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Submitted via www.bpa.gov/comment

Re: Bonneville Power Administration's Compliance with the Remand in *Industrial Customers of Northwest Utilities, et al. v. Bonneville Power Administration*, 767 F.3d 912 (2014).

Introduction

Thank you for another opportunity to comment on the Bonneville Power Administration's ("BPA") compliance with the remand from the Ninth Circuit Court of Appeals in *Industrial Customers of Northwest Utilities, et al. v. Bonneville Power Administration ("ICNU")*, 767 F.3d 912 (9th Cir. 2014). Both the Public Power Council ("PPC") and the Pacific Northwest Generating Cooperative ("PNGC") submitted initial comments, encouraging BPA to approach this remand with a different focus. Specifically, we urged that instead of continuing to find ways to forgo recovery of the unlawful payments it made to Alcoa under the Alcoa Amendment, BPA should embrace the notion that it is permitted to recover the payments, and focus on selecting the best mechanism for recovery.

Unfortunately, the Draft Record of Decision ("ROD") issued by BPA appears to continue the previous policy. Although the Draft ROD states that BPA "has not yet reached a final determination"[1] and encourages commenters "to provide any additional input, legal or otherwise, that might assist the Administrator in making his final decision,"[2] it also notes that "Bonneville's draft determination is that it will not be seeking [recovery] relief."[3] The Draft ROD offers no response to the key part of the Court's remand – "to explain why, with respect to each [potential plan for recovery of overpayments to Alcoa], the costs and downside risks justify abandonment

[1] Draft ROD, at 24.
[2] *Id*.
[3] *Id*. at 18.

of the opportunity to recover any overpayment." *ICNU*, 767 F.3d at 929. BPA has said that this issue "involves business considerations, in addition to the legal issues, that should inform Bonneville's analysis and ultimate conclusions."[4] Yet, the Draft ROD offers no analysis of any such business considerations, and presents only limited legal analysis.

BPA's apparent preliminary decisions are neither clear nor complete, and are not supported by sufficient analysis. This makes it difficult to us to offer complete feedback on the Draft ROD and impossible to evaluate it in the context of an overall business strategy. As a general matter, however, PPC and PNGC are concerned with BPA's approach to this remand and urge BPA to engage in a more thorough evaluation of both legal and business considerations, as discussed more fully below.

I. Pertinent Legal Considerations

In response to the Court's directive "to analyze alternative plans for recovery of any overpayment to Alcoa," *ICNU*, 767 F.3d at 929, BPA considered (1) breach of contract (2) contract illegality, (3) mistake of law, (4) unjust enrichment, and (5) administrative offset as potential theories for recovery, but decided that none of these theories are likely to be successful against Alcoa. Ultimately, BPA concluded that there has been no breach of contract, that contract illegality or mistake of law do not provide bases for relief, and that, because Alcoa did not engage in fraud, duress, or undue advantage, a claim for unjust enrichment would fail.

Notably, this analysis is strikingly similar to the analysis BPA presented in the DSI Lookback ROD,[5] which the Court found to be neither objective nor persuasive, and not capable of supporting BPA's decision to forego recovery of the illegal subsidies it paid to Alcoa. *See id*. at 927-30. Rather than taking a fresh new look at the potential legal theories for recovery in the Draft ROD, BPA resigns to the fact that "no new theories of relief were offered."[6] BPA does so despite the existence of a federal common law right and a statutory right of the government to recover the funds it erroneously or illegally paid. *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 275 (7th Cir. 1991) ("the agency has statutory and common law authority" to recover any overpayments). The Court in *ICNU* referred to both of these theories of recovery, yet they are barely addressed in the Draft ROD. *ICNU*, 767 F.3d at 923-24 n 6.

Before delving into BPA's potential legal claims, it is important to recognize the principles that have been firmly established. It is now beyond dispute that the subsidies BPA paid to Alcoa under the Alcoa Amendment were unlawful because BPA had no authority to pay them. *Id.* at 915 ("We held these subsidy arrangements unreasonable and contrary to BPA's statutory authority, as they did not comport with Congress's mandate that BPA operate in a businesslike manner."). In addition, having been directed by the Court to analyze Alcoa's potential counterclaim for net underpayment, BPA concluded in the Draft ROD that the counterclaim "has

[4] BPA's May 6, 2015 letter to the region initiating the administrative process for responding to the Court's remand in *ICNU*, at 4.
[5] *See* Issues Remanded to Bonneville Power Administration in *PNGC I* and *PNGC II*, Administrator's Record of Decision, at 4-5 (February 18, 2011).
[6] Draft ROD, at 4.

no merit."[7] Having established that BPA unlawfully paid money to Alcoa, and that Alcoa has no meritorious counterclaims that could influence BPA's analysis of *whether* to pursue recovery, BPA must now identify and evaluate the potential mechanisms for recovery of this debt.

1. BPA has a federal common law right to recover its unlawful payments

BPA ignores a substantial body of case law recognizing the federal government's common law right to recover the funds its agents erroneously or unlawfully paid. In *ICNU*, the Court reiterated what has been long settled: "the Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid, so long as there is no clear statutory barrier to doing so." *ICNU*, 767 F.3d at 923-24 (quoting *United States v. Wurts*, 303 U.S. 414, 415-416 (1938); internal quotations omitted). Relying on the *Wurts* progeny of cases, federal courts across the country have acknowledged that "[i]t is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable … to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary." *DiSilvestro v. United States*, 405 F.2d 150, 155 (2nd Cir. 1968) (citations omitted).

In the context of the government's suit to recover overpayments for money received under a mistake of fact, one court explained that "[i]n the absence of applicable federal statutes, the federal courts fashion the remedies for the rights from the body of 'federal common law.'" *United States v. Independent School Dist. No. 1 of Okmulgee County*, 209 F.2d 578, 580 (10th Cir. 1954). And when the government mistakenly disburses funds, regardless of "[w]hether … the asserted remedy [is] for money had and received or restitution for unjust enrichment, the right to recover under controlling federal law is plain." *Id.* at 580-81; *see also Old Republic Ins. Co.*, 947 F.2d at 275 (even if the statute did not provide express authority for the government to recover its overpayments, "the recovery is authorized by the government's common law right to recover improperly paid funds."). The case law is clear that when the government erroneously disburses money, "there is ample power in the United States District Court to protect the sovereign against … unjust enrichment on familiar principles of money had and received." *City of New Orleans v. United States*, 371 F.2d 21, 28 (5th Cir. 1967) (citations omitted). "This harmonizes with the usual principle that Federal law fashions remedies for recovery of funds or property of the United States." *Id.*

BPA states in the Draft ROD that because Alcoa did not engage in improper conduct to obtain the benefits of the Alcoa Amendment, BPA's claim for unjust enrichment would fail.[8] Federal courts, however, have consistently rejected the contention that government's "money may not be recovered in private litigation when paid under a simple mistake of fact unless fraud or something akin thereto is also present." *Stone v. United States*, 286 F.2d 56, 59 (8th Cir. 1961). This is because of the unique relationship between the government and the recipient of the government's money, which informs the bigger question of whether the latter can be allowed to

[7] *Id.* at 23. As an aside, one has to question Alcoa's credibility in threatening to assert this claim because as BPA notes in the Draft ROD, "Alcoa's argument directly contradicts the express contract language, the intent of the parties, positions taken by Alcoa in litigation before the Ninth Circuit, and the *ICNU* opinion upholding the damage waiver as applying mutually to both Alcoa and Bonneville." *Id.* at 20.
[8] *Id*. at 16.

retain the fruits of action not authorized by law, resulting from the government agent's mistaken interpretation of the law. The Supreme Court has explained in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947):

> It is too late in the date to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. Whatever the form in which the Government functions, *anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority*. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. *And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority*. (Emphasis added; citations omitted).

The bottom line is that "[w]here monies are erroneously paid by agents of the United States, whether the error be one of fact or of law, the Government may always recover the money improperly paid." *Stone*, 286 F.2d at 58-59.

And, in fact, the federal government routinely files actions in the federal district courts to recover money erroneously or unlawfully paid. In finding for the Government on its common law claim of payment by mistake in a suit to recover overpayments to a contractor, one court explained that "[t]he only causation required in claims of payment by mistake is causation in fact." *United States v. United Technologies Corp.*, No. 99-093, 2012 U.S. Dist. WL 2263280, at *7 (D. Ohio June 18, 2012). There, the government asserted that it had paid the contractor in reliance upon a mistake of fact – that the invoices were current, complete and accurate – and had it known the facts, it would not have agreed to pay the amounts it did, and it was entitled to recover its overpayments. *Id*. Based on these assertions, the court found the contractor liable under the government's common law claim of payment by mistake. *Id.* at 8; *see also United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F.Supp. 1338, 1344 (E.D.Mo. 1996) (citation omitted).

But BPA need not rely solely on our legal research to convince itself of the existence of the federal common law right to collect its unlawful payments to Alcoa. The Bureau of the Fiscal Service ("BFS") is a federal agency under the Department of Treasury, charged with managing the government's accounting, central payment system and public debt. As the government's central debt collection agency, it has a unique understanding of the laws that govern administrative collection of federal nontax debts, including statutes, regulations, federal common law, interpretive guidance, and the positions BFS has taken on debt collection legal matters. In its capacity as an expert on collection of federal nontax debts, the BFS publishes a *Treatise on Federal Nontax Debt Collection Law* ("Treatise"). The Treatise, which we have attached for

BPA's reference,[9] is designed to provide federal agency counsel and program staff with an in-depth explanation and interpretation of the applicable nontax debt collection laws.

Although the Court in *ICNU* declined to hold that BPA has a duty under the Appropriations Clause of the Constitution to pursue recovery of its unlawful payments to Alcoa, the Treatise clearly recognizes that the appropriations principles underlie the federal debt collection process and give rise to the agencies' affirmative duty to attempt to collect their debts. It offers a detailed discussion of the case law establishing the federal agencies' common law right to collect its debts, noting that this common law right is "well-recognized in the improper payment context."[10] We encourage BPA to review the Treatise and, consistent with the Court's directives in *ICNU*, explain why, given the authorities cited in these comments and in the BFS's Treatise, BPA appears to believe it has no viable common law claim for recovery of the unlawful payments from Alcoa.

2. BPA has a statutory right to recover its unlawful payments

In addition to federal common law right to collect its erroneous payments, federal agencies have a statutory right to do so. "Under the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982, 31 U.S.C. §§ 3711(a)(1)(1988) ('DCA'), executive and legislative agencies are given the authority to collect monetary claims of the United States arising out of activities of the agency." *Old Republic Ins. Co.*, 947 F.2d at 275; *see Baker v. United States*, No. 15-343C, 2015 Fed. Cl. WL 5157486, at *2 (Ct. Cl. Sep. 2, 2015).

The DCA does not abrogate the federal agencies' common law authority, but provides an additional mechanism for agency heads to "try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1). In fact, "[o]ver the years, Congress through a series of governmentwide statutes, has acted to affirm, regulate, and augment the government's inherent and common law duty and powers with respect to debt collection." U.S. GOV'T ACCOUNTABILITY OFFICE, 14-GAO-RB pt. D, s. 2, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW – THIRD EDITION, 2008 WL 6969346, at *2 (2008).

The DCA defines the interchangeable terms "claim" and "debt" broadly, as any amount of funds that has been determined to be owed to the United States by a person, organization, or entity other than another Federal agency. 31 U.S.C. § 3701(b)(1). Besides granting recovery authority, the DCA actually imposes a duty on federal agencies to pursue the collection of debts, including interest. *See* 31 U.S.C. § 3711(a)(1) ("The head of an executive … agency *shall* try to collect a claim of the United States Government…" (emphasis added)); § 3717(a)(1) (provides for collection of interest and penalties on the outstanding debt). And federal regulations make clear that Congress intended for federal agencies to be aggressive in collecting the debts arising from their activities, instead of quickly forgiving indebtedness or waiving recovery. 31 C.F.R. § 901.1(a); *see also Lawrence v. Commodity Futures Trading Com'n*, 759 F.2d 767, 772 (9th Cir. 1985). And, a basic Pacer search reveals that, in fact, federal agencies across the country

[9] The Treatise is also available on the BFS's website, at https://www.fiscal.treasury.gov/fsservices/gov/debtColl/dms/debt_home.htm.
[10] Treatise, at Part I:4.

frequently use the DCA to pursue in federal district courts recovery of funds paid erroneously or unlawfully, or otherwise owed to the agencies.

But, as with the government's common law claim for recovery of overpayments, the Draft ROD did not adequately analyze the government's statutory authority to collect.[11] In fact, BPA did not even bother to explain whether it plans to certify the existence of the debt arising out of its unlawful payments to Alcoa and transfer it to the U.S. Department of the Treasury for collection, if Alcoa becomes delinquent in returning the money. *See* 31 U.S.C. § 3711(g)(1).

Once again, BPA need not rely on our legal research to convince itself of the existence of the government's statutory authority to recover funds that its agents wrongfully, erroneously, or illegally paid. The BFS's *Treatise on Federal Nontax Debt Collection Law* provides a comprehensive overview of the agencies' rights and responsibilities under the DCA and other debt collection statutes.[12] We encourage BPA to review the authorities cited in the Treatise and in these comments, and explain why BPA can legitimately forego making a statutory claim for recovery of the unlawful payments from Alcoa.

II. Pertinent Business Considerations

As noted above, BPA has said that its ultimate decision on whether to pursue recovery of its unlawful payments to Alcoa "involves business considerations, in addition to the legal issues, that should inform Bonneville's analysis and ultimate conclusions."[13] While the Draft ROD offers no analysis of any such business considerations, we can offer several.

Instead of making the decision on remand in isolation, the Administrator should consider whether to pursue recovery of BPA's unlawful payments to Alcoa in the context of the agency's broader mission to provide low-cost power and the agency's recent commitments to control its costs, preserve the value of the federal system, and be competitive in 2028 when the current Regional Dialogue power contracts terminate. PPC and PNGC have consistently urged the Administrator to take all reasonable actions to reduce its costs because BPA's power customers cannot absorb the steep trajectory of BPA's rates. A few months ago, the Administrator raised the power rates by another 7.1% on average, which came on the heels of substantial rate increases in each of the last two rate periods. In fact, over the last three rate periods, BPA's rate increases have compounded to an increase of approximately 25%.

BPA's repeated rate increases are particularly concerning in light of the current market conditions. While BPA's Tier 1 power rates have historically fared better than market rates, this pattern has flipped over the past few years. BPA's Tier 1 power rates, as well as the other priority firm rates, exceed the forecasted market prices, and indeed, have been above market for

[11] In the Draft ROD, BPA summarized Alcoa's general claims that the DCA and the Federal Claims Collections Act are not applicable. BPA did not specifically address these claims, but concluded that for practical reasons, an administrative offset or a rate surcharge would not provide a viable basis for recovery. Draft ROD, at 17-19.
[12] Treatise, Part I:4, Part 1:9-12.
[13] BPA's May 6, 2015 letter to the region initiating the administrative process for responding to the remand, at 4.

some time. If BPA continues the current pattern of incurring costs and increasing rates, it might see its regional support base and power sales deteriorate. While most preference customers have committed to purchasing BPA power through the term of the Regional Dialogue contracts, they are aware that they have been paying more for BPA power, and might be forced to search for new sources of power if BPA's prices continue to exceed the wholesale market. Indeed, Alcoa has recently chosen to abandon most of BPA's power supply because it could purchase cheaper power elsewhere.

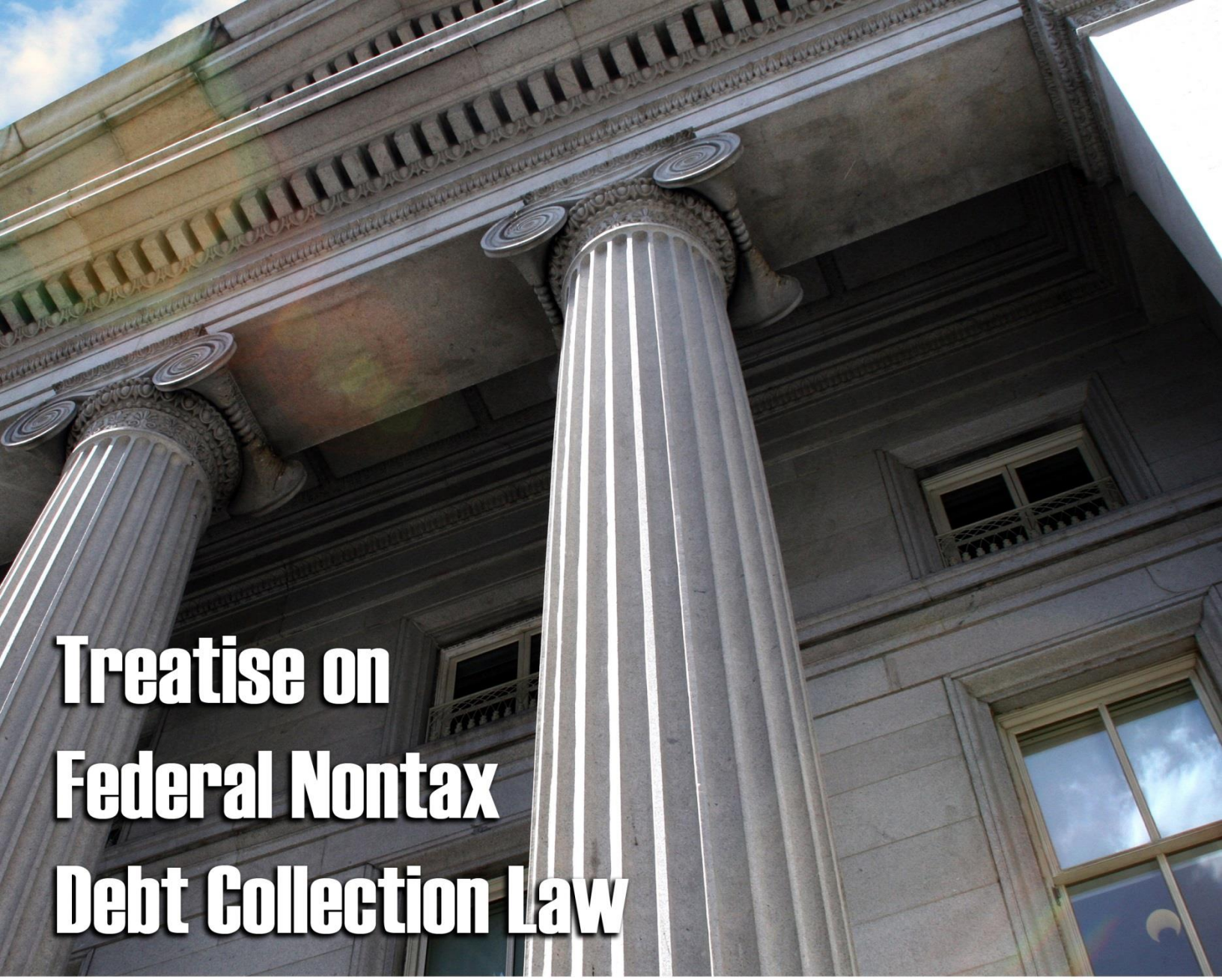
In the Final Record of Decision in the BP-16 Rate Proceeding, the Administrator recognized that BPA's latest rate increase "creates additional hardship in communities that have yet to recover from difficult times, in particular those in the more rural parts of the region."[14] The Administrator also recognized that "[a]s steward of the low-cost, low-carbon regional power and transmission system …BPA must maintain the system's value for generations to come."[15] Therefore, the Administrator committed to "remain steadfastly focused on being the low-cost energy provider of choice when new power sales contracts are offered in the next decade."[16] Toward that end, a helpful move would be for BPA to recover $25 million that it unlawfully paid to a company with $24 billion in annual revenues.

