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OFFICE OF THE ATTORNEY GENERAL

March 3, 2011

LEGAL MEMORANDUM

Ref: DRT 10-0001

TO: Director, Department of Revenue and Taxation

FROM: Attorney General 

SUBJECT: *License Fee on Federal Credit Union's ATM*

In December 2009 you wrote to this Office requesting guidance on a matter involving federal credit unions. You indicated that under 11 GCA §72102(b), a \$500 license fee is imposed on every Automated Teller Machines (ATM) that is not contiguous to a main branch or facility established and operated by a bank, credit union or non-bank entity.

You have indicated that the National Credit Union Administration (NCUA) quotes 12 USCA §1768, and has indicated that federal credit unions are exempt from Federal, State, Territorial and local taxing authority. The statute does provide an exception that any real property and any tangible personal property of Federal credit unions shall be subject to Federal, State, Territorial and local taxation to the same extent as other similar property is taxes. You have attached a copy of a letter of exemption from the NCUA for reference. You have asked whether an ATM established and operated by a federal credit union is tangible personal property that is subject to a licensing fee applied under 11 GCA §72102(b).

It was also revealed that Guam does not impose a license fee on the federal credit unions, as these entities are not regulated by the Banking and Insurance Commission; rather, the NCUA regulates all federal credit unions.

Discussion

12 USCA §1768 provides:

§ 1768. Taxation

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent

holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

Thus, under §1768, federal credit unions are exempt from all taxation except nondiscriminatory taxes on real property and tangible personal property. Under the Supremacy Clause, federal instrumentalities are immune from taxation by a State, unless such taxation is specifically authorized by Congress. *McCulloch v. Maryland*, 17 U.S. 316 (1819). Furthermore, federal credit unions are instrumentalities in that they are chartered and extensively regulated by the National Credit Union Administration.¹ *U.S. v. State of Maine*, 524 F.Supp. 1056 (D.Ct. Me. 1981).

In *U.S. v. State of Maine*, 524 F. Supp. 1056 (D.Ct. Me. 1981), the State of Maine attempted to impose a sliding scale fee federal credit unions based upon on the amount of unpaid balances on loans made to consumers. These fees were then appropriated for use by the Superintendent of the Bureau of Consumer Protection. After holding that the federal credit unions are federal instrumentalities, the court then addressed the issue of whether the sliding scale fee was a fee or a tax. The Court used the following three-pronged test announced by the Supreme Court in *City of Detroit v. Muray Corp.*, 355 U.S. 489 (1958): (1) Is the charge imposed in a non-discriminatory manner? (2) Is the charge a "fair approximation of the costs of the benefits" received? And (3) Is the charge structured to produce revenues that will not exceed the total cost to the government of the benefits to be supplied? *Maine* at 1059. The Court further stated that the "benefits" to be examined in applying the test are the benefits received by those on whom the charges are imposed, not merely benefits to the public at large. *Id.*

The fee imposed by DRT meets the first prong of the test in that it is imposed on all banks, credit unions and non-bank entity in Guam operating an ATM that is not contiguous to a main or branch facility. Thus, the license fee is non-discriminatory. However, the license fee fails to meet the second part of the test in that the license fee of \$500 imposed on federal credit unions is not a fair approximation of the costs of the benefits received. The credit union must pay a license fee, but it obtains no benefit for paying the fee other than the ability to operate its machine. The Government of Guam does not regulate the machines or the federal credit unions; rather, it is the National Credit Union Administration that regulates federal credit unions.

Finally, the third prong of the test is not met in that the fee is more in line with a tax, which is used to raising revenue, than in line with a "fee", and would be prohibited under 12 U.S.C.A. §1768. DRT has indicated that it does not charge federal credit unions the business licensing fee under 11 GCA §72102(a) because they do not regulate federal credit unions. Since the government does not regulate federal credit unions, it should not regulate the federal credit union's ATMs. Therefore if the \$500 fee were charged to the federal credit unions for the ATMs and no government benefits are provided to the federal credit union for that fee paid, the fee will produce revenues that will exceed the government's cost of benefits supplied. Thus, the third prong of the test stated in *City of Detroit* would not be met. Instead, the charge to the federal credit unions on the ATMs would be more in line with a prohibited tax. Therefore, no licensing fee should be imposed on federal credit union ATMs in the same manner that no licensing fee is imposed on the federal credit unions.

