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Michael McKenna
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Re: Applicability of Executive Order 13433 to NCUA when acting in its capacity as the conservator or liquidating agent of a federally insured credit union

Dear Mr. McKenna,

You have asked for our opinion on whether Executive Order ("EO") 13433, 72 Fed. Reg. 28,441 (May 16, 2007), which prohibits federal agencies from entering into contingency fee contracts for legal or expert witness services provided to or on behalf of the United States, applies to the National Credit Union Administration ("NCUA") when it acts either as the conservator or as the liquidating agent of a federally insured credit union. As discussed in detail below, we have concluded that the executive order does not prohibit the NCUA, in its capacity as conservator or liquidating agent, from entering into contingency fee contracts for legal services. When the NCUA acts in its capacity as conservator or liquidating agent of a failed credit union, it succeeds by operation of law to all the rights, powers, and duties of the credit union – that is, it "steps into the shoes" of the credit union. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). The NCUA, therefore, has the same authority to retain lawyers on a contingency fee basis that the credit union possessed before the NCUA was appointed conservator or liquidating agent. By its own terms, EO 13433 does not purport to "impair or otherwise affect" that clear statutory authority. EO 13433 § 4(b)(i). Indeed, when the NCUA contracts for legal services in its capacity as conservator or liquidating agent of a failed credit union, the legal services are not, we believe, provided "to or on behalf of the United States" within the meaning of the executive order. *Id.* § 1. Thus, we have concluded that EO 13433 does not prohibit the NCUA from entering into contingency fee arrangements in its capacity as conservator or liquidating agent.[1]

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[1] In analyzing this issue, we have reviewed the terms of EO 13433 as well as NCUA's enabling legislation, and have also examined federal court precedents addressing the powers of federal agencies that act as conservators, liquidating agents, and receivers for failed financial institutions. Our case law analysis focused primarily on U.S. Supreme Court and appellate court decisions rather than district court decisions. Please note that we have not reviewed every court

THE EXECUTIVE ORDER

EO 13433 was signed by President George W. Bush on May 16, 2007. Section 1 of the order expresses the "[p]olicy" behind the executive order:

> To help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States, it is the policy of the United States that organizations or individuals that provide such services *to or on behalf of the United States* shall be compensated in amounts that are reasonable, *not contingent upon the outcome of litigation or other proceedings*, and established according to criteria set in advance of performance of the services, *except when otherwise required by law*.

EO 13433 § 1 (emphases added).

Section 2 of the order provides that "[h]eads of agencies shall implement within their respective agencies the policy set forth in section 1," *id.* § 2(a), and that "no agency shall enter into a contingency fee agreement for legal or expert witness services addressed by section 1 of this order, unless the Attorney General has determined that the agency's entry into the agreement is required by law," *id.* § 2(b). Section 3 provides definitions for the terms "agency" and "contingency fee agreement" as those terms are used in the order. With exceptions not relevant here, "agency" is defined to mean "an executive agency as defined in section 105 of title 5, United States Code." *Id.* § 3(a). *See* 5 U.S.C. § 105 (" 'Executive agency' means an Executive department, a Government corporation, and an independent establishment"). Again with exceptions not pertinent here, "contingency fee agreement" is defined as "a contract or other agreement to provide services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained." EO 13433 § 3(b).

Finally, section 4 of the order, entitled "General Provisions," includes several provisions that are pertinent to the analysis of the scope and meaning of the order. Section 4(a) provides that the order "shall be implemented consistent with applicable law and subject to the availability of appropriations." *Id.* § 4(a). More importantly for purposes of our analysis, Section 4(b) provides that "[n]othing in this order shall be construed to impair or otherwise affect . . .

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decision analyzing the powers of federal receivers, conservators, and liquidating agents, as there are hundreds of such decisions; we are nonetheless confident that we have identified and reviewed those federal appellate decisions that have a direct bearing on our analysis.

authority granted by law to an agency or the head thereof." *Id.* § 4(b)(i).

