such credit.

LAW AND ANALYSIS

Background

1. COVID-19 Related Employee Retention Credit

Section 2301(a) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020), allowed a credit ("employee retention credit") against applicable employment taxes, as defined by section 2301(c)(1) of the CARES Act, for eligible employers, defined by section 2301(c)(2) of the CARES Act, that pay qualified wages, including certain health plan expenses, to some or all employees after March 12, 2020 and before January 1, 2021. However, section 2301(f) of the CARES Act provided that "[t]his 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 206 of the Relief Act made retroactive amendments to section 2301 of the CARES Act but did not

amend section 2301(f) for wages paid after March 12, 2020, and before January 1, 2021.

Section 2301 of the CARES Act was amended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 ("Relief Act"), which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020). Section 207 of the Relief Act amended section 2301(m) of the CARES Act to extend the application of the employee retention credit to qualified wages paid before July 1, 2021. It also amended section 2301(f) of the CARES Act. As amended, section 2301(f)(1) of the CARES Act provided 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." However, section 2301(f)(2)(A) of the CARES Act, as amended by section 207(d)(3)(A) of the Relief Act, provided that paragraph (1) shall not apply to "any organization described in section 501(c)(1) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code…" Section 207(k) of the Relief Act provided that this amendment applied to calendar quarters beginning after December 31, 2020.

Section 9651 of the American Rescue Plan Act of 2021 ("ARP"), Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021) added section 3134 to the Internal Revenue Code ("Code") which provided an employee retention credit for qualified wages paid after June 30, 2021, and before January 1, 2022. However, section 80604 of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (November 15, 2021), amended section 3134(n) of the Code to provide that the employee retention credit under section 3134 of the Code applied only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an eligible employer which is a recovery startup business, January 1, 2022). Section 3134(f)(1) of the Code provided that no employee retention credit shall 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. However, section 3134(f)(2)(A) provided 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.

[1] 12 USC § 1752(1).

[2] United States v. Michigan, 851 F.2d 803, 806 (6th Cir. 1988) (citing S. Rep. No. 555, 73d. Cong., 2d Sess. (1934)).

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]

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.

> "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.
[5] 12 USC § 1766(b)(1).
[6] 12 USC § 1768.

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 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 wages paid after March 12, 2020, and before January 1, 2021, federal credit unions may not claim the employee retention credit. Section

[7] See United States v. Michigan, 851 F.2d at 806-807.

2301(f) of the CARES Act, as amended by section 206 of the Relief Act, prohibits instrumentalities of the United States government from claiming such credit.

For wages paid after December 31, 2020, and before July 1, 2021, federal credit unions may claim the employee retention credit. Although section 2301(f)(1) of the CARES Act, as amended by section 207 of the Relief Act, prohibits instrumentalities of the United States government from claiming the employee retention credit, section 2301(f)(2) of the CARES Act, as amended by the section 207 of the Relief Act, specifies 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.

For wages paid after June 30, 2021, and before October 1, 2021 (or in the case of wages paid by a federal credit union which is a recovery startup business, January 1, 2022), federal credit unions may claim the employee retention credit. Although section 3134(f)(1) of the Code prohibits instrumentalities of the United States government from claiming the employee retention credit, section 3134(f)(2) specifies 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.