BPA's approach to its ultimate decision in this matter should be focused on the business interests of BPA and its preference customers, who have borne the costs of BPA's unlawful payments to Alcoa. It is time for BPA to abandon its unsupported practice of seeking avenues to provide benefits to Alcoa or to forego recovery of subsidies that the Court has declared to be unlawful. Given the agency's recent commitment to being a competitive regional provider of low-cost power, pursuing recovery of the unlawful payments to Alcoa would be a step in the right direction.

We thank you for this opportunity to comment on BPA's Draft ROD.

[14] Administrator's Final Record of Decision, BP-16 Rate Proceeding, at P-1 (July 2015).
[15] *Id.* at P-2.
[16] *Id*.

ATTACHMENT



Treatise on Federal Nontax Debt Collection Law

Legal Background on the Collection of Nontax Debts Owed to the United States

Bureau of the Fiscal Service

United States Department of the Treasury
Bureau of the Fiscal Service
Treatise on Federal Nontax Debt Collection Law

DRAFT EDITION

Introduction

This *Treatise on Federal Nontax Debt Collection Law (Treatise)* provides legal background on the collection of nontax debts owed to the United States (referred to as "federal nontax debts"). Federal nontax debts may arise from a number of sources, including direct or guaranteed loans; overpayments to federal employees, contractors, or benefit recipients; and unpaid fees, fines and penalties. If the United States cannot collect debt owed to it, it must eventually terminate its collection efforts and realize the loss. The more debt the United States collects, the less it must borrow or raise to fund Government services. Federal agencies have a legal responsibility to collect debts owed to the United States, as required and authorized by various laws.

The purpose of this *Treatise* is to provide federal agency counsel and program staff with an in-depth explanation and interpretation of the laws that govern administrative collection of federal nontax debts, including statutes, regulations, federal common law, interpretive guidance, and the positions that the U.S. Department of the Treasury's Bureau of the Fiscal Service has taken on debt collection legal matters.

This *Treatise* covers the laws that apply generally to all federal agencies and programs and does not address program-specific laws, which may interact with, and sometimes take precedence over, the governmentwide rules. This *Treatise* will be updated periodically, and each part of the *Treatise* will be dated to reflect the most recent publication date. Before relying on the interpretations contained in this *Treatise*, agencies should validate that the state of the law has not changed since publication. Also, agency program staff should always consult with their legal counsel on agency and program-specific questions.

PART I: FOUNDATIONAL CONCEPTS
APPLICABLE TO FEDERAL NONTAX DEBT COLLECTION

(July 2014)

TABLE OF CONTENTS

A. APPROPRIATIONS LAW AND THE AFFIRMATIVE DUTY TO COLLECT

I. INTRODUCTION

This section provides a background on how appropriations principles underlie the federal debt collection process and give rise to an affirmative duty to collect. This section also provides an overview of federal common law and constitutional principles that govern federal debt collection, many of which have been codified and expanded upon in statutory law. An understanding of these principles is essential to the practice of federal debt collection law. Finally, this section lays out the history of federal debt collection law.

II. THE RIGHTS AND RESPONSIBILITIES OF AGENCIES COLLECTING DEBTS

A. Appropriations Principles

Appropriations law finds its origins in the United States Constitution, which provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. CONST. art. I, § 9, cl. 7. In other words, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990); *Reeside v. Walker*, 52 U.S. 272, 291 (1851). Congress' power to make appropriations derives from the Constitution's Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper" for carrying out the powers vested in the United States. U.S. CONST. art. I, § 8, cl.18. Federal law further mandates that appropriations "be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). Thus, unless specifically authorized by statute, an agency cannot use funds for a purpose other than that which Congress specified in legislation. *Id.* Furthermore, only Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. In interpreting this clause, the Supreme Court has explained that "[s]ubordinate officers of the United States are without [the] power [to dispose of the rights or property of the United States], save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294-95 (1941) (citations omitted); *see also United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840); *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959).

In the absence of statutory authority, the principles set forth in the Appropriations and Property Clauses generally require that agencies establish their debts, affirmatively collect their debts, not forgive or waive debts, and charge interest on unpaid debts. *See* U.S. CONST. art. I, § 8, cl.18 and art. IV, § 3, cl. 2. The term "property" includes the "right" to collect a debt owed to the United States. *See Royal Indemnity Co.*, 313 U.S. 289, 294-95. Failure to exercise this right or waiving this right is akin to disposing of property, and disposing of property is akin to spending the Government's property without compensation. *See id.* Only Congress can determine how money should be spent and when to dispose of property. *Id.* (holding that unless Congress gives statutory authorization to forgive debt, an agent of the Government does not have the power to

extinguish the right to payment that was constitutionally reserved to Congress). Given these constitutional principles, agencies have a duty to attempt to collect their debts.

B. Rights and Responsibilities of Agencies in the Debt Collection Process

In addition to a constitutional duty to collect debts, agencies possess a statutory duty to pursue collection of debts. 31 U.S.C. § 3711(a)(1); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 772 (9th Cir. 1985) (federal debt collection laws "express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice."). Federal regulations make clear that agencies satisfy this statutory duty by "aggressively" pursuing debts. 31 CFR § 901.1(a). Moreover, collection actions must be "undertaken promptly with follow-up action taken as necessary." *Id.*

Agencies are required to maximize recoveries efficiently and cost-effectively. 31 U.S.C. § 3711(a)(3); 31 CFR § 901.10. They are required to "service and collect debts . . . in a manner that best protects the value of the assets." OMB Circ. A-129,[1] Sec. IV. Agencies must weigh the costs of their collection efforts against expected recoveries. 31 U.S.C. § 3711(a)(3); 31 CFR § 901.10. Agencies should use data on the rates and costs of their debt collection efforts to compare the cost effectiveness of alternative collection techniques. 31 CFR § 901.10 (stating that agencies should conduct periodic analyses of cost effectiveness in debt collection efforts). Moreover, where possible, agencies must cooperate with one another in their debt collection efforts. 31 CFR § 901.1(c). While agencies are required to aggressively pursue debts, the law does not require the duplication of collection activities previously undertaken. *See* 31 CFR § 901.1(a).

III. THE COMMON LAW RIGHT TO COLLECT DEBTS

A. The Federal Government's Right to Collect

In addition to the legislatively-mandated duty to collect debt, federal agencies have a common law right to collect debt. This is well-recognized in the improper payment context. *See United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15 (1st Cir. 2005) ("[I]n the context of recovery of overpayments, the Government has broad power to recover monies wrongly paid from the Treasury, even absent any express statutory authorization to sue."); *Fansteel Metallurgical Corp.*, 172 F. Supp. at 270. Federal courts have long recognized that "[t]he Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid." *United States v. Wurts*, 303 U.S. 414, 415 (1938); *see also Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 275 (7th Cir. 1991) (an agency "has statutory and common law authority" to collect debts, including overpayments); *Collins v. Donovan*, 661 F.2d 705, 708 (8th Cir. 1981) ("The government has a recognized common law right to recover overpayments.").

[1] Office of Mgmt. & Budget, Circular A-129 (revised), Policies for Federal Credit Programs and Non-Tax Receivables (Jan. 2013) [hereinafter OMB Circular A-129].

(1) Evolution of Case Law

Since the early nineteenth century, the Supreme Court has recognized that Congress may delegate its authority to compromise or waive a debt through statutes. *See, e.g.*, *Royal Indem. Co.*, 313 U.S. at 294; *United States v. Burchard*, 125 U.S. 176, 180-81 (1888); *Hart v. United States*, 95 U.S. 316, 318 (1877); *Gratiot*, 39 U.S. at 537-38. Without statutory authorization from Congress, however, a debt cannot be extinguished. *See id.* While federal agencies cannot dispose of a debt without statutory authority, they do have common law authority to bring suits to enforce contracts, recover overpayments, and otherwise protect Government property. *See United States v. Bank of Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841) ("The right to sue is independent of statute . . . .").

Early cases affirming the Government's right to recover debts focused on erroneous government expenditures. *See, e.g.*, *United States v. Burchard*, 125 U.S. 176, 180-81 (1888) (the Government has the right to recover mistaken overpayment of naval officer); *Hart v. United States*, 95 U.S. at 318 (the Government has the right to recover unpaid alcohol tariff because the officer had no authority to dispense with the tariff requirement). Due to the constitutional requirement that federal officers spend federal funds only with statutory authorization, courts found that, unlike principals in the private sector, the United States could not be financially bound by the decisions of its agents acting without authority. *See Whiteside v. United States*, 93 U.S. 247, 256-57 (1876); 51 Comp. Gen. 162 (1971) ("[T]he Government is bound only by acts of its agents which are within the scope of their delegated authority." (internal citations omitted)). As a result, "when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution" and, as such, "it is not only lawful but the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case." *Fansteel Metallurgical Corp.*, 172 F. Supp. at 270 (internal citation omitted). The length of time since the Government discovered the overpayment or acted to recover the overpayment does not alter the affirmative duty and right to pursue debt collection. *Id.* at 271. The only temporal limit on the Government's ability to collect such claims occurs when "Congress has clearly manifested its intention to raise a statutory barrier." *Old Republic Ins. Co. v. Fed. Crop Ins. Corp*., 746 F. Supp. 767, 770 (N.D. Ill. 1990), *aff'd*, 947 F.2d 269 (7th Cir. 1991); *see also Bechtel v. Pension Benefit Guar. Corp*., 781 F.2d 906, 907 (D.C. Cir. 1985).

Early case law also supports the Government's right to recover all debts, not just those debts resulting from erroneous payments. *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818) (holding that the United States can sue to enforce contracts with the same "right which is secured to every citizen of the United States"). While Congress may abridge the Government's right to sue, no act of Congress is necessary for the Government to maintain the right to pursue debt collection efforts. *United States v. Wurts*, 303 U.S. 414, 415-416 (1938); *Dugan*, 16 U.S. at 181; *Johnson v. All-State Constr., Inc.*, 329 F.3d 848, 853-54 (Fed. Cir. 2003); *Cecile Indus. Inc. v. Cheney*, 995 F.2d 1052, 1056 (Fed. Cir. 1993). The United States can bring suits in both state and federal courts. *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1851) ("Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws.").

(2) Right to Charge Interest

As a general rule, federal agencies cannot extend credit on interest-free terms unless Congress authorizes such terms. *See* U.S. CONST. art. I, § 9, cl. 7; 31 U.S.C. § 3717; *Matter of Farmers Home Admin. — Rural Housing Loans*, 65 Comp. Gen. 423 (1986). Failure to charge interest on a debt would be an improper disposition of federal funds because a specific sum of money is worth more the sooner it is received. *See, e.g.*, *Motion Picture Ass'n v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("[I]nterest compensates for the time value of money, and thus is often necessary for full compensation."); *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) ("The cost of delay in receiving money . . . is the loss of the time value of money, and interest is the standard form of compensation for that loss."). As such, there is a common law right to charge interest, at least where contractual debts are concerned. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 248 (1949) ("interest sometimes has been allowed in favor of the Government under other statutes when the Government's position has been primarily that of a creditor collecting from a debtor," but not in the case of collecting penalties imposed for a violation of an order); *Rodgers v. United States*, 332 U.S. 371, 373 (1947) ("Since penalties under the Agricultural Adjustment Act are imposed under an Act of Congress, they bear interest only if and to the extent such interest is required by federal law."); *Billings v. United States*, 232 U.S. 261, 286 (1914) ("If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account."); *Young v. Godbe*, 82 U.S. (Wall) 562, 565 (1873) ("If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment."); *United States v. United Drill & Tool Corp.*, 183 F.2d 998, 1000 (D.C. Cir. 1950) (allowing interest on a debt arising from an overpayment on a contract, but stating in dicta that "if the obligation is not in the nature of an obligation to pay money, as, for example, if a statute imposes a penalty, interest is not allowed . . . . [because] there is no debtor-creditor relationship").

(3) Right to Collect from States, Localities, and Domestic and Foreign Sovereigns

The common law right of the United States to recover debts extends to debts owed by all persons, including states and localities. *See United States v. Texas*, 507 U.S. 529, 536 (1993) (holding that the common law right to recover prejudgment interest applies to states); *Bd. of Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939) (holding that the United States has a right to recover taxes illegally collected from Native Americans by states). Collection from foreign and domestic sovereigns is generally governed by international law, federal statute and/or federal policies. Because this collection activity can have important foreign policy implications, agencies will need to understand the legal and practical limits on their collection activities. Whether the sovereign will be immune from suit, for example, will depend on a variety of factors, including whether the sovereign consented (either explicitly or implicitly) to be sued, whether the United States has waived its own sovereign immunity in similar cases, the impact the suit would have on foreign relations, and whether the sovereign is acting in its capacity as a sovereign or in a commercial capacity. In cases involving private litigants and foreign sovereigns, courts have noted the importance of the State Department's

policy regarding immunity.[2] While agencies may pursue collection of debts owed by foreign and domestic sovereigns under common law, agencies should consult their legal counsel to determine what, if any, collection action is appropriate under current law.

B. Federal vs. State Common Law

The common law authority to bring suit to recover federal debt is derived from federal judge-made law, rather than state law. *See Bd. of Comm'rs*, 308 U.S. at 350. This ensures that state law will not abrogate the rights of the United States. *Id.* ("Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."). The Supreme Court sought to ensure national uniformity by creating rules based on federal judge-made law, instead of state laws that can vary widely. *United States v. Standard Oil Co.*, 332 U.S. 301, 310-11 (1947). In *Standard Oil Co.*, the Court applied federal judge-made law rather than state law because the issue concerned an inherently federal matter. *Id.* The Court held:

> The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

Id. at 311. Similarly, in *Clearfield Trust Co. v. United States*, the Court applied federal, rather than state law, to promote a uniform rule governing the issuance of commercial paper, an inherently federal matter. 18 U.S. 363, 367 (1943). The Court reasoned that the application of state law "would subject the rights and duties of the United States to exceptional uncertainty," and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." *Id.*; *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

Just as with other state laws, the United States is not bound by state statutes of limitation, regardless of where it files suit. *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 307 (1960); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Bd. of Comm'rs*, 308 U.S. at

[2] *See, e.g., Nat'l City Bank v. Republic of China*, 348 U.S. 356, 360 (1955) (explaining that "touching the evolution of legal doctrines regarding a foreign sovereign's immunity is the restrictive policy that our State Department has taken toward the claim of such immunity" and noting that "the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government"); *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812) (finding implied consent to suit); *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 686-87 (1955) (stating that the claim of immunity by a foreign sovereign "presents a political rather than judicial question" and that "Courts may not so exercise their jurisdiction, by the seizure and detention of property by a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations" (internal quotations and citations omitted)); *The Roseric*, 254 F. 154, 158 (1918) (noting that in cases involving foreign sovereigns, courts have sometimes accorded the sovereign with immunity, not because they lacked the judicial power over the sovereign, but because the exercise of that power "was waived out of a due regard for the dignity and independence of a sister sovereignty"); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 204 N.Y.S.2d 971, 975-7 (N.Y. Sup. Ct. 1960) (noting that "an agency wholly or partly owned or controlled by a foreign government is not entitled to the immunity of the government" and finding that "the privileged position of a sovereign is one of policy, and as such it should not be applied in matters wholly of a commercial nature").

350-51; *Stanley v. Schwalby*, 147 U.S. 508, 514-15 (1893). Sovereign immunity generally protects the United States from the defenses of laches or state statutes of limitation, unless immunity is expressly waived by federal statute. *Bd. of Comm'rs*, 308 U.S. at 350-51 (1939). And, if federal law specifies a statute of limitations, the federal statute of limitations would apply. *See John Hancock Mut. Life Ins. Co.*, 364 U.S. at 308; *Summerlin*, 310 U.S. 416-17; *Bd. of Comm'rs*, 308 U.S. at 351; *Schwalby*, 147 U.S. at 514-15. If federal law is silent as to a limitation of time, then no statute of limitation applies. *See id.*

C. Impact of Federal Statutes on the Common Law Right to Collect Debt.

In most contexts, the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (DCA), and other debt collection statutes do not abrogate federal agencies' common law authority. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534 (internal citations omitted). The common law right of agencies to recover debts is limited only insofar as Congress has enacted a statutory limitation. *Wurts*, 303 U.S. at 415-16. Courts require a high level of specificity in statutes to override common law debt collection principles, generally favoring long-established and familiar common law principles. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783-84 (1952) ("statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *see also Texas*, 507 U.S. at 534.

In *United States v. Texas*, for example, the Supreme Court found that the DCA did not abolish the common law right to charge pre-judgment interest on obligations owed by states. *Texas*, 507 U.S. at 539. The DCA required federal agencies to charge interest on debts, but specifically exempted debts owed by states from this requirement. *Id.* at 529. Under federal common law, it was clear that federal agencies could charge interest on debts owed by states. *Id.* at 533. The exemption of debts owed by states from the DCA mandate did not alter this common law right.[3]

With respect to administrative offset, Congress made clear that the DCA did not abrogate common law offset. 31 U.S.C. § 3716(d) ("Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law."); *Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 779 (2d Cir. 1996) (in bankruptcy proceedings, the federal agency "possesses a common law right to setoff its nontax debts against tax refunds" and "that the tax intercept statute does not preempt the application of that common law right in situations as to which the statute by its own terms does not apply."); *McCall Stock Farms, Inc. v. United States*, 14 F.3d at 1567 (Fed. Cir. 1993) (finding that the intent of the DCA was to expand federal agencies' authority to collect debts via offset, rather than restrict existing authority under the common law); *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054-55 (Fed. Cir. 1993) (stating that the United States has the right to assert an offset

[3] Subsequently, the Debt Collection Improvement Act of 1996 (DCIA) generally *required* the charging of interest on federal nontax debts owed by states. Prior to the passage of the DCIA, agencies were *authorized* (but not required) to charge interest on these debts. *See id.; see also* Pub. L. No. 104-134, § 31001(d), 110 Stat. 1321 (1996). The DCIA changed the definition of "person" for the purposes of sections 3716 and 3717 of title 31. *Id.* Prior to the DCIA, the term "person" excluded "an agency of the United States Government, of a State government, or of a unit of general local government." 31 U.S.C. § 3701. The DCIA's definition of person excludes only "an agency of the United States Government." *Id.*

under both the common law and the DCIA); *Allied Signal, Inc. v. United States*, 941 F.2d 1194 (Fed. Cir. 1991) (offset of claims from the same contract is not governed by the DCA); *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 295-96 (Fed. Cir. 1985) (procurement contract reserved the common law right to offset money owed by defaulted contractor).