DISCUSSION

Some commentators have suggested that EO 13433 prohibits the contingency fee arrangements at issue, emphasizing that the executive order applies broadly to "executive agenc[ies]," EO 13433 § 3(a), and that the NCUA was established, by statute, as an "independent" agency "in the executive branch of the Government," 12 U.S.C. § 1752a(a). We believe, however, that this argument overlooks certain critical aspects of the NCUA's statutory rights and powers when it acts as a conservator or liquidating agent for a failed credit union. These rights and powers, in our view, provide independent legal authority for contingency fee arrangements by the NCUA that EO 13433 on its face does not disturb, but rather expressly *preserves*. Moreover, because any such contingency fee contracts would not call for the provision of legal services "to or on behalf of the United States," they are not prohibited by the executive order. For these related but analytically distinct reasons, we believe that EO 13433 does not prohibit the NCUA from entering into contingency fee contracts in its capacity as conservator or liquidating agent.[2]

The NCUA's Rights and Powers as Conservator or Liquidating Agent

Our analysis of EO 13433 turns in large measure upon the nature of the NCUA's rights and powers when it acts as conservator or liquidating agent of a failed credit union. Regardless of the capacity in which it is acting, however, the NCUA has broad statutory authority under the Federal Credit Union Act ("FCUA") to enter into contracts with private entities. Thus, the FCUA provides that "[i]n addition to the authority conferred upon it by other sections of this chapter," the NCUA's Board

> is authorized in carrying out its functions under this chapter – . . . to expend such funds, enter into such contracts with public and private organizations and persons . . . without regard to the provisions of any other law applicable to executive or independent agencies of the United States, and perform such other functions or

[2] Because we conclude that NCUA is not prohibited by EO 13433 from entering into contingency fee contracts for legal services, we have not analyzed, and do not opine on, the question whether, if that executive order by its terms did prohibit such contingency fee contracts, the NCUA, as an independent agency, would nonetheless not be bound by that order. Nor have we analyzed or opined upon whether the order affects the NCUA's ability to enter into such contracts when it acts in different capacities (*e.g.*, as insurer of credit unions or otherwise as a regulatory agency).

> acts as it may deem necessary or appropriate to carry out the provisions of this chapter, in accordance with the rules and regulations or policies established by the Board not inconsistent with this chapter.

12 U.S.C. § 1766(i)(2).[3]

Even more significant are the provisions of the FCUA specifying the rights and powers of the NCUA when it is acting as conservator or liquidating agent of a failed credit union. In particular, the statute provides that "[t]he Board shall, as conservator or liquidating agent, and by operation of law, *succeed to . . . all rights, titles, powers, and privileges of the credit union*, and of any member, accountholder, officer, or director of such credit union with respect to the credit union and the assets of the credit union." *Id.* § 1787(b)(2)(A)(i) (emphasis added).

The statute also specifies:

> The Board may, as conservator or liquidating agent –
>
> (i) take over the assets of and *operate the credit union with all the powers of the members or shareholders*, the directors, and the officers of the credit union and shall be authorized to conduct all business of the credit union;
>
> (ii) collect all obligations and money due the credit union;
>
> (iii) *perform all functions of the credit union in the name of the credit union* which is consistent with the appointment as conservator or liquidating agent; and
>
> (iv) preserve and conserve the assets and property of such credit union.

[3] Although this and other provisions of the FCUA speak in terms of the authority of the NCUA's Board, 12 U.S.C. § 1766(d) makes clear that the "Board is authorized and empowered to execute any and all functions and perform any and all duties vested in it hereby, through such persons as it shall designate or employ; and it may delegate to any person or persons, including any institution operating under the general supervision of the Administration, the performance and discharge of any authority, power, or function vested in it by this chapter." *See also* 12 U.S.C. § 1789(a)(10) (authorizing the Board to "delegate to any officer or employee of the Administration such of its functions as it deems appropriate").

