



**America's
Credit Unions**

January 18, 2024

The Honorable Jason Smith
Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

The Honorable Ron Wyden
Chairman
Committee on Finance
U.S. Senate
Washington, DC 20510

The Honorable Richard Neal
Ranking Member
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

The Honorable Mike Crapo
Ranking Member
Committee on Finance
U.S. Senate
Washington, DC 20510

Dear Chairmen Smith and Wyden and Ranking Members Neal and Crapo:

Re: The Eligibility of Federally-Chartered Credit Unions to Access the Employee Retention Tax Credit

On behalf of America's Credit Unions, I am again writing to regarding an oversight in the CARES Act that unintentionally prohibited federally-chartered credit unions from successfully applying for the Employee Retention Tax Credit (ERTC) for tax year 2020. As you consider the ERTC in today's mark-up, we ask that the manager's amendment include a fix to this oversight. This error in the law made these credit unions practically the only private sector business entities that were made ineligible for this credit. In fact, state-chartered credit unions were and still are eligible to receive this credit for 2020. America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide.

Credit unions applauded and supported the efforts of the Administration and Congress to formulate and pass legislation to provide emergency relief to individuals and businesses affected by the COVID-19 pandemic. Despite being contrary to Congressional intent, the bill text of Coronavirus Aid, Relief, and Economic Security Act (CARES Act) unintentionally blocked federally-chartered credit unions from eligibility for the Employee Retention Tax Credit (ERTC) for tax year 2020.

Congressional intent was to block quasi-governmental entities from accessing this payroll credit, not federally-chartered credit unions. Federal credit unions are not-for-profit financial cooperatives under Section 501(c)(1) of the Internal Revenue Code. As such, they are classified as "federal instrumentalities." These new payroll tax credits in the CARES Act were not made available to certain governmental employers. -- *This 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. (Section 7001(e)(4) and Section 7003(e)(4) of Public Law 116-127 and Section 2301(f) of Public Law 116-136).

The text of the “federal instrumentality” exclusions seem to indicate that the prohibition on receiving the credits was aimed at governmental entities, not federal credit unions. Examples of other federal instrumentalities include Fannie Mae, Freddie Mac, and Ginnie Mae. However, Treasury failed to provide the clarification needed to prevent federally-chartered credit unions from being the only not-for-profit entities that were prohibited from receiving this relief.

As an aside, state-chartered credit unions (Section 501(c)(14)(A) of the Internal Revenue Code) are not prohibited from claiming the ERTC. It is inconsistent to prohibit federal credit unions from receiving the same aid as state-chartered credit unions. In fact, subsequent legislation enacted into law in 2020 permitted federal credit unions to claim the ERTC for eligible expenses paid in 2021. However, this legislation failed to fix the “federal instrumentality” exemption for eligible 2020 expenses.

On August 18, 2023, Lynne A. Camillo, Deputy Associate Chief Counsel at the Internal Revenue Service (IRS), wrote a memorandum (Memorandum Number: 202333001) stating that, as federal instrumentalities (Section 501(c)(1) of the Internal Revenue Code (IRC)), federal credit unions (FCUs) cannot claim the ERTC for 2020. In 2020, lawmakers indicated to the credit union industry that it was not Congressional intent that any credit unions be prohibited from applying for the credit. However, neither the Treasury nor the IRS would issue a definitive and timely statement on the eligibility of these credit unions for the credit. Therefore, credit unions lobbied Congress to enact a legislative fix to remove any and all doubt that these credit unions were eligible for the credit for 2020 health and payroll expenses.

The Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Disaster Tax Relief Act), as part of the Consolidated Appropriations Act of 2020, was enacted into law on December 27, 2020. It extended the ERTC to eligible expenses incurred after December 31, 2020, and before July 1, 2021. It also clarified that FCUs were eligible to apply for the credit for eligible 2021 wages and health expenses. However, much to our frustration, the IRS took the position that the nearly 2200-page bill failed to clarify whether FCUs were eligible to apply for the credit for wages and employee health expenses paid in 2020.

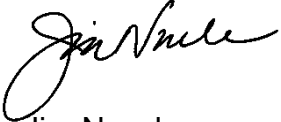
The American Rescue Plan Act of 2021, signed into law on March 11, 2021, extended the ERTC to eligible expenses paid after June 30, 2021, and before January 1, 2022. However, the Infrastructure Investment and Jobs Act, signed into law on November 15, 2021, amended the law and limited the ERTC to wages paid after June 30, 2021, and before October 1, 2021.

We again urge you, as the Congressional committees with jurisdiction over revenue legislation, to use consideration of this year’s Tax Relief for American Families and Workers Act of 2024 (the Smith-Wyden Tax Framework) - that is already making changes to the ERTC in today’s markup - as an opportunity to clarify the “federal instrumentality” language in the text of the CARES Act to allow

federal credit unions that have applied for, or wish to apply for, the ERTC for 2020 expenses. This is a matter of simple fairness.

As credit unions are planning for their internal operating expenses, your immediate clarification on this issue would be very helpful and appreciated. On behalf of America's Credit Unions and the 140 million credit union members, thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Nussle". The signature is written in a cursive, flowing style.

Jim Nussle
President and CEO