IV. HISTORY OF FEDERAL DEBT COLLECTION LAW

A. Debt Collection Law Prior to 1966

Before 1966, the Federal Government did not have a uniform policy regarding debt collection. *See* S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533 (stating that the four bills at issue "have the common purpose of providing for a more fair and equitable treatment of private individuals and claimants when they deal with the Government"). With few exceptions, agencies' authority "to deal adequately and realistically with claims of the United States" was restricted by existing law. *Id.* Most agencies lacked the authority to compromise their claims or to terminate or suspend debt collection efforts on uncollectable claims. *Id*. And, when agencies were unable to collect, they could do little more than refer the claim to the General Accounting Office (now known as the Government Accountability Office (GAO)), which had to attempt to collect on the same basis. *Id*. at 3. Only when the claim was referred to the Department of Justice (DOJ) could a debt be compromised. *Id*.

Without sufficient statutory powers, debt collection efforts languished. *See id.* at 1-3 ("It simply is not good business to send a worthless debt through this collection process and into court simply because no agency has the statutory authority to withhold it from this process."). It is the "inflexibility in the law" that prompted the Federal Claims Collection Act of 1966 (FCCA). *See id*. at 3.

B. Federal Claims Collection Act of 1966

Through the FCCA, Congress sought to establish a standardized, governmentwide debt collection system. *See generally id.*; *see also* Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966). The FCCA was designed to provide agencies with greater authority and flexibility, and to increase "the effectiveness of the GAO in its collection activities." S. Rep. No. 89-1331, at 2. The FCCA's intended "beneficial consequences" were described by the Attorney General as follows:

> Uncollectible claims of the Government could be disposed of by agency action without resort to litigation . . . . The removal from the courts of litigation which is essentially unnecessary, should enable the courts and the Department of Justice to devote more time to other pressing matters and should permit claims of the United States to be satisfied more expeditiously.

Id. at 8 (quoting Letter from Attorney General to the Vice President (March 10, 1966)). Because agencies are familiar with the types of debts owed to them, Congress reasoned that agencies should be given the legal authority and flexibility to handle these claims on their own. *Id.* at 5.

Thus, the FCCA authorized agencies, when appropriate, to compromise claims and to suspend or terminate collection efforts on claims up to a certain amount. Pub. L. No. 89-508 § 3.

C. Debt Collection Act of 1982

Sixteen years after the FCCA, Congress enacted the Debt Collection Act of 1982 (DCA) to "increase the efficiency of governmentwide efforts to collect debts owed to the United States and to provide additional procedures for the collection of debts owed to the United States." Pub. L. No. 97-365, 96 Stat. 1749 (1982). Among other debt collection remedies, the DCA authorized credit bureau reporting for delinquent debts (§ 3), offset of federal employee salaries (§ 5), administrative offset (§ 10), the charging of interest and penalties on delinquent debts (§ 11), and the use of private collection contractors (§ 13). Pub. L. No. 97-365, §§ 3, 5, 10, 11, 13. In enacting the DCA, Congress weighed anticipated costs associated with implementing the new legislation against expected collections, and determined that increased recoveries would offset any increased costs. S. Rep. No. 97-378, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3377, 3409 (citing a cost estimate provided by the Congressional Budget Office).

D. Deficit Reduction Act of 1984

The Deficit Reduction Act of 1984 was enacted "to provide for tax reform, and for deficit reduction." Pub. L. No. 98-369, 98 Stat. 494 (1984). It authorized agencies to collect delinquent debts by the offset of tax refunds to satisfy federal debts. *Id*. § 2653. Collections increased dramatically through use of this new authority, eventually leading to its expanded use. *See* S. Rep. No. 102-420, at 4-5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 4304, 4307-08 (collected an estimated $2.6 billion in delinquent debts between January 1986 and July 1992).

E. Debt Collection Improvement Act of 1996

The Debt Collection Improvement Act of 1996 (DCIA) further improved the federal debt collection process by emphasizing the dual considerations of maximizing collections while minimizing costs. *See* Pub. L. No. 104-134, § 31001(b), 110 Stat. 1321 (1996). Congress described seven purposes for this legislation:

> (1) To maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools.
> (2) To minimize the costs of debt collection by consolidating related functions and activities and utilizing interagency teams.
> (3) To reduce losses arising from debt management activities by requiring proper screening of potential borrowers, aggressive monitoring of all accounts, and sharing of information within and among Federal agencies.
> (4) To ensure that the public is fully informed of the Federal Government's debt collection policies and that debtors are cognizant of their financial obligations to repay amounts owed to the Federal Government.
> (5) To ensure that debtors have all appropriate due process rights, including the ability to verify, challenge, and compromise claims, and access to administrative

> appeals procedures which are both reasonable and protect the interests of the United States.
> (6) To encourage agencies, when appropriate, to sell delinquent debt, particularly debts with underlying collateral.
> (7) To rely on the experience and expertise of private sector professionals to provide debt collection services to Federal agencies.

Id. at § 31001(b). The DCIA added new debt collection authorities, strengthened existing debt collection authorities, mandated use of previously discretionary authorities, and centralized governmentwide delinquent debt collection activity at the U.S. Department of the Treasury (Treasury). *See generally id.*

For example, the DCIA required agencies to submit delinquent debts to Treasury for offset, required Treasury (and other disbursing officials) to offset federal payments to collect submitted debts, and authorized Treasury to charge a fee for this purpose. *Id.* at § 31001(d) (codified in sections of 31 U.S.C. § 3716). The DCIA also added state and local governments to the coverage of administrative offset, thereby allowing federal agencies to offset payments to state and local governments to collect delinquent debts owed by state and local governments. *Id.* at § 31001(d)(1).[4] And, it required agencies to match their debt records against federal employee records for the purpose of salary offset. *Id.* at § 31001(h) (codified in sections of 5 U.S.C. § 5514). The DCIA also made clear that "[n]othing in [its administrative offset provisions] is intended to prohibit the use of any other administrative offset authority existing under statute or common law." *Id.* at § 31001(d)(2) (codified at 31 U.S.C. § 3716(d)). Thus, the DCIA provided agencies with additional offset authority, without detracting from the authority present under common law or other statutory authorities. *Id.*; *see also Boers*, 44 Fed. Cl. at 733 (stating that the United States has the right to assert an offset under both the common law and pursuant to the DCIA). The DCIA also required federal agencies to obtain a taxpayer identification number (TIN) from any person who is in a relationship with the agency that may give rise to a receivable, § 31001(i), 98 Stat. 494 (codified at 31 U.S.C. § 7701(c)), and to include a payee's TIN on the payment instructions to a federal disbursing official, § 31001(y) (codified at 31 U.S.C. § 3325(d)). Obtaining TIN information from potential debtors and payees is critical, as a TIN is used to match debtor and payee information in Treasury's centralized governmentwide offset program (known as the Treasury Offset Program), and it helps agencies locate additional information about debtors.

Just as the DCIA centralized agencies' offset activity with Treasury, it also centralized at Treasury the servicing of delinquent debts. *Id.* at § 31001(m) (codified at 31 U.S.C. § 3711(g)). It required agencies to transfer to Treasury, subject to certain exceptions, debts delinquent for 180 days and authorized Treasury to use all available collection tools to collect the debt. *Id.*

The DCIA also generally required agencies to bar delinquent nontax debtors from obtaining federal financial assistance in the form of a loan, loan insurance, or loan guarantee, *id.* at § 31001(j) (codified at 31 U.S.C. § 3720B); mandated the reporting of delinquent consumer debt to credit bureaus, *id.* at § 31001(k) (codified at 31 U.S.C. § 3711(e)(1)); authorized agencies to pull consumer credit reports, *id.* at § 31001(m) (codified at 31 U.S.C. § 3711(h)), and required

[4] *See, supra*, footnote 3.

Treasury to issue rules for agencies to publicly disseminate delinquent debtors' names, *id.* at § 31001(r) (codified at 31 U.S.C. § 3720E). Moreover, the DCIA authorized agencies to garnish the wages of individuals without a court order. *Id.* at § 31001(o) (codified at 31 U.S.C. § 3720D).

F. Post-DCIA

In 2008, Congress eliminated the ten-year limitation that had previously applied to the collection of debts by administrative offset under 31 U.S.C. § 3716. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14219, 122 Stat. 1651, 2244–45 (2008) (codified at 31 U.S.C. § 3716(e)). And, in 2014, Congress modified 31 U.S.C. § 3716(c)(6) to require agencies to notify Treasury of any debts 120 days delinquent for offset purposes, shortening the time period by 60 days. Digital Accountability and Transparency Act of 2014, Pub. L. No. 113-101, § 5, 128 Stat. 1146 (2014). Efficient management of the Government's receivables continues to garner attention from policy makers.

B. DUE PROCESS

I. INTRODUCTION

This section summarizes the constitutional due process requirements for collecting federal nontax debts owed to the United States. Because federal debt collection affects a person's property rights, the due process guarantee in the Fifth Amendment to the U.S. Constitution is generally implicated by agencies' collection efforts. Statutes and regulations further define what process is due.

A. Overview of Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.[5] Courts interpret the phrase "due process" to guarantee both procedural and substantive due process. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 318 (1993). Procedural due process rights (i.e., procedural right to a fair adjudication process before being deprived of life, liberty, or property) are relevant to federal debt collection action and are the focus of this section.[6]

The purpose of due process is to prevent governmental abuse of power. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (abusive power means the power used to oppress); *Davidson v. Cannon*, 474 U.S 344, 348 (1986) (abusive power means power employed arbitrarily). Procedural due process mandates a fair decision-making process. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). It does not guarantee a perfect system. *Id.* Rather, it seeks to put procedures in place to minimize the risk of error. *Id.* As such, the minimum level of required procedure varies according to the private interests at stake, the risk of error, and the Government's interest. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). Supreme Court cases have held that, because the required procedure varies according to these factors, procedural due process is a "flexible concept." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985); *see also Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (defining due process as a "flexible concept" that changes with the situation); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (noting that procedural due process varies with the demands of the situation); *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (holding that due process "varies according to specific factual

[5] The Fifth Amendment imposes requirements on the Federal Government, while the Fourteenth Amendment imposes requirements on states. *See Pub. Utils. Comm'n of Dist. of Columbia v. Pollak*, 343 U.S. 451, 461 (1952). Because the Supreme Court treats due process requirements under the Fifth and Fourteenth Amendment as equivalent, precedent addressing both amendments is relevant. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (identifying the identical language in the two amendments and setting out a single standard).

[6] Federal debt collection procedures will likely not implicate substantive due process limitations (i.e., substantive right to liberty guaranteed in the Constitution) absent extraordinary circumstances. For example, while making a tenant pay a landlord's debt to have water service restored violated substantive due process, requiring an inmate to pay restitution from his prison account or threatening to arrest a debtor over a $400 debt, did not violate substantive due process. *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192, 204 (N.D.N.Y. 2010) (holding that it is unconstitutional to require a tenant to pay a landlord's bill to have water service); *Parrish v. Mallinger*, 133 F.3d 612, 614-15 (8th Cir. 1998) (holding that it is constitutional to deduct restitution debt from a prison account); *Smithies v. Bialoglowy*, No. 3:01CV1511, 2001 U.S. Dist. LEXIS 22959, at *3 (D. Conn. Dec. 19, 2001) (holding that police officer's threat of arrest over a $400 debt was not unconstitutional).

contexts"). In the debt collection context, several cases have elaborated on the "flexibility" of due process. *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1086 (E.D. Cal. 2008) (in a bad check diversion program, not requiring a hearing, extensive investigation, or personalized collection letters for every case because it would result in prohibitive costs); *Gradisher v. Cnty. of Muskegon*, 255 F. Supp. 2d 720, 731 (W.D. Mich. 2003), *aff'd*, 108 F. App'x 388 (6th Cir. 2004) (not requiring a full hearing before initiating collection action because of the increased costs and administrative burdens to the County and the limited benefit to the plaintiff).

Because the Due Process Clause does not guarantee an error-free decision-making process, a deprivation resulting from a good faith error, instead of deliberate action, will not constitute a due process violation. *See Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (holding that due process protections are not triggered by lack of due care by prison officials); *see also Rivera v. Illinois*, 556 U.S. 148, 154 (2009) (holding that a judge's good faith error in applying state law was not a due process violation); *Cannon*, 474 U.S. at 347-48 (1986) (stating that "lack of care simply does not approach the sort of abusive government conduct that the due process clause was designed to prevent."); *Games v. Cavazos*, 737 F. Supp. 1368, 1380-81 (D. Del. 1990) (holding that a negligent failure by the Department of Education and a guarantee agency to provide student borrower with pre-deprivation review because of a miscommunication between agencies was not a due process violation).

B. Constitutional v. Statutory Due Process

The Constitution sets the floor for due process; statutes or regulations can only supplement constitutional requirements. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978). Agencies should take care to distinguish constitutional requirements from statutory and regulatory requirements. While federal agencies often receive deference for interpreting statutes and regulations within the authorities Congress delegated to them, they are unlikely to receive similar deference when interpreting the Constitution. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (agency interpretation that raised a serious constitutional question was not entitled to deference when alternative interpretation did not raise constitutional issues).

C. When Due Process Rights are Implicated

(1) Governmental Action

Due process rights may be implicated by federal or state governmental action. In the federal context, governmental action includes both actions by federal employees taken in their official capacities and those taken by certain other persons acting under federal control. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619-20 (1991); *Nat'l Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988).

Private persons engaged by federal agencies to collect debts, for example, may be subject to constitutional due process requirements. *See Edmonson*, 500 U.S. at 620 (attributing the activities of private participants to the Government when those participants are acting "with

the authority of the Government"); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 932-33 (1982) (stating that "constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the [government] act jointly with a creditor in securing the property in dispute."); *Dennis v. Sparks*, 449 U.S. 24, 27 n.4 (1980) (due process rights are implicated by willful participants in joint action with the Government). In other words, a governmental agency does not escape its due process responsibilities by contracting with a private party and requiring the private party to take collection action on its behalf. Because the mere referral of a debt to a private contractor does not implicate a property interest, a federal agency need not provide a debtor with due process prior to referring a debt to a private contractor for collection purposes. *See McClelland v. Massinga*, 786 F.2d 1205, 1215-16 (4th Cir. 1986) (analyzing procedures of tax refund intercept program and not discussing the transfer itself as a due process issue). However, a debtor must be given due process before the private contractor initiates an involuntary collection action on the Government's behalf.

Actions by private persons taken independently of the Government will not implicate a person's due process rights. *See Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (finding that state regulation of nursing homes was not enough for the nursing home's actions to constitute governmental action). Similarly, mere governmental regulation does not make the activities of the regulated persons attributable to the Government or subject to due process requirements. *Id.*

(2) Deprivation of Property

A person's due process rights are only implicated when there is a deprivation of life, liberty, or property. *See* U.S. Const. amend. V. If there is no deprivation of life, liberty, or property, there is no constitutional due process violation. *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) (identifying deprivation as part of the requirement for a due process violation). Deprivation of property is the most relevant category for debt collection by the United States. To have a deprivation of property, there must be a property interest and there must be a deprivation of that property interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

a) Property Interests

The Supreme Court has broadly defined the property interests protected by procedural due process. The definition of property "extend[s] well beyond actual ownership of real estate, chattels, or money" and include certain rights and entitlements. *Bd. of Regents v. Roth*, 408 U.S. 564, 571-572 (1972) (finding that, in the context of public employment, people may have a property interest in their continued employment, such as with tenured positions or unexpired contract positions); *see also Atkins v. Parker*, 472 U.S. 115, 128 (1985) (finding food stamp benefits to be a form of property); *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (stating that welfare entitlements may be more like property than "gratuity"); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969) (analyzing wage garnishment as involving a property interest).

While property interests are defined broadly, they are not infinite, but exist when the person has "a legitimate claim of entitlement" to such benefits. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (finding no property interest in police enforcement of a restraining order); *Roth*, 408 U.S. at 570 (stating that "the range of interests protected by procedural due process is not infinite"). For example, as recognized by the Supreme Court, debt collection procedures that merely cause a person to be "stigmatized" are unlikely to raise due process concerns. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding that liberty interests were not impacted when police officers listed plaintiff's name on a flyer naming "Active Shoplifters," which was distributed to merchants). Government action that goes beyond reputational harm and impacts a recognizable property interest, however, will implicate due process rights. *See Paul*, 424 U.S. at 701 (distinguishing damage to reputation only from reputational damage combined with a recognizable property interest like losing government employment). Several courts have found that reputational damage alone does not implicate due process, unless it is coupled with a recognized property interest. *Spang v. Katonah-Lewisboro Union Free Sch. Dist.*, 626 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2009) (stating that plaintiff would have a valid claim if he could establish that the Government publicly made stigmatizing statements that were proximate to his dismissal from employment); *Anemone v. Metro. Transp. Auth.*, 410 F. Supp. 2d 255, 270 (S.D.N.Y. 2006) (finding a "stigma-plus" claim but dismissing the claim against the Inspector General because the Inspector General lacked control over the firing decision).

b) Deprivation

Deprivation requires a "cognizable injury." *See Wilkinson v. Austin*, 545 U.S. 209, 230 (2005). A threat of legal action or a lack of interim process is not an injury that will implicate due process rights. *See, e.g.*, *Hornbeck-Denton v. Meyers*, 361 F. App'x 684, 688 (6th Cir. 2010). In the debt collection context, voluntary surrenders of property, such as voluntary payments made in response to demand letters or collection calls, generally do not implicate due process rights. *See Gradisher*, 255 F. Supp. 2d at 728 (finding that voluntarily giving property to the Government prevents a due process claim because the Government did not interfere with the property interest).

Voluntary surrenders of property, however, may implicate due process rights if they were made in response to false or misleading statements by the Government. *See id.*; *see also Herrada v. City of Detroit*, 275 F.3d 553, 559 (6th Cir. Mich. 2001) (stating in dicta that if a payment were made in response to a materially false and misleading notice, it could not be construed as a voluntary payment). Similarly, due process rights will generally be implicated by the use of nonconsensual collection tools, such as administrative offset or administrative wage garnishment. *Garcia v. City of Albuquerque*, 232 F.3d 760, 770 (10th Cir. 2000) (holding that voluntary resignation was not a deprivation of property); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 393 (4th Cir. 1990) (finding that there is no deprivation when a person voluntarily surrenders a liberty interest); *Schwarm*, 552 F. Supp. 2d at 1083-84 (distinguishing cases of garnishment from voluntary payment made in response to a letter offering the option of (1) enrolling in a program and paying the

check amount plus fees, or (2) not enrolling in the program and facing the possibility of a criminal proceeding).