Id. § 1787(b)(2)(B) (emphases added). The statute also includes provisions specifying the NCUA's additional powers as conservator or liquidating agent. *See, e.g.*, *id.* § 1787(b)(2)(D) ("The Board may, as conservator, take such action as may be (i) necessary to put the credit union in a sound and solvent condition; and (ii) appropriate to carry on the business of the credit union and preserve and conserve the assets and property of the credit union."); *id.* § 1787(b)(2)(E) ("The Board may, as liquidating agent, place the credit union in liquidation and proceed to realize upon the assets of the credit union, having due regard to the conditions of credit in the locality."). Finally, under 12 U.S.C. § 1789(a)(1), the Board is authorized, in carrying out its rights and duties as conservator and liquidating agent, to "make contracts."

The statutory regime establishing the NCUA's rights and powers as conservator or liquidating agent closely parallels the statutory regime governing other federal agencies – most particularly, the Federal Deposit Insurance Corporation ("FDIC") – when acting as receiver or conservator for other failed federally insured financial institutions.[4] Decisions addressing the scope and nature of those agencies' powers as conservator or receiver are thus highly instructive on the nature of the NCUA's powers when it acts as conservator or liquidating agent for a credit union.

Numerous decisions hold, for example, that when the FDIC acts as receiver or conservator of a failed bank or thrift, it acts in a capacity that is legally distinct from its capacity as regulator or insurer of deposits. *See., e.g.*, *Bullion Servs., Inc. v. Valley State Bank*, 50 F.3d 705, 709 (9th Cir. 1995) ("Because FDIC Corporate and FDIC Receiver perform two different functions and protect wholly different interests, courts have been careful to keep the rights and liabilities of these two entities legally separate."); *FDIC v. La Rambla Shopping Ctr., Inc.*, 791 F.2d 215, 218 (1st Cir. 1986) (noting that FDIC's authorizing statute and case law "provide the FDIC with two virtually separate, legal identities," and holding that counterclaim premised upon acts of FDIC-Receiver cannot be brought against FDIC-Corporate); *Trigo v. FDIC*, 847 F.2d 1499, 1502 n.3 (11th Cir. 1988) ("In a typical purchase and assumption transaction, the FDIC

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[4] *See, e.g.*, 12 U.S.C. § 1821(d)(2)(A) (FDIC "shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution"); *id.* § 1821(d)(2)(B) (FDIC as conservator or receiver may (i) "take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution"; (ii) "collect all obligations and money due the institution"; (iii) "perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver"; and (iv) "preserve and conserve the assets and property of such institution"); *id.* § 1821(d)(2)(D) (FDIC's additional powers as conservator); *id.* § 1821(d)(2)(E) (FDIC's additional powers as receiver).

acts in two distinct capacities."); *FDIC v. Roldan Fonseca*, 795 F.2d 1102 (1st Cir. 1986) (FDIC-Corporate not liable for claims against FDIC-Receiver); *FDIC v. Ernst & Young LLP*, 374 F.3d 579, 582 (7th Cir. 2004) (FDIC-Corporate not allowed to pursue claim belonging to FDIC-Receiver); *FDIC v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (FDIC serves "in two distinct capacities: as an insurer of deposits of member banks and as a receiver for insured banks that have failed"); *Ameristar Fin. Servicing Co., LLC v. United States*, 75 Fed. Cl. 807, 810 n.8 (2007) ("When the FDIC acts as an insurer of bank deposits, it acts in a legal capacity that is separate and distinct from that as a receiver or conservator of a thrift.").

