

Statement of Robert Fenner, former NCUA General Counsel

In March 2009, in the wake of the financial crisis, the NCUA Board placed U.S. Central and Western Corporate Federal Credit Unions into conservatorship because of the grave risks each institution faced as a result of the declining value of their mortgage-backed security investments. The Conservator stepped into the shoes of these corporate credit unions and had a duty to investigate possible causes of action arising from the mortgage-backed securities. After careful deliberation, NCUA decided that a contingency fee arrangement with the law firms would best enable the Conservator to fulfill this duty in light of the lack of available cash or valuable liquid assets to pay hourly fees, the uncertainty of recovery, the novelty of the potential actions, and the complexity and likely duration of matters involving some of the world's largest banks. Without the contingency fee arrangement, it is hard to see how NCUA could have brought these cases at all.

Until now, NCUA has not released details of its contingency fee arrangement with the law firms. The agency realized from the outset that prematurely disclosing this information would have risked prejudicing the Conservator's—and later, the Liquidating Agent's—negotiating and litigating position in multiple high stakes cases against sophisticated banks with preeminent legal counsel. At the same time, the agency also recognized the benefits of public disclosure and transparency. When the cases were new and many, the balance appropriately favored delaying disclosure of the contingency fee arrangement. NCUA always recognized that it would be appropriate to disclose this information in the future, once the risk posed by disclosure had diminished sufficiently.

I understand that NCUA is now prepared to release details on its contingency fee arrangement. This disclosure signals that the recovery efforts have reached a stage where the interest in public disclosure outweighs the risk posed by disclosure. The decision is consistent with the agency's reason for protecting the information from disclosure until now. This deliberate, considered approach has acknowledged the importance of public disclosure while preserving the Conservator's and Liquidating Agent's interests in recovery following the financial crisis.