Before an agency transfers a debt to Treasury for collection, the agency with statutory authority over the debt is responsible for ensuring that due process requirements are met. *See* 31 CFR § 285.5(c)(6) (implementing 31 U.S.C. § 3716(c)); 31 CFR § 285.12(i) (implementing 31 U.S.C. § 3711(g)); *Johnson v. U.S. Dep't of Treasury*, 300 F. App'x 860, 862-63 (11th Cir. 2008). The transfer of a debt to Treasury (or to a private collection contractor) itself, however, does not implicate due process. Due process is not implicated until and unless an adverse action is taken.

(3) Rulemaking

Agency rulemaking exists to fill in details left open by an Act of Congress. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 305 (4th Cir. 2010). When a federal agency undertakes a "rulemaking proceeding in its purest form," procedural due process limitations are rarely implicated. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542 n.16 (1978). Only when a rulemaking proceeding closely resembles adjudication are due process rights implicated. *See Atkins v. Parker*, 472 U.S. 115, 126 (1985) (distinguishing "individual adverse actions" from "mass changes" to food stamp benefits).

(4) Statutes of Limitation and Laches

The removal of a statute limiting the time in which a particular debt collection action may take place does not violate a debtor's due process rights. *See United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993); *United States v. Glockson*, 998 F.2d 896, 898 (11th Cir. 1993). This is because the repeal "does not deprive a debtor of property." *Hodges*, 999 F.2d at 342. Federal debts generally do not expire. In other words, while a particular debt collection tool may have a statute of limitation, the underlying right to collect the debt does not have a time limitation. Eliminating a statute of limitation, however, could theoretically have due process implications if the elimination created "special hardships or oppressive effects." *Lee v. Spellings*, 447 F.3d 1087, 1089 (8th Cir. 2006) (noting that the Supreme Court has left open the possibility that lifting a statute of limitation could violate due process if it created "special hardships or oppressive effects," but finding no such special hardship when the statute of limitation on any tool to collect student loans was removed (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-316 (1945)).

Where no statute of limitation exists, the claim will generally not become stale. Staleness in the due process context generally refers to an "oppressive delay." *See United States v. Marion*, 404 U.S. 307, 324 (1971) (stating in a criminal case that, although the Sixth Amendment is the primary protection against stale charges, the Due Process Clause is also relevant).

II. PROCEDURAL DUE PROCESS REQUIREMENTS

A. Overview

Procedural due process has two basic components: notification and an opportunity to be heard. *Fuentes*, 407 U.S. at 81. As the Supreme Court explained, "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* (quoting *Baldwin v. Hale*, 68 U.S. 233, 233 (1863)). The notice and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

B. Notice

Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also Jones v. Flowers*, 547 U.S. 220, 229 (2006). Because the Due Process Clause guarantees fair, but not perfect, procedures, federal agencies must show reasonable efforts for notice and do not have to prove actual notice. *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (stating that "reasonable" not "heroic" efforts are required to notify the person of the pending action). Due process rights, including the right to a notice, may be waived as long as the right was "intentionally and knowingly relinquished." *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989).

(1) Content

a) Information

As a general principle, the notice should inform persons "of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. The notice should also inform the affected persons not only that they have an opportunity to contest the allegation(s) and/or the proposed action(s), but also how to contest them. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1977); *Games v. Cavazos*, 737 F. Supp. 1368, 1376-79 (D. Del. 1990) (notice in a tax refund intercept case was adequate where notice informed recipients that they had a right to review and instructed them how to contact the agency). The notice should be written clearly, in plain English, but, generally, even poorly drafted notices can suffice. *Knisley*, 656 F. Supp. at 1554. As the court explained:

> I do find that certain paragraphs of the notices at issue are written in that all too familiar style of "computerese." By that, I mean that the style of presentation is cold, impersonal, and staccato—even as individual sentences sometimes "run-on" cramming too much information into one unit of expression. I suggest that carefully rewriting the most convoluted paragraphs in "plain English" could only result in better communication

> and would make everyone's job a little easier. Moreover, the style appears to violate the cardinal rule of good writing: know your reader. Still, while offending good taste, common sense, and undoubtedly the elements of style as set forth by William Strunk, Jr. and E.B. White, when viewed as a whole I do not believe that the current notice offends the elements of due process.

Id. (internal citation omitted).

The level of detail that the agency must provide about the proposed adverse action depends on the circumstances, including how easy it is for the agency to provide details. *Mullane*, 339 U.S. at 314. In the debt collection context, the notice should generally advise the debtor of the nature and amount of the debt, including the basis for the debt, an explanation of how interest, penalties, and administrative costs are added to the debt, the date by which payment should be made to avoid late charges (if relevant) and enforced collection, an explanation of the agency's intent to enforce collection if debtor fails to pay, and an explanation of how the debtor can exercise the opportunity to dispute the existence or amount of the debt, or any of the proposed collection actions. Where practical, specificity is preferred. *See Anderson v. White*, 888 F.2d 985, 989 (3d Cir. 1989); *McClelland v. Massinga,* 600 F. Supp. 558, 566. An overly-specific notice, however, may restrict the actions an agency can take without having to provide additional notification. It is therefore advisable for agencies to draft their notices to be broad enough to cover any actions the agency might want to take in the foreseeable future.

A notice generally need not advise the debtor of possible defenses. *Anderson*, 888 F.2d at 992 (noting that "[t]he Supreme Court has never required that pre-hearing notices contain a list of potential defenses or explain available hearing procedures in intricate detail . . . ."); *Sibley v. Diversified Collection Servs.*, 1997 U.S. Dist. LEXIS 23583 (N.D. Tex. June 10, 1997) (holding that the failure of the administrative wage garnishment notice to include a list of defenses did not render it unconstitutional); *Games v. Cavazos*, 737 F. Supp. 1368, 1376 (D. Del. 1990) (in a case involving the offset of student loans, the court held that "considerations of due process do not require that the 65-day letter contain a non-exhaustive list of defenses"); *Kandlbinder v. Reagen*, 713 F. Supp. 337, 340 (W.D. Mo. 1989) (explaining that in context of tax refund offset, providing the debtor with list of possible defenses might have done more harm than good); *Massinga,* 600 F. Supp. at 566 (stating that tax refund intercept notice need not include a list of potential defenses), *rev'd on other grounds*, 786 F.2d 1205 (4th Cir. 1986). While notices generally do not need to advise the debtor of all possible defenses, some courts have held that listing at least some defenses may be required. *See Knisley*, 656 F. Supp. at 1554 (stating that, in the context of tax refund offset, while "due process does not require a list of all possible defenses, the better practice may be to list a number of those most frequently asserted"); *Wagner v. Duffy*, 700 F. Supp. 935, 943 (N.D. Ill. 1988) (finding that due process requires that the tax refund intercept notice provide the debtor with a list of common defenses); *Smith v. Onondaga Cnty. Support Collection Unit*, 619 F. Supp. 825 (N.D.N.Y. 1985) (finding that due process was insufficient where notice failed to list possible defenses or appeal procedures and debtor was not given an

opportunity for a hearing); *Nelson v. Regan,* 560 F. Supp. 1101 (D. Conn. 1983) (finding that the notice did not satisfy due process because it failed to list "the possible defenses an individual might have to the interception of tax refunds or the availability of regular procedures in which to challenge the offset"), *aff'd*, 731 F.2d 105 (2d Cir.), *cert. denied*, 469 U.S. 853, 105 S. Ct. 175 (1984). One of these cases suggested that common defenses might include: mistaken identity, mistaken calculation, and bankruptcy. See *Duffy*, 700 F. Supp. at 943. Agencies should consider whether listing possible defenses would protect the agency from due process challenges.

b) Mass Notice

A personalized notice is not necessary if mass notice is appropriate. Mass notice may be appropriate when all persons to be notified are similarly situated. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) (holding that when Congress changed food stamp program benefits, a notice containing only the substance of the amendment, and not a calculation of its impact on the person, was sufficient because "[a]ll citizens are presumptively charged with knowledge of the law"); *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . ."); *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."). In most circumstances, even when debtors are similarly situated, providing a debtor with, at a minimum, specific details about the amount and type of the debt owed is advisable.

c) Language

Agencies generally have no obligation to provide a translation of a notice when communicating with non-English speakers. *See Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (finding that it is well-established that notice of hearings can be sent in English to non-English speakers, if the notice would put a reasonable person on notice that follow-up is required). Translations are not required in either the Social Security benefit or in the criminal forfeiture context. *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir.1994) (finding no violation where an English-language notice regarding administrative forfeiture of seized currency was sent to French-speaking inmate because the notice would put a reasonable person on notice that it was important and, if necessary, should be translated); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (finding no violation where Social Security forms printed and sent in English only, where plaintiffs claimed that Spanish forms were required because of the number of Spanish speakers in the United States). Translation does not appear to be required even in the immigration context where agencies could reasonably assume that a sizable number of recipients do not speak English fluently. *See, e.g., Chavez v. Holder*, 343 F. App'x 955, 957 (5th Cir. 2009) (finding no right to receive Notice to Appear in language other than English); *Chen v. Gonzales*, 187 F. App'x 502, 504 (6th Cir. 2006) (finding that due process does not require forms sent to aliens about their immigration status be in any language other than English); *Khan v. Ashcroft*, 374 F.3d 825, 830 (9th Cir. 2004)

(holding that the Immigration and Naturalization Service did not violate petitioner's due process rights by not providing notice in petitioner's native language).

(2) Delivery

The means of delivering the notice must be reasonably designed to reach the debtor. *See Hanrahan*, 409 U.S. at 40. In the debt collection context, this generally means delivery of the notice to the debtor's last known address.

a) Last Known Address

Notice by mail to a person's last known address is the traditional method for notice under the Due Process clause. *See Dusenbery*, 534 U.S. at 169 (finding that postal service by certified letter is a "method our cases have recognized as adequate for known addressees"); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983) (requiring, in cases where mortagee is known, publication to be supplemented by "notice mailed to mortagee's last known available address"). The law generally does not require additional efforts by the agency beyond using the last known address, absent unique circumstances. *See e.g.*, *Stewart v. Dep't of Educ.*, 18 F. App'x 452, 453 (8th Cir. 2001) (upholding a notice provision requiring notice to be sent to last known address); *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984) (there is a strong presumption that a notice properly addressed was received by addressee and, in the context of certified mail, clear and convincing evidence is required to rebut this presumption); *Nelson v. Diversified Collection Servs. Inc.*, 961 F. Supp. 863, 869 (D. Md. 1997) (upholding sufficiency of a notice sent by the defendant to the plaintiff's last known address). See Section d), below, for a discussion of unique circumstances that may require additional efforts.

b) Electronic Mail

Notice by electronic mail, commonly known as "email," may satisfy due process if it is the best way to reach a person, and may be appropriate even where other means of delivery would be better calculated to reach the person. *See Hanrahan*, 409 U.S. at 40 (stating that notice must be reasonably calculated under the circumstances); *Dusenbery*, 534 U.S. at 170 (noting that procedures must be fair and reasonable, but "heroic" efforts are not required). As one court has aptly noted,

> Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut."

New England Merchs. Nat'l Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980). In some circumstances, email may also be sufficient where delivery to a physical address has failed. *See, e.g., Craigslist, Inc. v. Doe*, No. 09-4739, 2011 U.S. Dist. LEXIS 53123, at *3 (N.D. Cal. Apr. 25, 2011) (finding that email was sufficient where, although there was third-party discovery and other investigations, there had been ten failed service attempts without obtaining the correct physical address); *Chanel, Inc. v. Xu*, 2010 U.S. Dist. LEXIS 6734, at *4 (W.D. Tenn. Jan. 27, 2010) (permitting service of process by email where physical address was deemed invalid, and emails were not returned as "undeliverable").

c) Publication

Notice by publication will rarely be appropriate for delinquent debt collection and should generally be used only as a last resort. *See Mullane*, 339 U.S. at 320 ("Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests."); *Combs v. Doe*, No. 10-01120, 2010 U.S. Dist. LEXIS 113441 (N.D. Cal. Oct. 15, 2010) (stating that notice by publication should generally be used only as a "last resort"). In the case of missing or unknown persons, the agency should attempt to find a mailing address. *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962). If that address is not "easily ascertainable" then publication may be a constitutionally sufficient means of notice. *Id.* (finding that an address would be "easily ascertainable" if it could be found in the city's records); *see also Mullane*, 339 U.S. at 317 (finding publication notice sufficient for only those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained"); *Acevedo v. First Union Nat'l Bank*, 476 F.3d 861, 866 (11th Cir. 2007) (holding that publication notice was sufficient when the Federal Deposit Insurance Corporation did not know the identities of the holders of cashier's checks from a failed bank).

d) Unique Circumstances

Due process often demands context-specific procedures. If the agency has direct knowledge of a person's unique situation, additional steps may be required. For example, if the agency knows a person is incarcerated, the agency may be required to mail notice to the jail instead of the person's home address. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (in forfeiture proceeding, requiring notice to be mailed to the jail instead of to the home address when the agency knew that the owner of automobile was in jail). Similarly, if the agency knows the person to be incompetent, notice should be delivered to that person's guardian or trustee, if one has been appointed. *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956).

Whether an agency must take additional steps when notice is returned as undelivered depends on the circumstances. While the Supreme Court required additional reasonable steps when the proposed action involved the sale of real property in *Flowers*, such steps may not be required for less drastic actions. *See Flowers*, 547 U.S. at 225 (holding that

where the mailed notice of a tax sale is returned to the agency, "the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so"). In *Flowers*, the Court suggested that "reasonable steps" could include posting the notice on the door or sending it via regular mail to "occupant" so that it would be delivered without requiring a signature. *Id.* at 222. However, the Court also noted that a search of the local phone book and government records was not required because "[s]uch an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id.*

An agency may not have to take additional steps if it only has general information that a particular means of notice is less effective. For example, even if the agency is aware that mail often gets lost in the prison mail system, mail still meets the constitutional standard for notice. *See Dusenbery*, 534 U.S. at 172 (holding that mail to a penitentiary was "clearly acceptable" despite knowledge that the prison mail system was not as reliable as the general mail system).

(3) Waiver of Right to Notice

The right to notice can be waived. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989). However, there is a presumption against finding that the right to notice has been waived. *Glasser v. United States*, 315 U.S. 60, 70-71 (1942). For a waiver to be effective, it must be intentional and the person must know the right or privilege that she is giving up. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

A person generally does not waive the right to notice through the failure to act. *See Flowers*, 547 U.S. at 232 ("[A] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation." (quoting *Adams*, 462 U.S. at 799)). A debtor's failure to keep her address updated, even when required by statute, for example, does not negate the agency's obligation to provide reasonable notice under the circumstances, which is generally satisfied by sending notice to the last known address. *See Adams*, 462 U.S. at 795; *see also Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972) (holding that the state did not provide constitutionally sufficient notice when it mailed notice to the address of record, despite the Illinois law that required each vehicle owner to register his address, because state was aware that the vehicle owner was not at that address). In some situations, however, a person's failure to act may result in a constructive waiver. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) ("failure to follow [certain procedural] rules may well result in a curtailment of the rights" and "the failure to enter a timely objection to personal jurisdiction constitutes . . . a waiver of the objection").

(4) Timing of Notification

a) Pre-Deprivation

Generally, a person should be given notice of the debt, and the proposed actions to collect the debt, prior to any adverse debt collection action. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) (restating "the general rule that individuals must receive notice . . . before the Government deprives them of property"); *see also United States v. $8,850*, 461 U.S. 555, 562, n.12 (1983); *Fuentes*, 407 U.S. at 82; *Mullane*, 339 U.S. at 313. The timing of the notice must give the person sufficient time to address the issues raised in the notice. *See Lindsey v. Normet*, 405 U.S. 56, 64-65 (1972) (holding that giving a tenant six days for trial preparation is sufficient where the tenant can be expected to know material facts including the terms of the lease and payment of rent); *Goldberg*, 397 U.S. at 268 (requiring that notice provide an "effective opportunity to defend"); *Eguia v. Tompkins*, 756 F.2d 1130, 1139-40 (5th Cir. 1985) (requiring pre-deprivation opportunity to respond where a paycheck was withheld to pay uncollected county fees because the county knew about the discrepancies a year before the withholding).

b) Post-Deprivation

Sending due process notification only after deprivation of property is acceptable in exigent circumstances. *See James Daniel Good Real Prop*., 510 U.S. at 53 (finding that the Government's *ex parte* foreclosure on the debtor's real property was improper). Exigent circumstances may exist where there is a risk that the debtor will abscond with the property, a risk to public health or safety, or another important governmental interest is at stake. *See id.* at 57 (stating that the debtor could not abscond with real property). As explained by the Supreme Court, the common features of acceptable post-deprivation notice cases are:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 91 (finding that the Florida and Pennsylvania statutes that allowed the seizure of a debtor's possessions on behalf of a private person did not comport with the Due Process Clause). Examples of acceptable post-seizure notice cases include: collecting the internal revenue of the United States, meeting the needs of a national war effort, protecting against the economic disaster of a bank failure, and protecting the public from misbranded drugs and contaminated food. *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 37 (U.S. 1990) (explaining that "a State need not provide predeprivation process for the exaction of taxes" because such a requirement

"might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974) (holding that the seizure of the yacht without prior notice pursuant to Puerto Rican statute was appropriate because the seizure was necessary to secure the important Government interest in preventing the "continued illicit use of the property"); *Fuentes*, 407 U.S. at 91-92 (noting that "the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food") ; *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931) (in the context of collecting tax debt, finding that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.").

The post-deprivation offset notice provision in 31 CFR § 901.3(b)(4)(iii)(C) comports with due process requirements because it applies only "when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity for review," and therefore is used only in cases where prompt action is necessary to secure the important governmental interest of collecting federal debt, while being limited in scope. *See id.*

c) Stale Notice

Notice, even if sent far in advance of the threatened deprivation, is unlikely to ever become so stale that it is no longer effective. Nevertheless, an agency should assess whether relying on a previously sent notice is reasonable under the circumstances, or if the agency should resend the notices. *See Dusenbery*, 534 U.S. at 167 (articulating reasonableness as the general standard for judging sufficient notice). A new notice may not be required where the person is aware of the proceedings and has already had a reasonable opportunity to be heard. *See Schneider v. San Bernardino County*, 33 F.3d 59 (9th Cir. 1994) (holding that an eviction that occurred six months after the date of notice was valid). In the context of debt collection, notice should be re-sent, where possible, if there is a material change in the amount owed or the action to be taken. *See Roth v. United States*, No. 02-820, 2003 U.S. Dist. LEXIS 12931, at *2 (D. Minn. July 22, 2003).