In addition, and critical to our analysis, the Supreme Court has made clear that when the FDIC is acting in its distinct capacity as the receiver or conservator for a financial institution, it steps into the shoes of that institution. Thus, in *O'Melveny*, the Supreme Court held that the language of 12 U.S.C. § 1821(d)(2)(A)(i) stating that the FDIC as receiver shall " 'succeed to-all rights, titles, powers, and privileges of the insured depository institution' . . . appears to indicate that the FDIC as receiver 'steps into the shoes' of the failed S & L, obtaining the rights '*of* the insured depository institution' that existed prior to receivership." 512 U.S. at 86 (citations omitted; emphasis in original).[5] *See also Ernst & Young*, 374 F.3d at 581 ("FDIC-Receiver steps into the shoes of the failed bank and is bound by the rules that the bank itself would encounter in litigation."); *Murphy v. FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995) (citing *O'Melveny* for proposition that FDIC-Receiver steps into the shoes of failed thrift); *Harrison*, 735 F.2d at 412 ("It has been held that when FDIC acts as a receiver and liquidating agent for a failed bank, as it did here, it merely 'stands in the shoes of the insolvent bank.' ") (citing *FDIC v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971)); *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003) ("In its capacity as receiver . . . , plaintiff FDIC is merely standing in the shoes, and thus asserting the claims, of the defunct thrift."); *Ameristar*, 75 Fed. Cl. at 811 (as conservator, FDIC stepped into the shoes of failed thrift); *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 94 (D.D.C. 2012) ("Thus, like FDIC when it serves as a conservator or receiver of a private entity, [the Federal Housing Finance Agency ("FHFA")] when it serves as conservator 'step[s] into the shoes' of the private corporation, Fannie Mae.").

Given the virtually identical language in the statutes governing the FDIC's and the NCUA's rights and powers as conservator, receiver, or liquidating agent, it is clear that the NCUA likewise steps into the shoes of a failed credit union when it is appointed conservator or liquidating agent of the credit union. *Cf. United States v. Yeung*, 672 F.3d 594, 605-06 (9th Cir. 2012) (holding, citing *O'Melveny*, that NCUA as conservator for failed credit union could be treated as the victim of fraud perpetrated against credit union before it failed). As we discuss

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[5] *See also id.* at 86-87 ("It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive [statutory] framework . . . provides otherwise.").

below, this fact is of critical significance in the analysis of EO 13433's applicability to the NCUA when it acts as conservator or liquidating agent.

NCUA as Conservator or Liquidating Agent Has
Authority To Engage Contingency Fee Counsel

As noted previously, EO 13433 does not disturb any authority the NCUA may have under other law to enter into contingency fee contracts. Indeed, section 4(b)(i) of the order explicitly provides that "[n]othing in this order shall be construed to impair or otherwise affect . . . authority granted by law to an agency or the head thereof." We believe that at a minimum, this provision preserves the rights and powers to which the NCUA succeeds when it "steps into the shoes" of a failed federally insured credit union.

As discussed above, under the FCUA, when the NCUA is appointed conservator or liquidating agent for a credit union, it succeeds, by operation of law, to "all rights, titles, powers, and privileges of the credit union." 12 U.S.C. § 1787(b)(2)(A)(i). The statute also authorizes the NCUA as conservator or liquidating agent to "operate the credit union with all the powers of the members or shareholders, the directors, and the officers of the credit union," and to "conduct all business of the credit union," "collect all obligations and money due the credit union," and "perform all functions of the credit union in the name of the credit union." *Id.* § 1787(b)(2)(B). There is little question, then, that the NCUA steps into the shoes of the failed credit union and possesses all of the rights and powers that the credit union possessed before it was seized. *O'Melveny*, 512 U.S. at 86.

We are aware of no limitation on the rights and powers of federally insured credit unions to retain outside counsel under contingency fee contracts. The ability to employ outside counsel on a contingency fee basis is therefore one of the "rights, . . . powers, and privileges" of such credit unions. 12 U.S.C. § 1787(b)(2)(A)(i). It follows that under the FCUA, the NCUA succeeds to that right, power, or privilege when it is appointed conservator or liquidating agent. In this manner, the statute authorizes the NCUA, as conservator or liquidator, to enter into contingency fee contracts with outside attorneys as effectively as would statutory language that, in terms, specifically identified the ability to enter into such contracts as one of the conservator's or liquidating agent's rights and powers. *See also* 12 U.S.C. § 1766(i)(2) (authorizing NCUA to "enter into such contracts with public and private organizations [as it may deem necessary or appropriate to carry out its functions] without regard to the provisions of any other law applicable to executive or independent agencies of the United States").

