(Slip Opinion)

Allocation of Settlement Proceeds to the National Credit Union Administration

Under the Miscellaneous Receipts Act, the Department of Justice must deposit into the general fund of the Treasury the proceeds of a settlement under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Although this settlement in part reflected losses by the National Credit Union Administration's Share Insurance Fund, the "refunds to appropriations" exception to the Miscellaneous Receipts Act does not apply.

June 27, 2024

MEMORANDUM OPINION FOR THE
DEPUTY ASSISTANT ATTORNEY GENERAL
COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION

The Department of Justice ("Department") recently entered into a $1.435 billion settlement with UBS Securities LLC ("UBS") to resolve litigation under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1833a ("FIRREA"). That amount partly reflects losses incurred by the National Credit Union Administration ("NCUA") as liquidating agent for certain failed credit unions. You have asked whether the Department, consistent with the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) ("MRA"), may transfer part of those proceeds to NCUA.

We conclude the answer is no. The MRA requires a federal official or agent "receiving money for the Government from any source" to deposit it in the Treasury "as soon as practicable without deduction for any charge or claim." *Id.* Although the Executive Branch and the Comptroller General have long recognized an implied exception for "refunds to appropriations," these proceeds fall outside that exception.[1]

[1] To support our consideration of this question, we received views from the Department of the Treasury, the Office of Management and Budget, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and NCUA.

I.

A.

NCUA is a federal agency that charters and regulates federal credit unions and insures deposits in federal, state, and territorial credit unions. *See* Federal Credit Union Act, 12 U.S.C. § 1751 *et seq*. One of NCUA's principal functions is to liquidate federal credit unions that become bankrupt or insolvent. *Id.* § 1787(a)(1)(A). As liquidating agent, NCUA "succeed[s] 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); *see also id.* § 1787(b)(2)(B)(i).

When a credit union is liquidated, NCUA is responsible for "pay[ing] all valid obligations" of the failed credit union "in accordance with the prescriptions and limitations of" the Federal Credit Union Act. *Id.* § 1787(b)(2)(F). NCUA also must "pay[] . . . the insured deposits in such credit union" to accountholders "as soon as possible." *Id.* § 1787(d)(1). NCUA insures deposits up to $250,000. *Id.* § 1787(k)(3). When NCUA pays out deposit insurance, it becomes "subrogated to all rights of the accountholder against such credit union to the extent of such payment." *Id.* § 1787(e)(1).

NCUA's deposit insurance payments and other liquidation expenditures are financed by the National Credit Union Share Insurance Fund ("Share Insurance Fund"), a revolving fund that operates "without fiscal year limitation" and is funded through deposits, fees, penalties, and insurance premiums paid by insured credit unions. *Id.* § 1783(a). To partially compensate the Share Insurance Fund for its liquidation outlays, Congress authorized NCUA to "collect all obligations and money due the credit union," "realize upon the assets of the credit union," and "retain for the account of [NCUA] such portion of the amounts realized from any liquidation as [NCUA] may be entitled to receive in connection with the subrogation of the claims of accountholders." *Id.* § 1787(b)(2)(B)(ii), (2)(E), (11)(A)(i).

After the 2008 financial crisis, five NCUA-insured credit unions failed due to exposure to defective residential mortgaged-backed securities. *See NCUA Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 246 & n.9 (2d Cir.

2018). NCUA invoked its statutory authority to place the five credit unions into conservatorship and involuntary liquidation. *Id.* at 246. As liquidating agent, NCUA disbursed billions of dollars in share insurance payments and other liquidation-related expenditures. *See Corporate Asset Management and Estate Recoveries and Claims—December 2023*, NCUA (Dec. 31, 2023), https://ncua.gov/support-services/corporate-system-resolution/corporate-asset-management-estate-recoveries-claims/2023-q4.