¹ The Federal Credit Union Act established the National Credit Union Administration as an independent agency in the executive branch of the Government. 12 U.S.C.A. §1752a(a).

11 GCA §100104(b) recognized the federal preemption doctrine and the limitations federal law places on local regulation and provides:

§ 100104. Effect on Existing Banks.

...

(b) All national banking associations authorized to transact business in this territory, to the extent that the provisions of this Act are not inconsistent with and do not infringe paramount Federal laws governing national banking associations, shall hereafter be operated in accordance with the provisions of this Act.

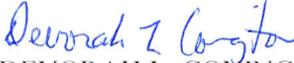
The federal credit unions are required to pay yearly licensing fees to the National Credit Union Administration (12 U.S.C.A. §1755; 12 CFR §701.6); since the federal government has legislated in the area of licensing fees, the Government of Guam is preempted and may not impose local licensing fees on the federal entities.

Additionally, The National Credit Union Administration has stated:

The "Office of Comptroller of the Currency (OCC) ...conclude[s] state requirements that national banks obtain state approvals or licenses to exercise a power authorized under federal law conflict with federal law and are preempted.² The OCC noted that "[i]f a national bank is authorized under federal law to exercise a power, it does not require the additional permission of a state to exercise that power."³

Letter dated October 4, 2002 from NCUA to North Carolina Regulatory and Compliances Services (footnotes in original).

In sum, the Department is preempted from imposing a license fee on a federal credit union's ATM machines.


DEVORAH L. COVINGTON
Assistant Attorney General

Attachment

² See OCC Interpretive Letters No. 872, dated October 28, 1999, and No. 866, dated October 8, 1999.

³ *Id.* at p. 10.

This is the cached copy of <http://www.ncua.gov/Resources/RegulationsOpinionsLaws/OpinionLetters/1998/98-0732.html>.

September 14, 1998

Richard W. Murray, President/CEO
IAG Federal Credit Union
One Interstate Terrace
600 Midland Avenue
Rye, New York 10580-3999

Re: **State** Tax or Assessments on ATMs, Your letter dated July 23, 1998.

Dear Mr. Murray:

You have asked whether the Massachusetts Division of Banking's annual assessment against a federal credit union's (FCU's) electronic branch is permissible. Section 24 of Massachusetts' Electronic Branches and Electronic Funds Transfer Statute requires the commissioner of banks to assess an annual fee against all electronic branches to cover the cost of regulating these entities. MASS. GEN. LAWS ANN., CH. 167B, §24 (WEST 1194). You advise that the amount being assessed is \$495. This assessment is not permissible.

The attached letter from James J. Engel to Jerome F. Coleman dated April 27, 1979, explains that "[s]tate and local **licensing** rules that entail the payment of a fee by the licensee are tantamount to a tax and are therefore preempted by section 122 of the Federal Credit Union Act (12 U.S.C. §1768)." That letter also explains that not all **fees** are impermissible. "For example, a rule that requires the obtaining of a building or occupancy permit from a local authority and entails the payment of a fee would not be considered a tax if it is shown that the fee bears a relation to the cost of a service being provided."

The \$495 fee being charged FCUs to maintain electronic branches in the **state** of Massachusetts does not appear to bear a relation to the cost of the service being provided. The fee is intended to cover the cost of examination and supervision by the **state** regulator. These entities are not examined or regulated by the **state** regulator. The assessment is, therefore, equivalent to a **licensing** fee which makes it an impermissible tax on FCUs.

Sincerely,

Sheila A. Albin
Associate General Counsel

GC/MFR:bhs
SSIC 3600
98-0732
Enclosure