For these reasons, we believe that the NCUA has "authority granted by law" in its capacity as conservator or liquidating agent to enter into contracts, including contingency fee contracts with private attorneys. EO 13433 § 4(b)(1). Because EO 13433 by its terms does not

"impair or otherwise affect" such "authority granted by law," the order does not prohibit the NCUA from entering into such arrangements when it acts as conservator or liquidating agent.

The NCUA's Contingency Fee Agreements Do Not Call for the Provision of Services to or on Behalf of the United States

Our conclusion that EO 13433 does not prohibit the NCUA from entering into contingency fee contracts as conservator or liquidating agent is fortified by our reading of sections 1 and 2 of the order. As discussed, section 2(b) of the order prohibits agencies from entering into contingency fee agreements only "for legal or expert witness services addressed by section 1 of this order." *Id.; see also id.* § 2(a) (requiring head of each agency to "implement . . . the policy set forth in section 1"). Section 1, in turn, refers to the policy "that organizations or individuals that provide [legal or expert witness] services *to or on behalf of the United States*" shall not be compensated on a contingent basis. Thus, the order by its terms prohibits only contingency fee arrangements for legal or expert witness services that are to be provided "to or on behalf of the United States." We believe that when it acts as conservator or liquidating agent, including when it retains outside counsel, the NCUA does not act for or on behalf of the United States. Any decision by NCUA to enter into contingency fee arrangements with such counsel, accordingly, would not involve the provision of legal service to or on behalf of the United States within the meaning of EO 13433.

As explained above, when appointed conservator or liquidating agent for a failed credit union, the NCUA succeeds to *the credit union's* "rights, titles, powers, and privileges," 12 U.S.C. § 1787(b)(2)(A)(i), and it therefore steps into the shoes of *the credit union*. *O'Melveny*, 512 U.S. at 86-87. It follows that when the NCUA steps into those shoes and enters into contracts with private entities, it does so *for or on behalf of the failed credit union* and its members and shareholders, rather than the United States.

This conclusion is confirmed by case law examining the status of the FDIC when it acts as receiver or conservator for failed banks and thrifts. In *O'Melveny*, for example, the Supreme Court rejected an argument that federal common law should govern a legal question raised in an action brought by the FDIC as receiver. The FDIC argued that federal law should govern because the case raised questions involving the rights of the United States under nationwide federal programs. 512 U.S. at 85. The Supreme Court rejected the premise of the FDIC's argument, emphasizing that "the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights" of the failed thrift. *Id.* (emphasis in original).

Three years after it decided *O'Melveny*, the Supreme Court again held, in *Atherton v. FDIC*, 519 U.S. 213 (1997), that federal common law would not govern an action originally

brought by the Resolution Trust Corporation ("RTC"), as receiver for a failed thrift, against the former officers and directors of the thrift. (The FDIC as receiver later succeeded to the RTC's rights in the action and was substituted as the plaintiff.) In so holding, the Court again noted that "as in *O'Melveny*, the FDIC is acting only as a receiver of a failed institution; *it is not pursuing the interest of the Federal Government* as a bank insurer." *Id.* at 225 (emphasis added).