Since then, NCUA has invoked the statutory authorities referenced above to recoup a portion of its liquidation expenses. *See, e.g.*, 12 U.S.C. § 1787(b)(2)(A)(i), (2)(B)(i)–(ii), (2)(E), (11)(A)(i). Pursuant to those authorities, NCUA initiated litigation to collect debts and obligations owed to the failed credit unions, including against parties that may have contributed to the credit unions' losses. *See* Letter for Michael Granston, Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division, from David C. Frederick, Counsel to NCUA, *Re:* United States v. UBS Securities LLC*, No. 18-6369 (E.D.N.Y.) Settlement* at 5 (Sept. 1, 2023) ("Frederick Letter"); *Legal Recoveries from the Corporate Crisis*, NCUA (Nov. 19, 2020), https://ncua.gov/support-services/corporate-system-resolution/legal-recoveries-corporate-crisis ("*Legal Recoveries*"); *see also, e.g.*, 1st Am. Compl. ¶ 13, *NCUA Bd. v. Goldman, Sachs & Co.*, No. 13-cv-6721-DLC (S.D.N.Y. Nov. 14, 2014), ECF No. 149 (suit filed by NCUA as liquidating agent for various credit unions pursuant to 12 U.S.C. § 1787(b)(2)(A) ultimately resulting in settlement); 1st Am. Compl. ¶ 14, *NCUA Bd. v. Morgan Stanley & Co.*, No. 13-cv-06705-DLC (S.D.N.Y. Nov. 17, 2014), ECF No. 221 (same). By June 30, 2017, NCUA had recovered more than $5.1 billion in litigation, and it has retained the recoveries it obtained using these statutory tools. *See Legal Recoveries*.

B.

NCUA's present request does not arise from the statutory tools that Congress expressly provided NCUA for recovering liquidation expenses. Instead, NCUA seeks an allocation of funds that the Department has recovered on behalf of the United States under FIRREA. FIRREA provides a cause of action for the Department to recover a "civil penalty" from a person or entity who has violated certain predicate criminal statutes. *See* 12 U.S.C. § 1833a(a), (c). FIRREA's maximum penalty is

$1,000,000 per violation, or $5,000,000 for continuing violations, *id.* § 1833a(b)(1)–(2), adjusted for inflation, *see* 28 U.S.C. § 2461 note; 28 C.F.R. § 85.5(d). But "[i]f any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator," then the maximum penalty becomes "the amount of such gain or loss." 12 U.S.C. § 1833a(b)(3)(A). FIRREA defines "person" to include NCUA's Share Insurance Fund. *Id.* § 1833a(b)(3)(B). So NCUA's losses can drive the amount of FIRREA penalties.

In August 2023, the Department finalized a $1.435 billion settlement with UBS to resolve UBS's alleged liability under FIRREA for issuing defective residential mortgage-backed securities. *See* Press Release, U.S. Attorney's Office, Eastern District of New York, *UBS Agrees to Pay $1.435 Billion to Resolve Claims That It Made Misrepresentations in the Sale of Residential Mortgage-Backed Securities* (Aug. 14, 2023), https://www.justice.gov/usao-edny/pr/ubs-agrees-pay-1435-billion-resolve-claims-it-made-misrepresentations-sale-residential. The Civil Division has informed us that the settlement amount was based primarily upon an assessment of the amount of gain or loss caused by UBS's alleged violations, *see* 12 U.S.C. § 1833a(b)(3)(A), including losses to NCUA's Share Insurance Fund.

After the settlement, NCUA requested that up to $250 million be allocated to the Share Insurance Fund. *See* Letter for Vanita Gupta, Associate Attorney General, from Jeffrey A. Zick, Associate General Counsel, NCUA, *Re:* United States v. UBS Securities LLC*, No. 18-6369 (E.D.N.Y.) Settlement* at 1 (Aug. 18, 2023); *see also* Frederick Letter at 4. NCUA emphasized that the settlement was calculated in part to reflect the deposit insurance payments that the Share Insurance Fund disbursed in connection with NCUA's liquidation of WesCorp, an NCUA-insured credit union that had significant exposure to UBS-issued residential mortgage-backed securities. *See* Frederick Letter at 2, 4. NCUA argued that the portion of the proceeds attributable to NCUA's losses should be returned to the Share Insurance Fund as a "refund" to NCUA's appropriation. *Id.* at 2.

II.

The MRA provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or

claim." 31 U.S.C. § 3302(b). A cornerstone of appropriations law originally enacted in 1849, *see* Act of Mar. 3, 1849, ch. 110, 9 Stat. 398, the MRA helps "preserve[] Congress's constitutional control over the expenditure of public funds," *Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs*, 42 Op. O.L.C. __, at *3 (Mar. 6, 2018) ("*Legal Costs*"); *see* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). It does so by "requiring government officials to deposit government monies in the Treasury," so that agencies cannot "us[e] such monies for unappropriated purposes," *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1361–62 (D.C. Cir. 1996), or "augment [their] appropriations from outside sources without statutory authority," *Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration*, 30 Op. O.L.C. 53, 56 (2006) ("*FCA Suits*").