C. Opportunity to be Heard

(1) General Standard

Like the requirement for notice, the opportunity to be heard must be provided "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). To determine the required form of the opportunity to be heard, courts use a balancing test. *Mathews*, 424 U.S. at 335. The test recognizes that the benefits of additional procedure may not justify the additional costs. *Id.* Under the *Mathews* balancing test, courts weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. This is a flexible, context-specific standard. *Id.*

(2) Material Facts

Every person is guaranteed an opportunity to be heard if the Government proposes deprivation of life, liberty, or property. That opportunity is unnecessary, however, where there is no disagreement on material facts or application of the law. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (stating that due process does not entitle a person to a hearing to establish a non-material fact); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973) (explaining that Congress did not intend, and due process does not require, a hearing where it is clear from the pleadings that the applicant will not be successful). Therefore, where a debtor does not dispute a material fact "such as the actual existence or amount of his debt," further process is not due. *See Gaddy v. U.S. Dep't of Educ.*, 08-CV-573 DLI LB, 2010 WL 1049576, at *4 (E.D.N.Y. Mar. 22, 2010). For example, where a debtor responds to an administrative wage garnishment with irrelevant information, no hearing is required. *See id.* at *4 (upholding a garnishment decision made after a review of the record but without a hearing because the only evidence the debtor submitted was a copy of the 1999 order dismissing defendant's previous action against the debtor, which was dismissed without prejudice). Similarly, agencies are not required to provide an opportunity to hear frivolous claims. *See Burnett v. Comm'r of Internal Revenue*, 227 F. App'x 342, 345 (5th Cir. 2007) (affirming a Tax Court penalty for a plaintiff making frivolous claims and noting that the opportunity to be heard was provided for non-frivolous claims only); *Ralidis v. United States*, 169 F. App'x 390, 391 (5th Cir. 2006) (finding no due process violation where the agency offered a meeting to discuss non-frivolous arguments).

(3) Decisionmaker

To have an opportunity to be heard, the decisionmaker must be someone who is capable of fairly judging the case. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). This requires that the decisionmaker be competent and capable of understanding the material facts as well as how to apply those facts in a case. *See Withrow v. Larkin*, 421 U.S. 35, 55, (1975) (making a rebuttable presumption that the state administrators were capable of fairly evaluating the facts at hand because of the assumption of their intellect and conscience). A decisionmaker can be an agency employee or an administrative law judge (ALJ). *See Parham v. J.R.*, 442 U.S. 584, 607 (1979) (noting that due process does not "require that the neutral and detached trier of fact be law trained or a judicial or administrative officer"); *Withrow*, 421 U.S. at 54 (noting that members of the Wisconsin Medical Examining Board could be neutral decisionmakers); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (allowing adjudication by Social Security examiner); *FTC*

v. Cement Inst., 333 U.S. 683, 702 (1948) (allowing the agency's Commissioners to adjudicate proceedings).

Additionally, the decisionmaker should be neutral. The decisionmaker must be able to decide the case based on the evidence, not on preset biases. *See Parham*, 442 U.S. at 597; *Withrow*, 421 U.S. at 58; *Jackson v. Norman*, 264 Fed. Appx. 17, 19 (1st Cir. 2008). Courts presume that agency decisionmakers are neutral. *Withrow*, 421 U.S. at 47 (establishing a presumption of honesty and integrity for adjudicators). This presumption is strong and, to rebut it, there should be evidence that the adjudicator's mind was "irrevocably closed." *Cement Inst.*, 333 U.S. at 701.

While not strictly required to meet due process standards, it is generally best practice that the reviewing official not be the same person who made the original decision. *See Withrow*, 421 U.S. at 58 (finding that, while "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation," it also does not "preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high."); *Cement Inst*, 333 U.S. at 702-703 (finding no due process violation of "for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law" and noting that the federal agency "cannot possibly be under stronger constitutional compulsions in this respect than a court"). The fact that different members of the same agency conduct both the investigative and adjudicative functions is generally not worrisome. For example, different members within the same agency or office can establish that a debt is owed and subsequently render a decision after considering evidence from the debtor. *See Cement Inst.*, 333 U.S. at 702 (allowing the agency to determine antitrust proceedings despite its previous report suggesting that it believed that the practices were illegal); *Nelson*, 961 F. Supp. at 869 (finding that an agency that approved and granted a loan can later determine that it is delinquent without running afoul of the requirement that the decisionmaker be neutral). While combining investigation and adjudication is generally acceptable, it is generally inappropriate for the decisionmaker to be directly and personally interested in the outcome of the claim. *See Aetna Life Ins. Co. v. Lavole*, 475 U.S. 813, 824 (1986) (state supreme court justice should have recused himself from the case because he had a personal interest in the outcome). This means that, while the agency could have a financial interest in the outcome, the actual decisionmaker cannot be financially rewarded for a particular decision or type of decision. *Withrow*, 421 U.S. at 47.

(4) Document Production

Agencies must provide the debtor with access to the documents that the agency is using to establish its case. *See Greene v. McElroy*, 360 U.S. 474, 496 (1959) (explaining that the Government needs to disclose evidence to provide the person with the opportunity to show that such evidence is untrue); *Goldberg*, 397 U.S. at 270. These documents must be sufficient to inform the person of the relevant charges. However, the agency generally is not required to provide every potentially relevant document, because there is no due process right to pretrial discovery in administrative cases. *See Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (holding that there was no right to discovery in the Environmental Protection Agency's

administrative hearing); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999) (noting that administrative hearings must be fundamentally fair, but that pretrial discovery is not a prerequisite for fairness). Similarly, agencies generally need not disclose confidential documents. *See Rasheed-Bey v. Duckworth*, 969 F.2d 357, 362 (7th Cir. 1992) (non-disclosure of confidential documents is not a due process violation where the person had sufficient notice of the facts underlying the charge against him).

(5) Maintaining Records

Though required procedures vary based on the nature of the case, the decisionmaker should generally maintain a record, make decisions based on the record, and issue a timely decision. *Goldberg*, 397 U.S. at 271. The decision generally should be in writing and based upon evidence presented. *Id.* at 271. The decisionmaker should state the reasons for the decision and the evidence, but does not need to provide a full opinion or formal findings of fact or conclusions of law. *Id.* The decisionmaker can also use technical or scientific facts from his or her expertise. *Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994); *see also Woldmeskel v. INS*, 257 F.3d 1185, 1192 (10th Cir. 2001) (stating that agencies cannot primarily base their decision on facts not in the record without providing notice and an opportunity to contest inferences from those facts).

(6) Type of Opportunity to be Heard

The opportunity to be heard means the "opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Loudermill*, 470 U.S. at 546; *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that a student is entitled to present his side of the story before being suspended for 10 days, but that this right to be heard does not require that a student have "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of events"). These rights, however, are not boundless. The person "shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Craft*, 436 U.S. at 16 n.17 (quoting *Londoner v. Denver*, 210 U.S. 373, 386 (1908)); *see also Goss v. Lopez*, 419 U.S. at 583.

The precise amount and mode of providing a person with an opportunity to be heard varies according to the situation, and is determined by weighing the *Mathews* factors. *Mathews*, 424 U.S. at 335; *Morrissey*, 408 U.S. at 481. The *Mathews* factors are the private interest, the risk of erroneous deprivation, the value of additional procedures, and the Government's interests, including administrative costs. *Mathews*, 424 U.S. at 335. The formality and procedural requirements of hearings are not uniform, *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), and can "take many forms, including a 'formal,' trial-type proceeding, an 'informal discuss[ion]' . . . or a 'paper hearing,' without any opportunity for oral exchange." *Gray Panthers v. Schweiker*, 652 F.2d 146, 148 n.3 (D.C. Cir. 1981).

a) Administrative Reviews and Hearings

In the debt collection context, the agency can resolve most disputes through an informal review of the file. As one court stated, "[t]he opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." *Craft*, 436 U.S. at 16 n.17 (citing *Goss v. Lopez*, 419 U.S. 565, 581-584 (1975)); *see also Gray Panthers*, 652 F.2d at 148 n.3.

i. Paper Hearings and Reviews

Paper hearings or reviews are generally sufficient for debt collection cases. The material facts in dispute in these cases can frequently be determined from written materials. Moreover, the process of determining whether a payment is overdue is generally not complex. *See Connecticut v. Doehr*, 501 U.S. 1, 14 (1991) (explaining that debts and delinquent payments are generally uncomplicated and lend themselves to documentary proof); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (holding that oral hearings are not required in cases involving straightforward computation matters); *Mathews*, 424 U.S. at 340-46 (stating that an oral hearing was not required prior to the termination of the Social Security benefits because written submissions were sufficiently probative, and because of the high costs to the Government relative to the small benefit); *see also California ex rel. Lockyer v. Fed. Energy Regulatory Comm'n*, 60 F. App'x 23, 24 (9th Cir. 2003); *Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 34, 46 (1st Cir. 2001); *Duranceau v. Wallace*, 743 F.2d 709, 712 (9th Cir. 1984). The prohibitive cost of providing pre-termination oral hearings is a frequent theme in opinions addressing this issue. *See Buttrey v. United States*, 690 F.2d 1170, 1183 (5th Cir. 1982) (holding that a paper hearing and an informal meeting were sufficient for the denial of a dredge permit because a formal hearing would not be worth the cost); *Zurak v. Regan*, 550 F.2d 86, 96 (2d Cir. 1977) (finding that a reason not to require in-person hearings was the financial and administrative burdens on the agency).

ii. Oral Hearings

An oral hearing is only required where the case cannot be fairly resolved based on the written record, such as when credibility determinations are at issue. *See Goldberg*, 397 U.S. at 269 (indicating that in the context of terminating welfare benefits, oral hearing was required because written submissions may not be a realistic option for the recipients "who lack the educational attainment necessary to write effectively" and because "written submissions do not afford the flexibility of oral presentations"). Accordingly, the Federal Claims Collection Standards only require a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence. 31 CFR § 901.3(e). Whether credibility is at stake depends on the type of case and the issues actually being contested. *See Califano*, 442 U.S. at 696 (holding that the agency is not required to sort through all reconsideration requests so that a hearing can be provide in the rare cases that involve credibility).

Where an oral hearing is required, the agency may conduct the hearing over a video or telephone conference, assuming an in-person hearing is not needed to correct any alleged deficiencies in the proceeding. *See Veliz v. Holder*, 375 F. App'x 148, 149-50 (2d Cir. 2010) (allowing a video conference instead of an in-person hearing for an asylum hearing); *Sanford v. Comm'r of Internal Revenue*, 283 F. App'x 780, 783 (11th Cir. 2008) (holding that a telephone hearing did not violate due process); *O'Meara v. Waters*, 464 F. Supp. 2d 474, 480 (D. Md. 2006) (finding the Internal Revenue Service's process of offering telephone hearings constitutional); *Casey v. O'Bannon*, 536 F. Supp. 350, 355 (E.D. Pa. 1982) (allowing phone hearings to be provided to applicants for public assistance who found traveling to regional centers onerous); *but see Kirby v. Astrue*, 731 F. Supp. 2d 453, 457 (E.D.N.C. 2010) (not allowing impeachment of a claimant's credibility based on personal impressions observed from video).

b) Full Evidentiary Hearings

Even where an oral hearing is required, constitutional due process generally does not require a full evidentiary hearing with the formality of a standard trial. *See Mathews*, 424 U.S. at 348 (arguing that the judicial model of an evidentiary hearing is not required in all circumstances and is not effective in all circumstances); *Nelson*, 961 F. Supp. at 870 (distinguishing termination of welfare benefits, which requires a full evidentiary hearing, from wage garnishments, where less formal proceedings suffice). The requisite level of formality will depend on the nature of the case. *See Mathews*, 424 U.S. at 342-48; *Dixon v. Love*, 431 U.S. 105, 113 (1977) (noting that ordinarily, less procedure than an evidentiary hearing is required before an agency can take adverse administrative action); *see generally Goldberg*, 397 U.S. 254 (requiring an evidentiary hearing before terminating welfare benefits, because welfare provides the funds to obtain essential items like food, housing, and medical care). In an evidentiary hearing, the person generally has the right to be represented and assisted by counsel, but the agency is not required to pay for the attorney. *See Goldberg*, 397 U.S. at 268 (noting that the failure of the agency to permit respondent to appear with or without counsel caused the proceeding to be constitutionally invalid).

c) Post-Deprivation Review

In certain circumstances, the opportunity to be heard can come after the deprivation. *See Mathews*, 424 U.S. at 339. Post-deprivation hearings are likely warranted when there is a high risk that the Government could not otherwise collect. However, the post-deprivation hearing should be held soon after the deprivation. In cases where informal review or paper hearings may not be constitutionally sufficient, additional post-deprivation review can sometimes constitute a sufficient opportunity to be heard. *See id.* at 338-39 (emphasizing that pre-deprivation written opportunity to contest was paired with the post-deprivation opportunity to appeal through an evidentiary hearing before an administrative law judge as well as the opportunity for judicial review).

d) Judicial Review

Final agency determinations are generally subject to judicial review. *See* Administrative Procedures Act, codified at 5 U.S.C. § 701 *et seq*. (providing limited waiver of sovereign immunity and allowing for judicial review of certain final agency decisions).

(7) Waiver of Opportunity to be Heard

The opportunity to be heard consists of a guaranteed chance to be heard; there is no requirement that the debtor in fact be heard. *See Boddie*, 401 U.S. at 379 (stating that due process can be waived). If a person fails to comply with "reasonable procedural or evidentiary rule[s]," that person is not guaranteed a further opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *see also D.H. Overmyer Co.*, 405 U.S. at 185-86; *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 908 (6th Cir. 2006) (finding that undue delay can operate as an "irrevocable renunciation" of objection). If a statute guarantees the opportunity to be heard upon request and that request is not made, the debtor has had his opportunity to be heard. *See Nelson*, 961 F. Supp. at 870 (in an administrative wage garnishment case, finding "[t]he fact that the statute only provides hearings upon request does not make the procedure insufficient").

III. CONSEQUENCES OF VIOLATING DUE PROCESS

In the debt collection context, agency actions taken in violation of due process are generally voidable, but not void. Generally, debtors will not be entitled to damages for due process violations because the Due Process Clause is not money-mandating. *Perry v. United States*, No. 2014-5021, 2014 U.S. App. LEXIS 4461, *2 (Fed. Cir. Mar. 11, 2014) (finding that the Court of Federal Claims—which has jurisdiction to hear monetary claims against the United States—lacked jurisdiction over the due process violation claim); *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (stating that "the Fourth Amendment does not mandate the payment of money for its violation"); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that the Due Process Clauses of the Fifth and Fourteenth Amendments "do not mandate payment of money by the government").

Debtors may, however, be entitled to injunctive relief for due process violations. Injunctive relief for a due process violation will generally consist of providing the debtor with the process to which the debtor was entitled. *See Marcello*, 574 F. Supp. at 598-99; *Roudebush*, 452 F. Supp. at 634. Federal agencies, therefore, generally should not be required to return any funds collected in violation of due process, unless it is later determined that the funds should not have been taken. *See Marcello*, 574 F. Supp. at 598-99. In *Marcello*, the court required that persons whose tax refunds had been intercepted without due process receive additional notice, but the court did not require those funds to be returned unless further process showed that the interception was unwarranted. *Id.*; *see also Moseanko v. Yeutter*, 944 F.2d 418, 420 (8th Cir. 1991) (stating that funds collected by offset do not have to be immediately returned when the hearing procedure under a new regulation would provide the plaintiffs with a sufficient opportunity to be heard); *Smith v. Onondaga Cnty. Support Collection Unit*, 619 F. Supp. 825,

831 (N.D.N.Y. 1985) (ordering "proper notice and opportunity to be heard" as a remedy); *Eguia v. Tompkins*, 756 F.2d 1130, 1139-40 (5th Cir. 1985) (concluding that a post-deprivation hearing remedied prior due process problems); *but see Roudebush*, 452 F. Supp. at 634 (indicating that the court would be willing to hear motions on restitutionary and injunctive relief in advance of a new hearing).

In some cases, injunctive relief may include not only a requirement that the agency provide procedural due process, but that it also return the funds collected in violation of the debtor's due process. However, in the federal debt collection context, a requirement to make a payment to the debtor returning funds collected in violation of the debtor's due process will often be futile, because the Government generally has a right to offset the return of such funds under applicable statutes and common law.

PART III: THE FEDERAL NONTAX DEBT COLLECTION PROCESS

(October 2014)

TABLE OF CONTENTS

A. CONTACT WITH AND OBTAINING INFORMATION ABOUT THE DEBTOR

[forthcoming]

B. PAYMENT AND RESOLUTION OF DEBT

[forthcoming]

C. REFERRAL OF DEBTS TO TREASURY OR OTHER DEBT COLLECTION CENTERS

[forthcoming]

D. OFFSET

I. Introduction

Offset (also called "setoff") is one of the most complex areas of federal debt collection law and operations. It is often confused with other legal debt collection remedies such as garnishment, levy, and recoupment. An agency may employ offset on its own, directly with another agency, or centrally through the Department of the Treasury (Treasury). There are many authorities for offset, including the common law, statutes that apply governmentwide, and statutes specific to a particular agency or program. Each legal basis for offset has distinct permissions and restrictions on when, how, and what an agency may offset to collect its debts. This chapter will define offset, distinguish it from other, similar remedies, and explain the law governing each type of governmentwide offset. This chapter does not address authorities specific to an agency or program or the law of setoff in bankruptcy.[1]

II. "Offset" Defined

A. "Offset" and "Setoff"

The terms "offset" and "setoff" are generally interchangeable. The right has been available to parties under common law. *See, e.g., Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 (1962); *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Gratiot v. United States*, 40 U.S. (15 Pet.) 336, 370 (1841). "The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other." *Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995). In other words, if Debtor A owes Creditor B $25, but Creditor B owes Debtor A $35, Creditor A may "offset" its $25 payment against Debtor B's debt, leaving Debtor B with a debt of only $10 owed to Creditor A. The right of setoff circumvents "the absurdity of making A pay B when B owes A." *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913). The term "offset" has also been defined in the various laws Congress has enacted. Each definition varies in the details of what competing claims may be included; however, the underlying concept remains that an amount payable by the United States to a person may be reduced by an amount that person owes to the United States and applied to the debt. *See e.g.*, 31 U.S.C. § 3701(a)(1) ("'administrative offset' means withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim").

B. Offset Distinguished from Garnishment, Attachment, and Levy

Offset involves only two parties—the creditor and debtor—and the funds that are offset generally do not change hands. Garnishment, attachments, and levies, on the other hand, involve the seizure of property held by a third party and result in that property being transferred from the third party to the creditor. *See generally* 66 Comp. Gen. 260 (1987). Creditors may seize any type of property through garnishment, attachment, or levy. Offset, on the other hand, is the

[1] This chapter also does not discuss the offset of federal payments to collect debts owed to states. *See, e.g.*, 26 U.S.C. § 6402(c), (e), (f); 31 U.S.C. § 3716(h); 31 CFR §§ 285.1, 285.3. 285.6, and 285.8.

crediting of monetary amounts against competing claims.

C. Offset Distinguished from Withholding

Simply withholding funds without applying them to the indebtedness is legally distinct from offset. *Strumpf*, 516 U.S. at 18-19 (bank's freeze of a depositor's account did not constitute a setoff under the Bankruptcy Code); *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 817 (D.C. Cir. 1997) (temporary withholding is not offset in the context of the Debt Collection Act).