Numerous other decisions underscore that when the FDIC acts as a receiver or conservator of a failed financial institution, it acts on behalf of the financial institution and not on behalf of the United States. *See, e.g., FDIC v. McFarland*, 243 F.3d 876, 888 (5th Cir. 2001) (FDIC's "actions as a receiver do not concern the 'rights of the United States in a nationwide federal program' ") (citations omitted); *Ledo Fin. Corp. v. Summers*, 122 F.3d 825, 829 (9th Cir. 1997) (when FDIC acts as receiver, "it is not pursuing the interest of the United States"); *Herron*, 857 F. Supp. 2d at 94 ("when acting as receiver, FDIC does not pursue the interests of the government"); *FDIC v. Flagship Auto Ctr., Inc.*, No. 04-7233, 2009 WL 484175, at *3 (N.D. Ohio Feb. 25, 2009) (when acting as receiver, FDIC is not an agency for purpose of the Equal Access to Justice Act).[6]

In fact, federal courts have held that when the FDIC acts as receiver or conservator for a failed financial institution, it can pursue that institution's claims against the federal government, even if that requires the FDIC to bring suit against the United States. Thus, in *Plaintiffs in All Winstar-Related Cases v. United States*, 44 Fed. Cl. 3 (1999), the U.S. Court of Federal Claims held that such a suit by the FDIC-Receiver against the United States did not amount to a non-justiciable intra-governmental claim. In analyzing this issue, the court stressed that the FDIC-Receiver succeeded to the rights of the failed institution:

> In its capacity as receiver . . . , FDIC is obligated to marshal the assets of the failed thrifts *for the benefit of the thrifts' creditors and shareholders. In this capacity it is acting on behalf of the insured institutions and their creditors and shareholders and is under an obligation to assert claims of the institutions even against the*

[6] *Cf. Davidson v. FDIC*, 44 F.3d 246, 250 (5th Cir. 1995) (noting "absence . . . of a significant federal interest" in case involving FDIC's rights as receiver); *Bank of New England Old Colony v. Clark*, 986 F.2d 600, 603 (1st Cir. 1993) (holding that FDIC-Receiver was not a federal instrumentality for purposes of exception to Tax Injunction Act, and noting that, as successor to private bank, FDIC-Receiver's "governmental role in this case is minimal"); *Harrison*, 735 F.2d at 411-12 (applying equitable estoppel to FDIC-Receiver, in part because when acting as receiver, FDIC acted in a proprietary rather than sovereign capacity); *American Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1144 (D.C. Cir. 2011) (claim against FDIC-Receiver "is a claim against the depository institution for which the FDIC is receiver").

> *United States.* FDIC, as receiver, is authorized by statute to "take over the assets of . . . the insured depository institution," 12 U.S.C. § 1821(d)(2)(B)(i), and to "collect all obligations and money due the institution." 12 U.S.C. § 1821(d)(2)(B)(ii). In addition, FDIC may "perform all functions of the institution in the name of the institution . . . ." 12 U.S.C. § 1821(d)(2)(B)(iii).

44 Fed. Cl. at 7 (alteration in original) (emphasis added). After noting the Supreme Court's statements in *O'Melveny* that the FDIC-Receiver steps into the failed institution's shoes, the Court of Federal Claims concluded that "any inquiry concerning the existence of 'case or controversy' should be conducted as if this litigation were between the failed thrifts and the United States." *Id. See also Coast-to-Coast Fin. Corp. v. United States*, 52 Fed. Cl. 352, 363-64 (2002) (FDIC-Receiver's breach of contract claim against United States presented case or controversy); *Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002) ("FDIC is not the government for purposes of *Winstar* claims" against the United States.).

Obviously, if the FDIC is able to bring claims *against* the United States when it acts as receiver or conservator, it cannot be said that it is providing services *for or on behalf of* the United States when it acts in that capacity.

Along similar lines, the Court of Federal Claims has held that it does not have jurisdiction under the Tucker Act, which grants that court jurisdiction over certain damages claims against the United States, over claims brought against the FDIC in its capacity as receiver or conservator. Because the FDIC in that capacity is standing in the shoes of the failed bank or thrift, a claim against the FDIC as receiver or conservator does not constitute a claim against the United States for purposes of the Tucker Act. Thus, in *AG Route Seven*, the court held that "[i]n its capacity as receiver for New Surety, plaintiff FDIC is merely standing in the shoes, and thus asserting the claims, of the defunct thrift. Consequently, the FDIC's attendant role herein is tantamount to that of a private party, and not the government *per se*." 57 Fed. Cl. at 534-35 (citation omitted). Similarly, because the FDIC's role as conservator of a thrift is to preserve and conserve the thrift's assets, and the "United States was neither the source nor the owner of the assets," the court in *Ameristar* concluded that the FDIC as conservator "was not acting as the United States" for purposes of Tucker Act jurisdiction. 75 Fed. Cl. at 812.[7] Significantly, in *Ameristar*, the contract at issue was entered into by the FDIC-Conservator *after* the financial institution had been seized, rather than by the financial institution itself before seizure. The court