Although the MRA by its terms broadly covers money received "from any source," the Executive Branch and the Comptroller General have long recognized that it does not apply in two circumstances.[2] First, Congress may supersede the MRA with a statute that "specifically authorize[s] the agency to retain" a particular category of recovered funds. *FCA Suits*, 30 Op. O.L.C. at 57; *see Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries*, 22 Op. O.L.C. 251 (1998) (discussing one such authorization). The Comptroller General has explained that the congressional authorization must be express and particular to the type of receipt in question: if legislation "does not expressly authorize an agency to deposit receipts of a particular type into the . . . fund and there is no other basis for doing so, those receipts—even if related in some way to the programs the . . . fund supports—must be deposited in the Treasury as

[2] As our Office has repeatedly affirmed, opinions of the Comptroller General do not bind the Executive Branch but may provide helpful guidance on appropriations matters and related questions. *E.g.*, *Legal Costs* at *3 n.2; *see also Bowsher v. Synar*, 478 U.S. 714 (1986). Our prior opinions have specifically endorsed certain Comptroller General opinions concerning circumstances in which the MRA does not apply. *E.g.*, *FCA Suits*, 30 Op. O.L.C. at 59–60 (citing *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, 69 Comp. Gen. 260, 260 (1990), and *Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 WL 230221 (Comp. Gen. Feb. 14, 2000)); *Apportionment of False Claims Act Recoveries to Agencies*, 28 Op. O.L.C. 25, 27–28 (2004).

miscellaneous receipts." *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, 69 Comp. Gen. 260, 262 (1990) ("*FEMA*").

Second, the Executive Branch and the Comptroller General have long recognized an implied exception for "refunds to appropriations." *Apportionment of False Claims Act Recoveries to Agencies*, 28 Op. O.L.C. 25, 27 (2004) ("*FCA Recoveries*"); *FEMA*, 69 Comp. Gen. at 262. That exception allows an agency to retain certain recoveries that are "directly related to, and . . . a direct reduction of, a previously recorded expenditure." *FCA Recoveries*, 28 Op. O.L.C. at 27 (quotation marks omitted); *accord FEMA*, 69 Comp. Gen. at 262. As early as 1926, the Comptroller General described this exception as reflecting the "accepted and uniform rule of the accounting officers in the past" that, "if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due," then an agency may treat the money as a "credit to the appropriation originally charged." *Postal Service—Recovery of Indemnities Paid for Lost Mail*, 5 Comp. Gen. 734, 736 (1926) ("*Postal Service*"). And in 1950, the Treasury Department and the General Accounting Office ("GAO"),[3] the latter of which the Comptroller General heads, jointly defined the refund exception as applying to "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances." Treasury Department–GAO Joint Regulation No. 1, § 2(b) (Sept. 22, 1950), *reprinted in* 30 Comp. Gen. 595, 595 (1950). As our Office has recognized, this historical exception "is grounded in" the purposes the MRA is designed to protect: "An agency that recovers an amount it erroneously paid from an appropriation or fund account essentially returns to the position it had occupied based upon the authorization of Congress." *FCA Suits*, 30 Op. O.L.C. at 57–58.

As relevant here, both our Office and the Comptroller General have addressed the refund exception's application to funds recovered in litigation, concluding that "most litigation awards must . . . be deposited into

[3] In 2004, Congress changed GAO's name from the General Accounting Office to the Government Accountability Office. *See* GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814. We use the abbreviation "GAO" to refer to both entities.