D. Offset Distinguished from Recoupment

Recoupment is an equitable doctrine, defensive in nature, used to determine amounts owed on a given transaction. *Bull v. United States*, 295 U.S. 247, 261-262 (1935); *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435 (7th Cir. 1993). Unlike setoff, recoupment is only available where the mutual debts arise out of the same transaction or occurrence. *Id.* Whether two claims arise out of the same transaction or occurrence is often fact based, and the test for determining whether claims arise out of the same transaction varies depending on jurisdiction. *Sims v. U.S. Dep't. of Health & Human Serv. (In re TLC Hospitals, Inc.)*, 224 F.3d 1008, 1011-12 (9th Cir. 2000) (finding that the agency's overpayments to corporation in one year arose from the same transaction as overpayments in another year, because there was a "logical relationship" between the overpayments and the underpayments); *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984) (in bankruptcy context, the recoupment of prepetition social security overpayments from postpetition social security payments was impermissible); *Tavenner v. United States (In re Vance)*, 298 B.R. 262, 267-68 (Bankr. E.D. Va. 2003) (in bankruptcy context, United States could recoup housing allowance overpayments from future salary payments because both the salary and housing allowance payments arose from the same contract, rather than an entitlement program).

III. Types of Offset

Federal law authorizes several types of offsets to collect various debts. These authorities can be carried out through different operational mechanisms. The following is a list of types of offset discussed in this chapter and other debt collection documents, and describes the legal authorities and operational means of conducting these offsets:

- "Administrative offset" means offset conducted pursuant to 31 U.S.C. § 3716(a) and (c).[2] It is the offset of federal nontax payments (other than current pay and retired military pay) to collect three types of debts—federal nontax, child support, and other debts owed to states. Payments offset under the administrative offset authority include contractor payments, certain benefit payments, final lump sum payments of federal salary, and

[2] While 31 U.S.C. § 3701(a)(1) defines administrative offset broadly as "withholding funds payable by the United States . . . to, or held by the United States for, a person to satisfy a claim," for the purposes of this *Treatise*, the term is defined more narrowly and generally includes only offsets taken pursuant to 31 U.S.C. § 3716. This is because there are more specific statutes that apply to the offset of salary payments (5 U.S.C. § 5514) and tax refund payments (26 U.S.C. § 6402 and 31 U.S.C. § 3720A).

federal retirement annuity payments. Administrative offset can be accomplished through various means, including internal offset, centralized offset through the Treasury Offset Program (TOP), or direct agency-to-agency offset.

- "Centralized administrative offset" means the collection of federal nontax debts from federal nontax payments through TOP pursuant to 31 U.S.C. §§ 3716 and implementing regulations at 31 CFR §§ 285.4 and 285.5. Centralized offsets are conducted by disbursing officials.

- "Common law" offset means any offset authorized under the common law. It generally means an internal offset or a direct agency-to-agency offset, rather than disbursing official or centralized offset.

- "Disbursing official offset" means the offset by the disbursing official (e.g., Treasury, Department of Defense, or Postal Service) pursuant to 31 U.S.C. §§ 3716 and 3720A and regulations promulgated at 31 CFR part 285, subpart A. The offset occurs after the paying agency has certified the amount of the payment. It includes all centralized administrative offset and tax refund offsets conducted by the disbursing official.

- "Internal offset" means an intra-agency offset under any legal authority.

- "Non-centralized offset" means any offset not conducted through TOP, regardless of the legal authority. It includes internal offsets and direct agency-to-agency offsets.

- "Salary offset" means the offset of current federal pay, including military retiree pay, through various means (i.e., TOP, internal offset, and direct agency-to-agency offsets), pursuant to 5 U.S.C. § 5514 and 5 CFR §§ 550.1101-550.1110. The term does not include offset of final lump sum payments of federal salaries (which is considered administrative offset).

- "State payment offset" means the offset of state payments to collect federal nontax debts pursuant to state laws and reciprocal agreements entered into between Treasury and the states as authorized by 31 U.S.C. § 3716(h) and 31 CFR § 285.6.

- "Tax refund offset" means the offset of federal tax refund payments to collect federal debts pursuant to 26 U.S.C. § 6402 and 31 U.S.C. § 3720A and implementing regulations at 31 CFR §§ 285.2, 285.3, 285.5, and 285.8.

IV. Federal Payments

A. All Federal Payments Generally Subject to Offset

Generally, any federal payment may be offset to satisfy a delinquent federal nontax debt up to the amount of the debt or the amount of the payment due. 26 U.S.C. § 6402(d); 31 U.S.C. §§ 3716(a), (c)(1)(A), 3720A(c); 31 CFR § 285.5(e)(1), (f)(2). Unless explicitly exempted by Congress or by the Secretary of the Treasury under statutory authority, all federal payments are

subject to offset. 26 U.S.C. § 6402(d); 31 U.S.C. §§ 3701(a), 3716(a), (c), 3720A(c); 31 CFR § 285.5(e). This means that no other person, including judges, payment agencies, creditor agencies, and contracting officers, may exempt a payment from tax refund or centralized administrative offset. *Id.*; *see also Executive Bus. Media Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (Attorney General is bound by the same laws that govern the agency he is representing); 67 Fed. Reg. 78936, 78940 (2002) ("contracting officials . . . do not have the authority to exempt contract payments from centralized offset. . . . Therefore, contract clauses prohibiting a federal agency from offsetting a payment generally do not apply to centralized offset . . ."). [3]

Some of the statutes protecting certain payments from creditors explicitly exempt the payment from offset. Other statutes exempt the payment from levies, garnishments, and "other legal process." Because "other legal process" generally refers to a writ of process for the enforcement of a judgment, such statutes do not, on their face, exempt the payments from offset. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (discussing the term "other legal process" in the context of 42 U.S.C. § 407, and stating that the term "should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism); *Lockhart v. United States*, 376 F.3d 1027, 1029 (9th Cir. 2004) (stating, without deciding, that offset "is a form of self-help that may not fall within the term ['other legal process']"), *aff'd by Lockhart v. United States*, 546 U.S. 142 (2005); *Powell v. U-Haul Int'l*, 2011 U.S. Dist. LEXIS 66449, *6 (N.D.N.Y June 22, 2011) (finding that the charging of Plaintiff's debit card constitutes did not constitute "other legal process" because it was not akin to execution, levy, attachment, or garnishment); *Sanford v. Standard Federal Bank*, 2011 U.S. Dist. LEXIS 17465, 2011 WL 721314, at *7 (E.D. Mich. 2011) (finding that the "bank's use of SSI funds to offset an overdraft does not constitute the use of a judicial or quasi-judicial mechanism" and is therefore not "other legal process"); *Wilson v. Harris N.A.*, 2007 U.S. Dist. LEXIS 65345, *33-34 (N.D. Ill. Sept. 4, 2007) (finding that the bank's collection of overdraft fees from Plaintiff's bank account which consisted of SSA benefit payments was not "other legal process"); 66 Comp. Gen. 260, *6-8 (1987) (while annuity payments were not subject to "other legal process" under 10 U.S.C. § 1450(i), offset was not "other legal process").

[3] Similarly, courts do not have the authority to override the clear will of Congress, absent a constitutional deficiency. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (stating that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) ("[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language"). This is true even if the court disagrees with the result. *Astrue v. Ratliff*, 560 U.S. 586, 598-604 (2010) (9-0 decision) (Sotomayor, J., concurring) (agreeing with the majority that offset was required by the plain meaning of the relevant statutes, but expressing dislike for the result); *United States v. Sotelo*, 436 U.S. 268, 279 (1978) ("However persuasive these considerations might be in a legislative forum, we as judges cannot override the specific policy judgments made by Congress in enacting the statutory provisions with which we are here concerned"). That is, courts do not have the authority to deny federal agencies the right of setoff, especially where Congress has explicitly provided for that right.

B. Special Rules for Certain Federal Nontax Payments

As described above, all federal payments are generally subject to offset to collect delinquent federal nontax debt. And, generally, the entire federal payment is subject to offset. There are several exceptions to these general rules. Some payments are entirely exempted from offset, while other payments are partially exempted from offset. This section will explore the rules applicable to federal nontax payments.

(1) Secretary-Exempted Payments: Means Tested

When requested by the head of the paying agency, the Secretary of the Treasury must exempt from centralized administrative offset payments under means-tested programs. 31 U.S.C. § 3716(c)(3)(B); 31 CFR § 285.5(e)(7)(i). Means-tested programs are defined as those programs "which base eligibility on a determination that the income and/or assets of the beneficiary are inadequate to provide the beneficiary with an adequate standard of living without program assistance." 31 CFR § 285.5(e)(7)(i). Treasury's Bureau of the Fiscal Service (Fiscal Service) has published standards for federal agencies to submit exemption requests to the Secretary, and prescribe the criteria that the Secretary will use to evaluate and respond to such requests. Exemption of Classes of Federal Payments from the Treasury Offset Program: Standards and Procedures (issued January 4, 2001) [hereinafter the TOP EXEMPTION STANDARDS], available at http://www.fiscal.treasury.gov/fsservices/gov/debtColl/pdf/dca/dmexem.pdf. Examples of means-tested payments include food stamp programs, supplemental security income programs, and temporary assistance to needy families programs. *Id.*

(2) Secretary-Exempted Payments: Non-Means Tested

When requested by the head of the paying agency, the Secretary may exempt non-means tested payments from administrative offset. 31 U.S.C. § 3716(c)(3)(B); 31 CFR § 285.5(e)(7)(ii). The paying agency may request that the Secretary exempt the entire payment or a percent of the payment. 31 CFR § 285.5(e)(7)(ii). If granted, the exemption applies to a class of payments, rather than to an individual payment. *Id.* Treasury will use the TOP Exemption Standards to evaluate such requests. As required by statute, these standards "give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program." 31 U.S.C. § 3716(c)(3)(B); TOP Exemption Standards. Among other things, these Standards require Treasury to consider whether there are any alternative financial resources available to payment recipients, whether payments can be made to alternative payees to accomplish the same program purpose, whether administrative offset is cost-effective and administratively feasible, and whether administrative offset will interfere with an important national interest. TOP EXEMPTION STANDARDS.

A listing of all means-tested and non-means tested payments that the Secretary has exempted from offset is available at http://www.fiscal.treasury.gov/fsservices/gov/debtColl/pdf/dca/dmexmpt.pdf.

(3) Loan Payments

The Secretary exempted federal loan payments (other than travel advances) from centralized administrative offset. 31 U.S.C. § 3716(c)(5) (authorizing the Secretary to prescribe the rules, regulations, and procedures necessary to carry out centralized offset); 31 CFR § 285.5(e)(2)(vii) (exempting loan payments other than travel advances from administrative offset).[4] The reason for the exemption of federal loan payments was explained as follows:

> If a loan payment is offset, the debtor/payee pays off one agency by creating a debt owed to another agency. The government's interests in debt collection through offset are not advanced by paying off a debt owed to one agency by creating a debt owed to another.

67 Fed. Reg. at 78939. Generally speaking, however, delinquent debtors should not be receiving federal loan payments. *See* 31 U.S.C. § 3720B (barring delinquent nontax debtors from most types of federal financial assistance).

Loan payments in the form of travel advances, however, were not exempted from centralized offset. 31 CFR § 285.5(e)(2)(vii). While exemption was warranted for other types of loan payments, it was not necessary for travel advances for a few reasons. 67 Fed. Reg. at 78939. First, federal employees have an ethical duty to pay their debts, especially those owed to federal and state agencies. *Id.* (citing 5 CFR § 2635.101(b)(12)). Second, unlike other types of loans, travel advances are short-term loans that are repaid as soon as an employee travels. *Id.* Third, while all delinquent nontax debtors are generally barred from receiving federal financial assistance, agencies generally do not have access to an employee's credit report or other information to determine whether the employee owes a delinquent nontax debt prior to issuing a travel advance. *Id.; see also* 31 U.S.C. § 3720B. So, if an agency fails to properly bar the employee from receiving the travel advance, the payment should be offset. *Id.*

(4) Tariff Payments

Amounts payable under the tariff laws of the United States are excluded from administrative offset. 31 U.S.C. § 3701(d)(3). Tariff laws generally refer to laws related to the imposition and collection of customs duties on imported goods, and are generally codified in Title 19 of the United States Code. *See* 31 U.S.C.A. § 3701.

(5) Federal Salary Payments

Like other federal payments, federal salary payments may (and generally must) be offset for the collection of delinquent federal nontax debts. 5 U.S.C. § 5514(a)(1); 31 U.S.C. § 3716(a), (c); 5 CFR § 550.1101-1108; 31 CFR § 285.7(d). Unlike most other federal payments, however, the amount which can be offset is limited. Only 15% of a debtor's disposable pay can be offset, unless the debtor agrees to a higher deduction. 5 U.S.C.

[4] Congress also exempted certain loan payments by statute. 31 U.S.C. § 3716(c)(1)(C) (exempting payments under title IV of the Higher Education Act of 1965 from administrative offset).

§ 5514(a)(1); 31 CFR § 285.7(g). Prior to offsetting a salary payment, the agency must have promulgated salary offset regulations. 5 U.S.C. § 5514(b); 5 CFR § 550.1104.

a) Salary Payments Defined

For the purposes of salary offset, federal salary payments include "basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay." 5 U.S.C. § 5514(a)(1). As used here, "retired pay" does not include retirement payments to former civilian employees certified by the Office of Personnel Management. *In re Collection*, 64 Comp. Gen. 907 (1985) (payments from the Retirement Fund are governed by 31 U.S.C. § 3716, not 5 U.S.C. § 5514). Rather, it includes retirement pay certified by the former employee's agency (i.e., military retiree pay). *Id.* (citing 5 U.S.C. § 8311(3) (defining "retired pay")); *see also* 5 CFR § 550.1103 (defining "disposable pay").

For the purpose of salary offset, salary payments also do not include final salary payments, lump sum payments, or travel advances or reimbursements. 5 U.S.C. § 5514(a)(1) (if an employee ceases active duty with an agency "before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned"); *see also* 31 CFR § 285.7(a)(6); 70 Fed. Reg. 22797, 22798 (2005). These non-salary payments have historically be distinguished from current pay. *See* 64 Comp. Gen. 907 (noting that final pay has been historically distinguished from current pay). Non-salary payments generally can be offset up to 100%. 5 U.S.C. § 5514 (if an employee ceases active duty with an agency "before collection of the amount of the indebtedness is completed," deduction shall be made "from subsequent payments of any nature due the individual from the agency concerned"); 31 CFR 285.7(a)(6) (the salary offset regulations do "not govern the centralized offset of final salary payments"); 70 Fed. Reg. at 22797 (a disbursing official may offset up to 100% of a former employee's final payment); *see also Crenshaw v. Ala. Dep't of Human Res.*, Civ. No. 07-2832, 2008 U.S. Dist. LEXIS 74121, *8-9 (D. Md. Sept. 23, 2008) (finding explicit authority for administrative offset under 31 U.S.C. § 3716, including for travel reimbursement payments).

b) Disposable Income Defined

Disposable pay is defined as the "part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld." 5 CFR § 550.1103; *see also* 5 U.S.C. § 5514(a)(5); 31 CFR § 285.7(b). For the purposes of this definition, amounts required to be withheld do not include garnishments for child support or alimony. 5 CFR § 550.1103. Nor do they include commercial garnishments. *Id.* Amounts required to be withheld, however, do include amounts withheld for levies pursuant to the Internal Revenue Code or amounts withheld for federal employment taxes, Medicare, health care premiums, retirement contributions, and life insurance premiums. *Id.* (citing 5 CFR §§ 581.105(b)-(f)).

(6) Benefit payments

a) Partial Exemption

Like other federal payments, most federal benefit payments[5] may (and generally must) be offset for the collection of delinquent federal nontax debt. 31 U.S.C. § 3716(a), (c); 31 CFR § 285.4. Unlike most other federal payments, however, the amount which can be offset is limited. By statute, a debtor's benefit payments of up to $9,000 per year—or $750 per month—are exempt from offset. 31 U.S.C. § 3716(c)(3)(A)(ii); 31 CFR § 285.4(e)(1)(iii). That is, the aggregate amount of a debtor's monthly benefit payments must exceed $750 to qualify for offset. *Id.*[6]

In addition, each benefit payment can only be offset up to 15%. 31 CFR § 285.4(e)(ii). The 15% limitation was imposed by regulation in response to the concerns some members of Congress expressed when enacting the Debt Collection Improvement Act. 63 Fed. Reg. at 444987-8. The Members were concerned that federal benefit recipients may depend on the benefit payments for a substantial part of their income. *Id.* (citing House Conference Report No. 104–537 on H.R. 3019, Balanced Budget Down Payment Act, II (April 25, 1996); Senate Report No. 104–330 on H.R. 3756, Treasury, Postal Service, and General Government Appropriation Bill 1997 (July 23, 1996); Conference Report accompanying the 1997 Appropriations Act, Congressional Record, September 28, 1996, H12005). With these concerns in mind, Fiscal Service imposed a 15% limit on the offset of federal benefit payments. *Id.*; *see also* 31 CFR § 285.4(e)(ii).

In other words, the amount of a benefit payment eligible for offset is the lesser of:

(i) the amount of the debt;
(ii) an amount equal to 15% of the monthly covered benefit payment; or,
(iii) the amount, if any, by which the monthly covered benefit payment exceeds $750.

31 CFR § 285.4(e); *see also Yagman v. Whittlesey*, Civ. No. 12-08413, 2013 U.S. Dist. LEXIS 130056, *11-13 (C.D. Cal. Aug. 9, 2013), *appeal docketed*, No. 14-55006 (9th Cir. January 6, 2014) (discussing the 15% offset limitation and the $750 floor). For example, if a debtor receives monthly benefits payments of $850, the amount which can be offset is the lesser of $127.50 (15% of $850) or $100 (the amount by which $850 exceeds $750). In this example, assuming the debt is at least $100, the amount which can be offset is $100. 63 Fed. Reg. at 44988.

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[5] The statute defines federal benefit payments as amounts received by the debtor under "programs cited under clause (i)" of 31 U.S.C. § 3716(c)(3)(A). *See* 31 U.S.C. § 3716(c)(3)(A)(ii).

[6] Due to the operational complexity of calculating the maximum allowable offset amount for debtors who receive more than one type of benefit payment, Fiscal Service offsets only those monthly covered benefit payments which individually exceed the $750 threshold. 63 Fed. Reg. 44986, 44987 (1998). So, while 31 U.S.C. § 3716 permits aggregating all benefit payments received by a debtor in meeting the $750 floor, due to the operational complexity of making this calculation, Fiscal Service calculates the floor separately for each individual payment. *Id.*

b) Veterans Benefits

While federal benefit payments are generally subject to offset, Congress has specifically protected certain benefit payments from the reach of creditors. For example, the United States generally cannot offset Veterans Affairs (VA) benefits payments to satisfy federal debts, regardless of whether the offset is conducted pursuant to common law or statute. 38 U.S.C. § 5301 (VA benefit payments are generally "exempt from the claim of creditors" and "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever"). The United States can, however, offset VA benefit payments to recoup past overpayments of VA benefit payments. 38 U.S.C. § 5301(c).

c) Other Benefit Payments

In addition to VA benefit payments, there are several other types of benefit payments that are generally protected from creditors. Although these payments are generally protected from creditors, some of them are nevertheless subject to administrative offset for a debt owed to the United States. Pursuant to 31 U.S.C. § 3716(c)(3)(A)(i):

> Notwithstanding any other provision of law . . . , except as provided in clause (ii), all payments due to an individual under—
>
> (I) the Social Security Act
> (II) part B of the Black Lung Benefits Act, or
> (III) any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits),
>
> shall be subject to offset under this section.