[7] *But see Auction Co. of America v. FDIC*, 132 F.3d 746, 748-50 (D.C. Cir. 1997) (concluding that FDIC-Receiver constitutes the United States for purposes of statute of limitations, and suggesting that claim against FDIC-Receiver would be cognizable under the Tucker Act).

rejected the plaintiff's suggestion that that fact should change the result, concluding that the FDIC as conservator stepped into the shoes of the institution every bit as much as does the FDIC when acting as receiver, and that its actions as conservator, including entering into contracts, were therefore on behalf of the institution and not the United States. *Id.*

In short, because the actions of the FDIC as conservator or receiver – and by analogy, the actions of the NCUA as conservator or liquidating agent – are by operation of law undertaken on behalf of the institution to whose rights it succeeded and not on behalf of the United States, any legal services provided pursuant to contingency fee agreements entered into by the NCUA in its capacity as conservator or liquidating agent are not provided "to or on behalf of the United States" within the meaning of EO 13433.

It should be noted that our conclusion in this regard does not turn on whether the NCUA is considered a federal agency when acting as conservator or liquidating agent. In other words, even assuming that the NCUA should be treated as a federal agency, legal services rendered pursuant to contingency fee contracts awarded by the NCUA as conservator or liquidating agent for a failed credit union are not provided to or on behalf of the United States within the meaning of the executive order. As the Supreme Court noted in *O'Melveny*, even if the FDIC-Receiver is considered "the United States," it does not necessarily follow that it is asserting the rights of the United States rather than the rights of the failed financial institution for which it is acting as receiver. 512 U.S. at 85. For this reason, decisions holding that the FDIC-Receiver is a federal agency or part of the United States government for various purposes do not, in our view, speak to the relevant issue under the executive order or seriously call our analysis or conclusions into question.[8]

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[8] *See, e.g.*, *Battista v. FDIC*, 195 F.3d 1113 (9th Cir. 1999) (claim for pre-judgment interest against FDIC-Receiver barred by sovereign immunity); *Auction Co.*, 132 F.3d at 748-50 (FDIC-Receiver treated as federal agency for statute of limitations purposes); *FHFA v. Royal Bank of Scot. Grp. PLC*, No. 11-01383, 2012 WL 3580522 (D. Conn. Aug. 17, 2012) (FHFA as conservator treated as federal agency for purposes of statute authorizing stay of discovery in "private" actions); *FDIC v. Craft*, 157 F.3d 697 (9th Cir. 1998) (assuming that Federal Tort Claims Act applies to tort claims against FDIC-Receiver); *FDIC v. Hartford Ins. Co.*, 877 F.2d 590 (7th Cir. 1989) (same); *Franklin Sav. Corp. v. United States*, 970 F. Supp. 855 (D. Kan. 1997) (same); *FDIC v. TWT Exploration Co.*, 626 F. Supp. 149 (W.D. Okla. 1986) (same). *See also United States v. Sweeney*, 226 F.3d 43, 46 (1st Cir. 2000) (characterizing as "open question" whether FDIC-Receiver acts in the name of or on behalf of the United States for purposes of criminal contempt statute); *Shock v. United States*, 254 F.3d 1, 4-5 (1st Cir. 2001) (characterizing as "difficult question" whether FDIC-Receiver is United States agency for purposes of Equal Access to Justice Act ("EAJA")). *But see Placida Prof'l Ctr., LLC v. FDIC*, No. 09-2221, 2012