the Treasury." *Legal Costs* at *6. Specifically, "the Comptroller General has long held that funds recovered by the Department of Justice are not refunds unless 'they represent recoveries of moneys theretofore illegally or erroneously paid from appropriated funds.'" *Id.* at *5 (quoting *Accounting—Repayments to Appropriations*, 6 Comp. Gen. 337, 339–40 (1926)). Consistent with this view, our Office has explained that the mere fact that compensatory damage awards "make an agency whole following a loss attributable to an agency expenditure" does not, without more, satisfy the refund exception. *Id.* at *7–8. Hence, in 2018 we concluded that an arbitral award of legal costs did not qualify for the exception even though wrongful conduct might have been a but-for cause of the legal costs and, absent that conduct, the agency would not have incurred the costs. *Id.* at *7. We explained that the agency expenditures were a "necessary incident of its operations" and that they did "not become erroneous or improper simply because the agency later prevail[ed] in . . . litigation." *Id.*

At the same time, both our Office and the Comptroller General have long held that portions of a monetary recovery under the False Claims Act, 31 U.S.C. §§ 3729–3733 ("FCA"), may qualify for the refund exception. Under the FCA, a person who submits a false claim "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000," adjusted for inflation, "plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* § 3729(a)(1). In several opinions, our Office and the Comptroller General have determined that the "overpayments" prong of the refund exception allows an agency to retain single damages from an FCA recovery. *FCA Recoveries*, 28 Op. O.L.C. at 29; *accord FCA Suits*, 30 Op. O.L.C. at 59; *FEMA*, 69 Comp. Gen. at 262; *Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 WL 230221, at *1 (Comp. Gen. Feb. 14, 2000) ("*TVA*"). This is because such damages can represent a return of payments "in excess of what was actually due." *Legal Costs* at *5 (quoting 2 GAO, *Principles of Federal Appropriations Law* 6-172 (3d ed. 2006) ("*Federal Appropriations Law*" or "GAO Red Book")); *see TVA*, 2000 WL 230221, at *2 ("TVA may credit the TVA Fund with that portion of a False Claims Act award or settlement that represents a reimbursement of moneys erroneously disbursed from the Fund."). An agency may not, however, "receive any portion of the FCA recovery that represent[s] an amount beyond actual losses to the agency, such as multiple

damages or penalties," which must instead be "remitted to the Treasury for deposit into the general fund." *FCA Recoveries*, 28 Op. O.L.C. at 29.

III.

We now address whether the Department may allocate to NCUA a portion of the UBS settlement that corresponds to the liquidation payments NCUA disbursed from the Share Insurance Fund as a result of UBS's alleged FIRREA violations. There is no dispute that the settlement constitutes money "receiv[ed] . . . for the Government from any source," 31 U.S.C. § 3302(b), such that the MRA would typically require its deposit into the general fund of the Treasury. But NCUA advances a number of arguments for why it may nonetheless receive a portion of the settlement. For the reasons that follow, however, we find NCUA's arguments unpersuasive and conclude that the MRA bars the Department from transferring the settlement proceeds to NCUA.

A.

As explained above, the Executive Branch and the Comptroller General have long recognized an implied exception to the MRA for "refunds to appropriations," which covers amounts collected to offset "payments made in error," "overpayments," and "adjustments for previous amounts disbursed" including "returns of authorized advances." *See supra* Part II. NCUA argues that the portion of the UBS FIRREA settlement that reflects the loss to the Share Insurance Fund falls within this exception as either an "overpayment" or a "return[] of [an] authorized advance[]." Frederick Letter at 1–2. Specifically, NCUA claims that UBS's fraudulent conduct caused it to "overpa[y]," such that the loss to the Share Insurance Fund should be treated similarly to single damages in FCA recoveries. *Id.* at 2. Alternatively, NCUA contends that the payments it disbursed could be considered an "advance" of funds—to be repaid over time as WesCorp's liquidation estate recovered money owed by third parties—and that the settlement proceeds therefore qualify as a return of this authorized advance. *Id.*

But NCUA's arguments both fail for the same reason: the payments at issue were not made "in excess of what was actually due," *Legal Costs* at *5; *see* 2 *Federal Appropriations Law* at 6-172; *Postal Service*, 5 Comp.

Gen. at 736, and the recovery thus does not "restore[] to the [agency's] appropriation amounts that *should not have been paid* from the appropriation," *Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor*, B-302366, 2004 WL 1812721, at *3 (Comp. Gen. July 12, 2004) (emphasis added); *see Legal Costs* at *5; *FCA Suits*, 30 Op. O.L.C. at 58. As we have explained, the MCA's refund exception serves to return an agency to "the position it had occupied based upon the authorization of Congress." *FCA Suits*, 30 Op. O.L.C. at 57–58. But when Congress has actually required the agency to make a particular payment, the agency is already in the position that Congress directed once the payment is disbursed, and the payment does not fall within the refund exception even if it is subsequently recovered in litigation.