31 U.S.C. § 3716(c)(3)(A)(i). Moreover, pursuant to 31 U.S.C. § 3716(c)(3)(C):

> The provisions of sections 205(b)(1), 809(a)(1), and 1631(c)(1) of the Social Security Act[7] shall not apply to any administrative offset executed pursuant to this section against benefits authorized by title II,[8] VIII[9], or title XVI[10] of the Social Security Act, respectively.

31 U.S.C. § 3716(c)(3)(C). Given the explicit provisions of 31 U.S.C. § 3716, federal agencies can administratively offset the following federal benefit payments:

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[7] 42 U.S.C. §§ 405(b)(1), 1009(a)(1), and 1383(c)(1).
[8] Federal Old-Age, Survivors, and Disability Insurance Benefits
[9] Special Benefits for Certain World War II Veterans
[10] Supplemental Security Income for the Aged, Blind, and Disabled

- Federal Old-Age, Survivors, and Disability Insurance (OASDI)[11] benefit payments under the Social Security Act[12]
- Payments under part B of the Black Lung Benefits Act[13]
- Payments administered by the Railroad Retirement Board (other than tier 2 benefit payments)[14]

Federal agencies, however, cannot administratively offset payments under the Black Lung Benefits Act (other than payments made under Part B), and payments under Longshore and Worker's Compensation Act. *See* 31 U.S.C. § 3701(d); 31 U.S.C. § 3716(c)(3); 30 U.S.C. § 932(b); 33 U.S.C. § 916; 42 U.S.C. § 407.

(7) Civil Service Retirement Payments

Like other federal payments, federal civil service retirement annuity payments may be offset for the collection of federal nontax debt. 31 U.S.C. § 3716; 31 CFR § 285.5(e)(1). By regulation, the Secretary of the Treasury exempted 75% of each retirement annuity payment from centralized administrative offset. 31 CFR § 285.5(f)(2)(i)(C).

By limiting the offset amount for federal retirement payments, these payments are treated similarly to other income payments protected by law, including private sector wages. 15 U.S.C. § 1673(a)(1) (limiting garnishments of disposable pay to 25%); 67 Fed. Reg. at 78940-41 (explaining Secretary's reasons for exempting 75% of federal retirement payments). Although not statutorily required, Fiscal Service determined that this limit was warranted after balancing the Government's interest in collecting debts within a reasonable time with the debtor's interest in receiving some retirement income. 67 Fed. Reg. at 78940-41.

(8) Settlements and Judgments

Like other federal payments, judgments and settlements that are paid by the United States are subject to centralized administrative offset for the collection of federal nontax debt. 31 U.S.C. § 3716(a), (c); 31 CFR § 285.5(e)(1) (listing types of federal payment eligible for offset, including judgment payments); *see also* 31 U.S.C. § 3728(a) (requiring Treasury to withhold paying from the Judgment Fund a judgment against the United States for a debt owed by the plaintiff); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998)

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[11] Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, established a federal insurance program to pay cash benefits to elderly and disabled workers and to their survivors and dependents.

[12] *See Lockhart v. United States*, 546 U.S. 142, 145 (2005) (holding that "[b]ecause the Debt Collection Improvement Act clearly makes Social Security benefits subject to offset, it provides exactly the sort of express reference that the Social Security Act says is necessary to supersede the anti-attachment provision"); *Omegbu v. U.S. Dep't of Treasury*, 118 Fed. Appx. 989, 991 (7th Cir. 2004) (holding that offset of social security benefit payments was permissible, notwithstanding, 42 U.S.C. § 407, due to the express language of 31 U.S.C. § 3716); *Jones v. U.S. Dep't of Educ.*, 2010 U.S. Dist. LEXIS 67609, 7-8 (E.D.N.Y. July 6, 2010) (permitting offset of social security benefits for collection of federal student loan).

[13] 31 U.S.C. § 3716(c)(3)(A)(i)(II).

[14] 31 U.S.C. § 3716(c)(3)(A)(i)(III).

(recognizing the right of the United States to set off judgment payments to collect debts); *United States v. Cohen*, 389 F.2d 689, 690 (5th Cir. 1967) ("it is the duty of the Comptroller General to withhold payment to a judgment creditor as an off-set against the indebtedness of that creditor to the United States"). The full amount of these payments may be offset. 31 U.S.C. § 3716(c)(1)(A); 31 CFR § 285.5(e)(9).

When entering into a settlement agreement, agencies—or the Attorney General on their behalf—are not authorized to exempt the settlement payment from offset (which is mandatory), as the authority to exempt payments lies with Congress. *See Applegate v. United States*, 52 Fed. Cl. 751, 758 (Fed. Cl. 2002) (stating in dicta that "[t]he only exception to the Attorney General's otherwise plenary settlement authority arises where there is some 'clear and unambiguous directive from Congress' that limits that authority") (citing *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); *Executive Bus. Media, Inc.*, 3 F.3d at 762; *see also Johnston v. Dep't of the Treasury*, 2004 M.S.P.B. LEXIS 2591 (M.S.P.B. Sept. 30, 2004) (settlement agreement between former employee and an agency required that agency to pay the settlement amount without offset, but did not affect the rights of other federal agencies from offsetting the payment). That is, while the Attorney General has broad discretion and plenary authority to settle disputes, the Attorney General, in representing a government agency, is bound by the same laws that govern the agency. *Executive Bus. Media Inc.*, 3 F.3d at 762.

C. Special Rules for Federal Tax Payments

As described above, all federal payments—including tax refund payments—are generally subject to offset to collect delinquent federal nontax debt. 31 U.S.C. § 3720A (requiring tax refund offset); 26 U.S.C. § 6402(d) (same); *see also* 31 CFR § 285.2.

(1) Joint Taxpayers

Tax refund payments are often made jointly to two payees. A joint tax refund payment is subject to offset for a debt of either payee. 31 CFR § 285.5(e)(4); *see also* 31 CFR § 285.2(f). If an offset occurs for a debt owed by only one spouse, the non-debtor spouse (i.e., the "injured spouse") can contact the Internal Revenue Service (IRS) to claim the portion of the tax refund to which he or she is entitled. 31 CFR § 285.2(f); 67 Fed. Reg. at 78939-40.

(2) Disclosure

Information about tax refund payments generally constitutes "return information." *See* 31 U.S.C. § 6103(b)(2). To the extent an agency has received federal tax information, the agency may be limited in whether and under what circumstances it may disclose that information. *See generally* 26 U.S.C. § 6103; 31 CFR § 285.2(j); *see also* 62 Fed. Reg. 34175, 34176 (1997) (Fiscal Service "will provide creditor agencies with sufficient information to identify the debt for which amounts have been collected, but will not disclose the payment source for the amounts collected").

D. Special Rules for State Payments

Certain payments made by states may be offset to collect federal nontax debt. 31 U.S.C. § 3716(h); 31 CFR §§ 285.1, 285.6. This is done through Fiscal Service's State Reciprocal Offset Program, which allows states to collect certain debts through the offset of federal nontax payments in return for allowing the United States to collect federal nontax debts through the offset of certain state payments. *Id.* States participating in this reciprocal offset program must enter into an agreement with Fiscal Service. *Id.* This agreement, among other things, sets forth which state payments will be eligible for offset to collect federal nontax debts. *Id.*

V. Federal Nontax Debts

A. All Federal Nontax Debts Are Subject to Offset.

When thinking about offset, it is necessary to distinguish between the general rules that apply to payments and the general rules that apply to debts. This section will discuss the federal nontax debts that may be collected through the offset of certain federal and state payments.

While there are certain payments that are exempt from centralized administrative offset, all delinquent, legally enforceable federal nontax debts are required to be collected through offset. 31 U.S.C. § 3716; 31 U.S.C. § 3720A. And, as described in Section VI below, federal agencies are required to submit debts delinquent for more than 120 days to TOP.

B. Eligible Debts

(1) Debt Defined

A debt is defined as "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency." 31 U.S.C. § 3701 (definition of debt for administrative and tax refund offset purposes); *see also* 31 CFR § 285.2(a) (definition of debt for centralized, tax refund offset purposes); 31 CFR § 285.5(b) (definition of debt for centralized, administrative offset purposes). For purposes of centralized offset, an eligible debt must be past-due and legally enforceable. 31 CFR § 285.2(b)(1), (d)(1); 31 CFR § 285.5(d)(3)(i). The debt must also be for more than $25 and not secured by collateral subject to a pending foreclosure action, unless the offset will not affect the Government's rights to the secured collateral. *Id.* Debts subject to the automatic stay or discharge injunction due to bankruptcy are not legally enforceable for offset purposes. 67 Fed. Reg. at 78939.

(2) Agency Determination

To be eligible for administrative offset, a debt must be determined to be due by an agency official. 31 U.S.C. § 3701(b); 31 CFR § 285.5(a), (b). Debts that are subject to a pending

administrative review process, for example, generally are not legally enforceable for the purposes of centralized offset. 31 CFR § 285.5(b) (definition of "legally enforceable"). On the other hand, an appeal of a final agency decision does not necessarily render the debt unenforceable. 70 Fed. Reg. 3142, 3143 (2005) ("Statutes, regulations and agency guidance applicable to particular debts may provide for appeals after a final agency decision on any matter related to the debt").

(3) Due Process

As described in Part I.B of this *Treatise*, the United States may not deprive a person of property without first providing due process. U.S. CONST. amend. V. Offset is a governmental action and is a deprivation of property. Thus, prior to collecting a debt through offset, agencies generally must provide the debtor with due process.

Offsets conducted pursuant to common law must meet the requirements of the Constitution. Offsets conducted pursuant to statute must also meet the requirements of the Constitution, which are generally defined by statute and regulation. Most statutory offset authorities provide for due process requirements that are specific to the type of offset being conducted. As such, the specific due process requirements will be discussed separately for administrative and tax refund offset in Section VI below.

(4) Excluded Debts/Debtors

While all debts can be collected through offset, there are some debts (or debtors) that are excluded from the statutory administrative and tax refund offset regimes.

a) Federal Agencies

Federal agencies are not debtors for the purposes of federal nontax debt collection. A debtor is any person, other than a federal agency, that owes a debt to the United States, including individuals, companies, states and localities, and other entities. 31 U.S.C. § 3701(c) ("In section 3716 . . . of this title, the term 'person' does not include an agency of the United States Government"); *see also Gov't Printing Office—Interest on Late Payments*, B-260532, 1995 U.S. Comp. Gen. LEXIS 317, 1995 WL 274916, at *1 (Comp. Gen. May 9, 1995) (stating that "interagency claims are not subject to remedies otherwise available for the collection of such debts").

b) Foreign Sovereigns

Foreign sovereigns are considered to be debtors for the purposes of federal nontax debt collection. 31 U.S.C. § 3701(b); 31 CFR § 285.5(d)(3)(iii). However, unlike debts owed by other types of debtors, creditor agencies may, but are not required to, submit debts owed by foreign sovereigns to Fiscal Service for offset purposes. 31 CFR § 285.5(d)(3)(iii); 67 Fed. Reg. at 78937 (permitting this exclusion under 31 U.S.C. § 3716(c)(5), which authorizes the Secretary to prescribe the rules necessary to carry out the centralized offset program). This exclusion applies to foreign sovereigns, and

not privately owned foreign corporations or by foreign individuals. *Id*. The Secretary deemed this exclusion appropriate because requiring submission of such debts for offset purposes could interfere with important foreign policy goals. 67 Fed. Reg. at 78937.

c) Tax and Tariff Debts

Debts arising under the Internal Revenue Code or the tariff laws of the United States should also not be considered debts for the purpose of administrative offset. 31 U.S.C. § 3701(d)(1) and (3); *see also Lyle v. Commodity Credit Corp.*, 104 F.3d 367, 1996 U.S. App. LEXIS 33314, at *6 (10th Cir. 1996) (stating that "31 U.S.C. § 3716 is inapplicable to debts under the Internal Revenue Code"). Because of the unique nature of tax and tariff debts, this treatise does not address what offset rights the government may possess to collect such debts.

d) Debts arising under certain portions of the Social Security Act

Administrative offset under 31 U.S.C. § 3716 generally does not apply to debts arising under the Social Security Act, except to the extent the debt arose from an overpayment of benefits. 31 U.S.C. §§ 3701(d)(2); 42 U.S.C. § 404(a)(1)(A), 1631(b)(4); 31 CFR § 285.5(b) (definition of "Debt or claim"); *see also* 31 U.S.C. § 3720A(f).

e) Hardship

In rare circumstances, a creditor agency can request that the amount of an offset be reduced below the maximum allowed by law. 31 CFR 285.5(d)(12). The debtor, however, is not entitled to such a reduction. *See id.* This should generally only occur when the creditor agency has determined that a lesser offset amount is reasonable and appropriate based on the debtor's financial circumstances. *Id.* A certified financial statement from the debtor will generally be necessary for this determination. *Id.*

C. No Statute of Limitations

Unless Congress explicitly provides for a limitations period, federal agencies will not be time barred from collecting their debts through any means, including offset. In general, there is no statute of limitations for offset.[15] 31 U.S.C 3716(e)(1) (explicitly stating that no time limitation on collection through administrative offset shall be effective); 31 CFR § 285.5(d)(3)(v) (stating

[15] While Congress originally provided for a ten year statute of limitations for administrative offset, it removed this limitation in 2008. Food, Conservation and Energy Act of 2008, Pub. L. 110-234, § 14219, 122 Stat. 923. An effect of this amendment is that debts that were once outside the umbrella of administrative offset due solely to the statute of limitations are now once again eligible to be collected via administrative offset. *See id;* 74 Fed. Reg. 27707, 27707-08 (2009). Prior to collecting on these older debts, however, federal agencies may need to provide the debtor with additional notification of their intent to offset. *See, e.g.*, 31 CFR § 285.5(d)(6)(iii) (for debts delinquent more than ten years as of June 11, 2009, agency must send the debtor notice of its intent to offset); 31 CFR § 285.2(d)(6)(ii) (similar); 31 CFR § 285.7(d)(7) (similar). This additional notification is intended to alert a debtor that the statute of limitations the debtor may have been relying upon is no longer applicable. 74 Fed. Reg. at 27707-08.

that a debt can be collected through centralized offset "irrespective of the amount of time the debt has been outstanding"). Moreover, a defense of laches against the United States will generally fail. *Lee v. Spellings*, 447 F.3d 1087, 1089-90 (8th Cir. 2006) (holding that the United States retained its right to collect through administrative offset and the defense of laches "may not be asserted against the government").

Even when a statute of limitations for pursuing a civil action has expired, the United States can still pursue collect via offset. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 96-99 (2006) (stating that a statutory limit on a judicial remedy does not limit administrative remedies); *Thomas v. Bennett*, 856 F.2d 1165, 1168-69 (8th Cir. 1988) (the statute of limitations in 28 U.S.C. § 2415(a) "merely eliminates one potential remedy" to collect the debt and did not, therefore, eliminate the right of offset); *Gerrard v. U.S. Office of Educ.*, 656 F. Supp. 570, 574 (N.D. Cal. 1987) (holding that the fact that the statute of limitations for the remedy of a civil action had been cut off did not preclude the government from collecting the debt by administrative offset); *Matter of Dep't of Homeland Sec. Inspector Gen.*, 2009 U.S. Comp. Gen. LEXIS 42, 2009 WL 674390, at *7 (Comp. Gen. Mar. 13, 2009) (agency "should be alert to opportunities that may be available to offset or withhold other funds payable to the" debtor, even if recovery is time barred by another statute).

VI. Centralized (Disbursing Official) Offset

Fiscal Service has the operational responsibility for operating the Treasury Offset Program (TOP), through which federal agencies can collect delinquent debts by the centralized offset of federal tax and nontax payments.[16] 31 U.S.C. § 3716(c); 31 U.S.C. § 3720A(h); 31 CFR § 901.3; 31 CFR §§ 285.2, 285.4, 285.5-285.7. Fiscal Service also has authority to issue regulations regarding the offset of tax and nontax payments for the collection of federal nontax debts. 31 U.S.C. §§ 3716(b)(1), (c)(5), 3720A(d).

Federal agencies are required to submit their delinquent nontax debts to Fiscal Service for offset purposes. 31 U.S.C. § 3720A (requiring tax refund offset); 31 U.S.C. § 3716(c)(6) (requiring administrative offset); 31 CFR § 285.5(d) (same); *see also Anand v. U.S. Nat'l Sec. Agency*, No. 5:05-cv-469 (FJS/GJD), 2006 WL 3257430, 2006 U.S. Dist. Lexis 82165, at *7-8 (N.D.N.Y. Nov. 9, 2006) (statute's mandatory language establishes a lack of agency discretion in referring a valid delinquent debt for offset purposes). When an agency refers a debt to Fiscal Service for offset purposes, the debt will generally be subject to collection by any federal payment (and certain state payments) made to the debtor. 31 U.S.C. § 3716; 31 U.S.C. § 3720A.

Prior to submitting a debt to TOP, however, agencies must satisfy the prerequisites of each type of offset. TOP is programmed to comply with a variety of laws, including laws that govern how debts can be collected, what payments can be intercepted, and how offset can be conducted. This section will provide an overview of some of these laws, including the requirement to use administrative offset and tax refund offset to collect delinquent debts and the prerequisites to

[16] TOP also includes programs to collect certain state debts (including the State Reciprocal, Child Support, and State Income Tax, and Unemployment Insurance Compensation Programs) and a program to collect certain federal tax debts (i.e., the Federal Payment Levy Program whereby TOP is used to process levies served by the IRS).

using these debt collection remedies. It will also describe in the offset process, and those of the payment agencies, the creditor agencies, and the disbursing agencies (including the Fiscal Service). It will also describe the role of the Fiscal Service in administering TOP.

A. Administrative Offset

(1) Creditor Agency Must Use Centralized Administrative Offset

Creditor agencies are required to use centralized administrative offset to collect federal nontax debts once debts are delinquent for 120 days. 31 U.S.C. § 3716(c)(6)(A). Creditor agencies may use administrative offset to collect delinquent debts at an earlier time, if they have satisfied the necessary prerequisites. *See* 31 U.S.C. § 3716(a).

Unless otherwise specified, the requirements for centralized, administrative offset in the context of federal salary or federal benefit payments mirror the requirements for general, centralized administrative offset. *See* 31 CFR § 285.5(e)(3); *see also* 31 CFR §§ 285.2, 285.7.