Nor do we believe that *O'Melveny* and other decisions cited above are distinguishable on the ground that they involved claims stemming from the financial institution's actions *before* the FDIC was appointed receiver, while the NCUA would presumably enter into contingency fee contracts with outside counsel *after* it has been appointed conservator or liquidating agent. The relevant statutes do not distinguish between actions taken by the institution before appointment of a liquidating agent, receiver, or conservator and those taken by the institution after such an appointment. The critical point is that the conservator, liquidating agent, or receiver steps into the shoes of the institution, succeeds to the institution's rights and powers, and is authorized to conduct the business and to perform the functions of the institution in the institution's name. The actions of the conservator, liquidating agent, or receiver are, therefore, the actions of the institution, not those of or on behalf of the United States. *See Ameristar*, 75 Fed. Cl. at 812 (claim against FDIC based on post-appointment contract entered into by conservator is not against the United States).

Finally, to the extent that the NCUA, in its capacity as deposit insurer, is a creditor of a failed credit union for which the NCUA has also been appointed conservator or liquidating agent, at least part of any recovery in any lawsuit brought by outside counsel retained by the institution may redound to the benefit of the NCUA in its capacity as deposit insurer.[9] It is arguable that at least to that extent, legal services provided by any such outside counsel would be on behalf of the United States. While this argument is not frivolous, we do not believe it is correct. Leaving aside the fact that the NCUA is funded primarily by assessments on member credit unions rather than taxpayer funds,[10] even if as a *practical* matter, the NCUA as deposit insurer becomes a creditor of the receivership estate of the failed credit union, it does so as a *legal* matter by becoming subrogated to the rights of the insured depositors. *See* 12 U.S.C. § 1787(e)(1). The NCUA is in this respect no different from the FDIC. Similarly, the FDIC, in its capacity as deposit insurer, is typically the single biggest creditor of the receivership estate of a failed bank or thrift. This fact does not somehow transform actions taken by the FDIC in its capacity as receiver into actions taken on behalf of the United States rather than on behalf of the financial institution for which it is acting as receiver. *Cf. O'Melveny*, 512 U.S. at 88 (prospect that federal deposit insurance fund may be depleted is not sufficient federal interest to support

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WL 4903323 (M.D. Fla. Oct. 16, 2012) (agreeing with FDIC-Receiver's argument that it is not a federal agency for purpose of EAJA).

[9] We have no information, one way or the other, regarding whether it is in fact the case that the NCUA, as deposit insurer, is a creditor of any credit unions for which the NCUA, as conservator or liquidating agent, may retain contingency fee counsel. We simply have assumed, for purposes of analysis, that this may be the case.

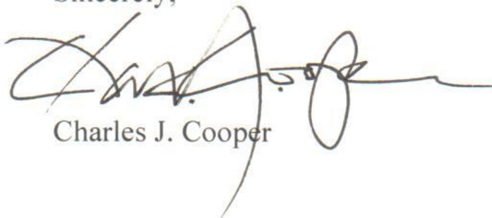
[10] *See, e.g.*, 12 U.S.C. §§ 1782(c), 1783(a), 1790e(d).

creation of federal common law to govern action brought by FDIC-Receiver); *Davidson*, 44 F.3d at 252 (same); *Ledo*, 122 F.3d at 829 ("[D]epletion of the insurance fund does not create a federal interest.").[11]

CONCLUSION

For the reasons discussed at length above, we have concluded that EO 13433 does not prohibit the NCUA, in its capacity as conservator or liquidating agent of a failed credit union, from entering into contingency fee contracts for legal services.

Sincerely,



Charles J. Cooper

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[11] *But see Landmark Land Co. v. United States*, 256 F.3d 1365, 1381-82 (Fed. Cir. 2001) (where 100% of recovery sought by FDIC-Receiver against the United States would be paid back to government as creditor of the receivership estate, case involves non-justiciable intra-governmental controversy).