Here, Congress required NCUA to make the relevant payments. In particular, NCUA seeks a refund for two categories of payments. *See* Frederick Letter at 5 n.1 (citing tables B4 and B6 of *Corporate Asset Management Estates Recoveries and Claims—June 2023*, NCUA (June 30, 2023), https://ncua.gov/support-services/corporate-system-resolution/corporate-asset-management-estate-recoveries-claims/2023-q2 ("*NCUA Recoveries and Claims*")). The first consists of "obligations" of the WesCorp liquidation estate that are "backed by the NCUA guarantee" and that NCUA has "repaid." *NCUA Recoveries and Claims* tbl. B4 & n.o. The second consists of payments of the "[s]hares/certificates" of WesCorp accountholders "insured up to the insurance limit." *Id.* at tbl. B6 & n.p. Neither of these payments, however, represent "amounts that should not have been paid from the appropriation," nor are they amounts NCUA paid "in excess of what was actually due." Rather, they are payments that NCUA was legally required to make and thus were "a necessary incident" of NCUA's operations and statutory functions. *Legal Costs* at *7.

Specifically, when a federally insured credit union fails, NCUA is legally obligated to appoint itself liquidating agent and thereafter pay the credit union's valid obligations and disburse insurance payments to accountholders. 12 U.S.C. § 1787(a)(1)(A), (b)(2)(F), (d)(1). The amount due, moreover, is prescribed by statute: NCUA is required to pay only the "valid" obligations of the credit union in accordance with the "prescriptions and limitations" of the surrounding provisions of the Federal Credit Union Act, as well as the total value of each accountholder's insured

deposits at the credit union, up to $250,000. *Id.* § 1787(b)(2)(F), (k)(1), (k)(3). And because NCUA has not claimed that it erroneously paid more than the total value of insured deposits under section 1787(k) or more than the value of the obligations that Congress required it to pay, it cannot invoke the MRA's refund exception.

For these same reasons, moreover, the UBS FIRREA settlement differs critically from single damages in an FCA recovery. To be sure, just as an FCA defendant's "false or fraudulent claims" are a but-for cause of the government's losses in an FCA case, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 182 (2016); *see* 31 U.S.C. § 3729(a)(1)(A), NCUA may not have had to liquidate WesCorp but for WesCorp's purchase of residential mortgage-backed securities linked to UBS's actions. But even if UBS caused WesCorp's failure, that fact alone does not bring the settlement within the refund exception. Compensatory damages often reflect amounts that, but for misconduct, agencies would not have incurred; nevertheless, "most litigation awards must . . . be deposited into the Treasury." *Legal Costs* at *6. Single damages from FCA recoveries instead can fall outside the MRA because when fraud induces a payment, the government makes a payment "in excess of what was actually due" and that "should not have been paid from the appropriation": had the government known about the undisclosed fraud, it need not and would not have paid. *Cf., e.g.*, *Escobar*, 579 U.S. at 181 (noting that a "misrepresentation" is "actionable under the False Claims Act" if it was "material to the Government's payment decision"). Here, by contrast, even if UBS's alleged fraud caused WesCorp's failure, and whether or not NCUA knew as much when it liquidated WesCorp, NCUA would still have been obligated to liquidate WesCorp and disburse insurance payments to depositors. Hence, the payments at issue here are unlike the FCA payments that are considered "overpayments" under the MRA's refund exception.

NCUA's legal obligation to make these payments also explains why the UBS FIRREA settlement is not the "return[] of [an] authorized advance[]." The Comptroller General's writings explain that this prong of the refund exception applies when an agency makes an upfront payment before it is certain of the amount due. *See* 2 *Federal Appropriations Law* at 6-172, 6-198–199. In these situations, if the amount the agency disbursed turns out to be "larger than [the agency] was required to make" or

"in excess of what was actually due," the excess amount may be recovered as a refund. *Id.* at 6-172 (quotation marks omitted). By contrast, if "the agency is *required* to make a given expenditure in any event," any subsequent recovery must be deposited in the general fund, even if Congress provided that the payment would be "subject to later reimbursement." *Id.* (emphasis added); *see* 61 Comp. Gen. 537, 539 (1982) (drawing this distinction and citing 52 Comp. Gen. 125 (1972)). Here, NCUA's payments bear little resemblance to the quintessential application of the "authorized advance" prong—a return of the unused portion of a travel advance—where the government makes an upfront payment that may exceed the amount it owes. *See* 2 *Federal Appropriations Law* at 6-171. Instead, the payments NCUA has identified flowed from its statutory obligations as the credit union's insurer and liquidating agent and were not this type of advance.

B.

NCUA also points to two pieces of evidence that, in its view, suggest that allocating to it a portion of the UBS FIRREA settlement would accord with Congress's intent. But in our view this evidence simply reinforces our conclusion that Congress did not authorize the deposit of the settlement proceeds at issue here outside of the general fund.

First, NCUA observes that "Congress authorized the Share Insurance Fund . . . to receive payment in satisfaction of th[e] $2.3 billion obligation" it incurred with WesCorp's liquidation. Frederick Letter at 2. For example, Congress has authorized NCUA, as liquidating agent, to "collect all obligations and money due the credit union[s]" in question, 12 U.S.C. § 1787(b)(2)(B)(ii), and to retain "for the account of [NCUA] such portion of the amounts realized from any liquidation as [NCUA] may be entitled to receive in connection with the subrogation of the claims of accountholders," *id.* § 1787(b)(11)(A)(i); *see also id.* § 1783(b) (authorizing the Share Insurance Fund to retain any "penalties collected by [NCUA] under any provision of [the credit union insurance subchapter]"). But even if Congress permits NCUA to retain money it collects through those avenues, that fact does not support NCUA's argument that it may retain—notwithstanding the MRA—a portion of the recovery that the Department obtained via a different avenue. As the Comptroller General has emphasized, a statute authorizing "an agency to deposit receipts of a

particular type" outside of the general fund covers only receipts of that type—not receipts of a different type, "even if related in some way to the programs [a] . . . fund supports." *FEMA*, 69 Comp. Gen. at 262. If anything, we are especially hesitant to expand the implied MRA exception beyond its historical scope when Congress has explicitly granted NCUA separate means to recover and retain money it expends as a liquidating agent.

Second, NCUA points out that Congress "specifically" identified any "'pecuniary loss'" suffered by the Share Insurance Fund as a basis for calculating FIRREA's maximum penalty amount. Frederick Letter at 3 (quoting 12 U.S.C. § 1833a(b)(3)).[4] But at most, this reference to the Share Insurance Fund might support analogizing these FIRREA recoveries to compensatory damages for the Share Insurance Fund's losses. And as we have explained, recoveries of compensatory damages are generally subject to the MRA and must be deposited into the general fund. In fact, referencing the Share Insurance Fund's losses in FIRREA's "civil penalty" provision, 12 U.S.C. § 1833a(a), (c), would be a highly unusual way to implicitly render the MRA inapplicable—because "*[g]enerally speaking*, moneys collected as a fine *or penalty* must be deposited in the Treasury as miscellaneous receipts," 2 *Federal Appropriations Law* at 6-211 (emphasis added).

Moreover, other provisions of FIRREA strongly suggest Congress did not remove the civil penalty proceeds at issue here from the MRA's reach. Specifically, in a nearby provision of the enacted law, Congress expressly authorized the Attorney General to transfer property obtained through civil forfeiture to any federal financial institution regulatory agency—such as NCUA—"to reimburse the insurance fund of the agency for losses suffered by the fund as a result of . . . receivership or liquidation." FIRREA, Pub. L. No. 101-73, § 963(b), 103 Stat. 183, 504 (1989) (codified at 18 U.S.C. § 981(e)(3)(B)). Thus, had Congress intended to authorize the Attorney General to also transfer FIRREA penalties to NCUA, it had the tools near at hand. Yet instead, Congress left intact the MRA's baseline rule.

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[4] For purposes of this opinion, we assume without deciding that the payments NCUA has disbursed from the Share Insurance Fund in the course of its liquidation of WesCorp qualify as "pecuniary loss[es]" to the Share Insurance Fund that "result[ed]" from UBS's conduct within the meaning of FIRREA. 12 U.S.C. § 1833a(b)(3)(A).

C.

Our Office's writings squarely foreclose NCUA's two remaining arguments.

First, NCUA notes that, "as a textual matter," the MRA specifies that monetary receipts "must go to the Treasury but does not specify the account." Frederick Letter at 1–2. Because the Share Insurance Fund is "an account at the Treasury," NCUA argues that allocating a portion of the UBS settlement to the Share Insurance Fund is consistent with the MRA. *Id.* at 2. But as NCUA recognizes, *id.*, both the Comptroller General and our Office have rejected this reading of the MRA, *see FCA Suits*, 30 Op. O.L.C. at 56. As we explained in *FCA Suits*, since at least 1909 "the longstanding view of the Executive Branch, shared by the Comptroller General, has been that [the MRA] requires" deposit into the general fund. *Id.* (footnote omitted). In light of that longstanding interpretation, we decline to revisit our position on the requirements of the MRA here.

Second, NCUA relies on the Share Insurance Fund's status as a "revolving fund." Frederick Letter at 2–3. A revolving fund is "a funding mechanism by which Congress, rather than setting a particular funding level, 'authorizes an agency to retain receipts and deposit them into the fund to finance the fund's operations.'" *Legal Costs* at *8 (quoting 3 *Federal Appropriations Law* at 12-85 (3d ed. 2008)). Here, NCUA asserts that "because the Share Insurance Fund is a revolving fund," the MRA either does not apply or should be interpreted more flexibly, on the theory that anti-augmentation concerns "are not (or are at least less) applicable" to revolving funds. Frederick Letter at 2–3.

Our *FCA Recoveries* opinion forecloses NCUA from relying on this argument here (whatever relevance the Share Insurance Fund's status as a revolving fund might have elsewhere). In *FCA Recoveries*, an agency argued that Congress had exempted it from the MRA and that it could therefore obtain a share of litigation recoveries the Department made on behalf of the United States. *See* 28 Op. O.L.C. at 26 n.4. But we explained that this argument was not "available" to the agency when the litigation recovery was payable to the United States government as a whole, not to the agency making the request. *Id.* Instead, the dispositive question was "whether and to what extent the 'refund to appropriations' exception . . . authorize[s] the Civil Division, on behalf of the United States, to distrib-

ute . . . recoveries to agency accounts . . . instead of the general fund." *Id.* Likewise here, the MRA binds the Department, and it is of no moment whether Congress authorized NCUA to retain funds recovered on its own behalf.

Moreover, opinions of both our Office and the Comptroller General make clear that revolving funds are not categorically exempt from the MRA. *See id.*; *FEMA*, 69 Comp. Gen. 260; *TVA*, 2000 WL 230221. To be sure, revolving fund status can impact the MRA's applicability insofar as Congress might authorize a revolving fund to retain certain receipts. 2 *Federal Appropriations Law* at 6-206. But as the GAO Red Book explains:

> [T]he existence of a revolving fund does not automatically signal that [the MRA] will never apply. . . . [W]here the statute establishing the fund does not authorize the crediting of receipts of a given type into the fund, those receipts must be deposited into the Treasury as miscellaneous receipts. To credit those receipts to the revolving fund would augment the revolving fund.

Id. Here, as we have explained, NCUA's statutes authorize it to retain other receipts, *see, e.g.*, 12 U.S.C. § 1787(b)(11)(A)(i), but not FIRREA recoveries.

In one specific respect, prior OLC and Comptroller General opinions have treated revolving funds differently than other appropriations for purposes of the refund exception. As to revolving funds, we have applied the refund exception to deem the MRA to permit not only refunds of erroneous payments, but also "interest income lost and administrative expenses incurred as a result of a false claim," on the theory that refunding such losses would place the agency in the position it would have been in but for the erroneous payment. *FCA Recoveries*, 28 Op. O.L.C. at 28; *see Legal Costs* at *8; *FEMA*, 69 Comp. Gen. at 263; *TVA*, 2000 WL 230221, at *2. But that principle does not help NCUA here, where the dispositive question is whether any erroneous payment occurred in the first instance.

IV.

For these reasons, we conclude that the MRA bars the Department from transferring any monetary proceeds from the UBS FIRREA settlement to

reimburse NCUA for insurance payments and liquidation expenses it has disbursed from the Share Insurance Fund.

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