(2) Creditor Agency Must Satisfy Prerequisites to Administrative Offset

a) Attempt to Collect

Prior to initiating an administrative offset, a creditor agency must "try" to collect a debt under 31 U.S.C. § 3711(a). 31 U.S.C. § 3716(a). The statute does not specifically delineate what constitutes a sufficient attempt to collect, but sending a demand letter probably suffices. *See McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1570 (Fed. Cir. 1993) (agency was not required foreclose on collateral, mediate, or file suit before initiating offset).

b) Notice

Prior to collecting a claim through administrative offset, agencies must first notify the debtor that the agency intends to use administrative offset to collect the debt. 31 U.S.C. § 3716(a)(1). A federal agency must also provide the debtor with written notice of the type and amount of the claim, and an explanation of the debtor's rights. 31 U.S.C. § 3716(a)(1) (setting forth the statutory requirements for administrative offset); 31 CFR § 285.4 (setting forth the regulatory requirements for administrative offset of benefit payments); 31 CFR § 285.5 (setting forth the regulatory requirements for centralized offset); 31 CFR § 285.7 (setting forth the regulatory requirements for salary offset).

The precise wording of the notice is left to the creditor agency. *See id.*; *but see Christensen v. United States*, 05-cv-4060, 2006 U.S. Dist. LEXIS 26224, 2006 WL 744296, at *7 (W.D. Mo. Mar. 23, 2006) (indicating that the agency's notice should have explicitly mentioned "administrative offset"). Notice must be written, and "reasonably calculated to reach the debtor," meaning that it can be provided through first class mail, certified mail or, in some circumstances, by email. 31 U.S.C. § 3716(a)

(requiring "written notice"); 31 CFR 901.3(b)(4)(ii)(A) (same); 31 CFR 285.5(d)(5) (requiring "[w]ritten notification . . . at the debtor's most current address known to the agency"). Actual notice is not required, as long as the agency can prove that its notice was sent to the debtor's last known address. *See, e.g., Omegbu v. U.S. Dep't of Treasury*, 118 F. A'ppx 989, 991 (7th Cir. 2004) (notice mailed to debtor's last known address was sufficient); *Setlech v. United States*, 816 F. Supp. 161, 162, 166-67 (E.D.N.Y. 1993) (notice to last known address was sufficient for tax refund offset purposes, even if debtor never received notice), *aff'd*, 17 F.3d 390 (2d Cir. 1993); *but see Jones v. Flowers*, 547 U.S. 220, 235 (2006) (in the context of the sale of real property, holding that reasonable, additional steps were necessary, if available, upon agency learning its notice attempt was ineffective).

Notice must be given at least sixty days prior to submission of the debt for offset, and the notice must be sent to the debtor's last known address. 31 CFR § 285.5(d)(6)(ii)(A). While the administrative offset statute does not specify a notice period, Fiscal Service's offset regulations provide for a sixty day notice period to match the notice period required for tax refund offset. *See id.*; *see also* 31 U.S.C. §§ 3716, 3720A(b)(2).

c) Opportunity to Review Records

Prior to collecting a claim through administrative offset, a federal agency must provide the debtor with "an opportunity to inspect and copy the records of the agency related to the claim." 31 U.S.C. § 3716(a)(2); 31 CFR 285.5(d)(6)(ii)(B). The agency is generally not required to produce every relevant document in the agency's possession upon a debtor's request to review the agencies records. *See American Airlines v. Austin*, 826 F. Supp. 553, 556-57 (D.D.C. 1993) (interpreting 31 U.S.C. § 3716(a)(2)). Rather, production of the documents on which the agency relied to render its determination is generally sufficient. *See id.*

d) Opportunity for Agency Review

Prior to collecting a claim through administrative offset, a federal agency must provide the debtor with an opportunity for a review within the agency of the decision of the agency related to the claim." 31 U.S.C. § 3716(a)(3); 31 CFR 285.5(d)(6)(ii)(C); *see Glinsey v. United States*, No. 2:98CR010-GHD, 2011 U.S. Dist. LEXIS 79198, at *5-6 (N.D. Miss. July 20, 2011) (debtor's financial ability to pay was not required a basis for agency review). An opportunity for a formal hearing or trial is generally not required prior to conducting an administrative offset. 31 CFR § 901.3(e); *Stover v. Ill. Student Assistance Comm'n*, No. 04-1298, 2005 WL 3597743, 2005 U.S. Dist. LEXIS 9621, at *25-26 (C.D. Ill. Apr. 21, 2005). A written review or "paper hearing" will generally suffice. *Id.* Similarly, an oral hearing is generally not required prior to conducting an administrative offset, except where the "validity of the debt turns on an issue of credibility or veracity." 31 CFR § 901.3(e).

If a debtor requests a review, the agency must review its records, as well as any evidence presented by the debtor. 31 CFR § 285.5(d)(6)(ii)(C); 31 CFR § 901.3(e)(4);

Shlikas v. SLM Corp., Civ. No. 09-2806, 2010 U.S. Dist. LEXIS 88371, at *17-19 (D. Md. Aug. 25, 2010) (denying agency's request for summary judgment because nothing in the record showed that the agency considered the debtor's objections and requests for documents, nor did they show that the debtor was not advised of the agency's decision). After requesting agency review, the agency must also inform the debtor of the agency's determination. *See id.*

e) Opportunity to Enter into Repayment Agreement

Prior to collecting a claim through administrative offset, a federal agency must provide the debtor with "an opportunity to make a written agreement with the head of the agency to repay the amount of the claim." 31 U.S.C. § 3716(a)(4); *see also* 31 CFR 285.5(d)(6)(ii)(C). One distinction between common law offset and offset under 31 U.S.C. § 3716 is that "[t]here is no constitutional requirement that debtors be allowed to negotiate settlements on debts owed to the government." *Wisdom v. Dep't of Hous. & Urban Dev.*, 713 F.2d 422, 425 (8th Cir. 1983). Under the statute, however, agencies are required to provide debtors with this opportunity. 31 U.S.C. § 3716(a)(4). While debtors are entitled to the opportunity to enter into a repayment agreement, the creditor agency has the discretion to determine whether the proposed repayment agreement is reasonable. 31 CFR § 901.8. Generally, an agency should not agree to a repayment agreement if the debtor is financially able to pay the full amount of the debt in one lump sum. 31 CFR § 901.8(a).

f) Additional Due Process Required for Salary Offset

Prior to offsetting federal salary payments, agencies are generally required to provide due process beyond what is required for general centralized administrative offset. 5 U.S.C. § 5514(a)(2); 31 CFR § 285.7(i).

i. Notice

Prior to conducting salary offset, the creditor agency must provide the debtor with 30 days written notice of the nature and amount of the indebtedness determined by an agency official to be due, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the debtor (as well as how to exercise such rights). 5 U.S.C. § 5514(a)(2)(A); 31 CFR § 285.7(d)(3)(iii); 5 CFR § 550.1104(d). The notice must also inform the debtor of the frequency, amount, and duration of the intended deduction(s) and an explanation of the agency's policy regarding the charging of interest, penalties, and administrative costs. 5 CFR § 550.1104(d)(3)-(4).

ii. Opportunity to Dispute

Prior to initiating salary offset, the creditor agency must provide the debtor with an opportunity to inspect and copy the agency's records regarding the debt and an opportunity to enter into a written repayment agreement. 5 U.S.C. § 5514(a)(2)(B)-

(C); 5 CFR § 550.1104. The agency must also provide the debtor with an opportunity for a hearing on the existence or amount of the debt and, for debtors whose repayment schedule was established other than by a written agreement, concerning the terms of the repayment schedule. 5 U.S.C. § 5514(a)(2)(D); 5 CFR § 550.1104.

Such a hearing must be provided if the debtor requests a hearing within 15 days of receiving the notice in accordance with the agency's procedures. 5 U.S.C. § 5514(a)(2); 5 CFR § 550.1104. A timely request for a hearing will stay the commencement of collection proceedings. 5 U.S.C. § 5514(a)(2); 5 CFR § 550.1104(d)(9). An untimely hearing will not stay the commencement of collection proceedings unless the hearing official fails to issue a final decision within 60 days after the hearing request. 5 U.S.C. § 5514(a)(2); 5 CFR § 550.1104(d)(10), (f). Unlike hearings in most other debt collection contexts, a salary offset hearing may not be conducted by an individual under the supervision or control of the head of the agency. 5 U.S.C. § 5514(a)(2)*;* 5 CFR § 550.1104(d)(7). Administrative law judges are not considered to be under the supervision or control of the head of the agency. *See* 5 CFR § 930.201. However, there is no requirement that a hearing official must be an administrative law judge. *See* 5 U.S.C. § 5514. The hearing official is required to issue a final decision at the earliest practicable date, but not later than sixty days after the hearing request. 5 U.S.C. § 5514(a)(2); 5 CFR § 550.1104(d)(10).

iii. Exceptions

While agencies are generally required to provide the debtor with notice and an opportunity to be heard prior to offsetting a salary payment, there are some exceptions that permit the agency to provide post-deprivation due process. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c). For example, an agency can make routine intra-agency pay adjustments attributable to clerical or administrative errors or delays in processing a past salary payment that occurred within preceding 4 pay periods, without first providing notice. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c)(2). Similarly, an agency can make any intra-agency adjustment to pay arising out of an employee's election of coverage or a change in coverage under a federal benefits program which require periodic deductions from pay, if the amount to be recovered was accumulated over 4 pay periods or less. 5 CFR § 550.1104(c)(1). Finally, an agency may make any intra-agency adjustments in pay that amount to $50 or less. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c)(3). If they agency does not provide prior due process, however, it must provide the debtor with written notice at the time of the adjustment or as soon thereafter as practical. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c). This written notice should inform the debtor about the amount and nature of the adjustment and a point of contact for contesting the adjustment. *Id*. In these circumstances, a hearing is generally not required. *Id.*

B. Tax Refund Offset[17]

(1) Creditor Agency Must Use Tax Refund Offset

Tax refund offset is "withholding or reducing a tax refund payment by an amount necessary to satisfy a debt owed by the payee(s) of a tax refund payment." 31 CFR § 285.2(a). It is authorized by 31 U.S.C. § 3720A and 26 U.S.C. § 6402(d). Creditor agencies are generally required to submit their delinquent federal nontax debts to Treasury for tax refund offset purposes, and Treasury (as a disbursing office) is generally required to offset tax refund payments to collect submitted debts. 31 U.S.C. § 3720A; 31 C.F.R § 285.2(b)(1).[18]

(2) Creditor Agency Must Satisfy Prerequisites to Tax Refund Offset

a) Attempt to Collect

Prior to using tax refund offset, agencies must first attempt to collect the debt. 31 U.S.C. § 3720A(b)(4)-(5); 31 C.F.R § 285.2(d)(1)(ii). The statute does not specifically delineate what constitutes a sufficient attempt to collect, but an agency will meet the requirement by taking minimal steps toward collection, such as issuing a demand letter and providing due process. *See id.*; 62 Fed. Reg. at 34177 (explaining that the requirement that agencies must attempt to collect prior to using tax refund offset does not require that the agencies first report the debt to a credit bureau or attempt to collect using administrative or salary offset).

b) Notice

Prior to collecting a claim through tax refund offset, agencies must first notify the debtor that the agency proposes to use tax refund offset to collect the debt. 31 U.S.C. § 3720A(b)(1); 31 C.F.R § 285.2(d)(1)(B)-(C), (2); *Games v. Cavazos*, 737 F. Supp. 1368, 1377-78 (D. Del. 1990) (notice that an offset might occur is sufficient and agencies need not provide actual notice that an offset will occur). This notice must be sent at least sixty days prior to conducting a tax refund offset. 31 U.S.C. § 3720A(b)(2); 31 C.F.R § 285.2(d)(1)(B)-(C).

While agencies are strongly encouraged to provide written notice, the agency can determine for itself what method of notice to use. Notice can be provided through first class mail, certified mail, or email, so long as it is reasonably calculated to notify the debtor. *See* 31 U.S.C. § 3720A (requiring written notification, without specifying the

[17] Tax refund offset, as discussed in this chapter, applies to the collection of federal nontax debts and certain state debts; it does not apply to the collection of federal tax debt. While outside of the scope of this treatise, Treasury is authorized to credit the amount of a tax overpayment to collect a tax debt pursuant to 26 U.S.C. § 6402(a); 26 CFR § 301.6402-1.

[18] The Tennessee Valley authority may, but is not required to, report delinquent nontax debts to Treasury for tax refund offset. 31 U.S.C. § 3720A(a); 31 CFR § 285.2(b)(1).

method of notification); 26 U.S.C. § 6402(d) (not specifying notice requirements); 31 CFR § 285.2(d) (2)(i) (agencies will satisfy the requirement to notify a debtor if it "uses the current address information contained in the agency's records"); *Gerrard*, 656 F. Supp. at 575 (noting that the tax refund offset statute "does not require any particular form of notice"). Actual notice is not required. *Id.*; *In re Huff*, 343 B.R. 136, 143-44 (W.D. Pa. 2006) (stating that actual notice is not requires and finding that a single notice—rather than annual notice—to the debtor was sufficient); *Setlech*, 816 F. Supp. at 167 (stating that "[t]he means used to provide need not eliminate all risk of non-receipt"); *Gerrard*, 656 F. Supp. at 575 (notice by mail to the debtor's regular address was sufficient, regardless of whether the debtor actually received notice).

c) Opportunity for Agency Review

In addition to providing notice, agencies must provide the debtor with an opportunity to dispute the use of tax refund offset in a manner that meets minimum constitutional requirements for due process. Prior to using tax refund offset, agencies must first provide the debtor with at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable. 31 U.S.C. § 3720A(b); 31 CFR § 285.2(d). Agencies must review any evidence presented and inform the debtor of the results of their review. *Id.*

(3) Limited Judicial Review

No court has jurisdiction to review Treasury's actions to offset a federal tax refund payment. The Internal Revenue Code deprives courts from having jurisdiction "to hear any action, whether legal or equitable, brought to restrain or review" a tax refund offset. 26 U.S.C. § 6402(g); 31 CFR § 285.2(i); *Greenland v. Van Ru Credit Corp.*, Civ. No. 06-02, 2006 U.S. Dist. LEXIS 73492, at *12-13 (finding that the court had no jurisdiction to review Treasury's actions regarding the offset of a tax refund payment for the collection of a debt owed to the Department of Education); *Richardson v. Baker*, 663 F. Supp. 651, 654 (S.D.N.Y. 1987) (rejecting plaintiff's claim that the intercept program is unconstitutional and finding that the court lacked jurisdiction "to review an authorized reduction made by the Secretary of the Treasury"); *Satorius v. U.S. Dep't of Treasury-IRS*, 671 F. Supp. 592, 594 (E.D. Wis. 1987) (finding that the court was precluded from reviewing IRS's actions in reducing a tax refund to collect a child support debt and that "Congress clearly recognized that the IRS does not have the information and resources needed to adjudicate the validity of the alleged [debt]").

Courts do, however, have jurisdiction over the creditor agency's actions. The Internal Revenue Code does not "preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid." 26 U.S.C. § 6402(g); *Thomas v. Bennett*, 856 F.2d 1165, 1167-1168 (8th Cir. 1988) (creditor agency's actions reviewable by court).

C. Offset Process

Delinquent debts owed to the United States generally must be submitted to Treasury for collection by offset of eligible federal payments. When a payment is offset, the paying agency has satisfied its payment obligation; specifically, the payment is made in the form of a reduction of a debt, rather than, for example, a deposit into the payee's bank account. 31 U.S.C. § 3716(c)(2); 31 CFR § 285.5(d)(10)(i), (ii), (v); 31 CFR § 285.5(e)(9). Thus, the net effect on the debtor's overall net worth and financial situation is the same regardless of whether the payment is offset.

(1) Payees

a) Generally

Payments are generally offsetable for debts owed by the payee. *See Astrue v. Ratliff*, 560 U.S. 586, 594 (2010) (holding that Equal Access to Justice Act fees are payments to the litigant, not the litigant's attorney and, thus, can be offset to collect debts owed by the litigant); *Caylor v. Astrue*, 769 F. Supp. 2d 1350, 1354 (M.D. Fla. 2011) (leaving to the agency's discretion whether to honor the assignment of the litigant's Equal Access to Justice Act fees to the litigant's attorney and noting that this practice is appropriate only if the litigant does not owe any federal debts). Payment agencies are responsible for identifying the payee (and, in the case where a person other than the payee is subject to having the payment offset, identifying that person). 31 CFR § 285.5(e)(5), (8).

b) Joint Payees

A payment made jointly to two or more persons is offsetable for a debt of either payee. 31 CFR § 285.5(e)(4). This rule is based on the presumption that payments are made to persons who each own an undivided interest in the whole payment. 67 Fed. Reg. at 78939-40. If a non-debtor joint payee requests a refund of the monies that were offset and applied to the debtor joint payee's debt, the payment agency must determine whether the legal presumption was incorrect, and a refund is thus appropriate. 67 Fed. Reg. at 78939-40; *see also* 31 CFR § 285.2(f) (referencing a non-debtor taxpayer's ability to file an injured spouse claim).

c) Assigned Payments

If a person (i.e., an assignor) assigns a right to receive a federal payment to a third party (i.e., an assignee), the assigned payment will be subject to offset to collect a delinquent debt owed by the assignee. 31 U.S.C. § 3716(e)(2) (offset permissible if not prohibited); 31 CFR § 285.5(e)(6). Such payment will also be subject to offset to collect the delinquent debts of the assignor, unless:

(A) In accordance with 41 U.S.C. § 15(e)-(f), the payment has been properly assigned to a financial institution pursuant to a Federal contract, the contract contains provisions prohibiting the payment from being reduced or offset for debts owed by the contractor, and the debt arose independently of the contract; or

(B) pursuant to 31 U.S.C. § 3727, the payment is being made to the assignee as settlement or satisfaction of a claim brought by the assignee against the creditor agency based upon the contract, and the debt of the contractor arises independently of the contract;[19] or

(C) the debtor has properly assigned the right to such payments and the debt arose after the effective date of the assignment.

31 CFR § 285.5(e)(6)(ii)(A)-(C).

d) Payments made to Representative Payees

Certain federal payments can be made to "representative payees." This is common in the context of certain benefit payments, where a nursing home or family member can serve as the representative payee for a person entitled to the benefit of such payments, or where an attorney serves as a representative payee for a client. 67 Fed. Reg. at 78940. Payments that are made to a person solely in that person's capacity as a representative payee are offsetable only to collect debts owed by the person having the beneficial interest in the payment. 31 CFR § 285.5(e)(5). That is, such payments cannot be offset to collect the debts owed by the representative payee. *Id.* Payment agencies are responsible for identifying representative payees. *Id.*

(2) Role of Fiscal Service and the Treasury Offset Program (TOP)

Congress centralized within Treasury the collection of federal nontax debts through offset. 31 U.S.C. § 3716(c). Treasury's Fiscal Service is responsible for Treasury's implementation of these debt collection provisions. Treasury Directive 16-14 (Jan. 9, 2014). Offset was centralized within Fiscal Service, in part, because of Fiscal Service's role as the disbursing agency for the majority of federal payments. *See* 31 U.S.C. § 3321. Because of its role in disbursing payments, Fiscal Service is uniquely suited to perform centralized offset by matching payments made by various federal agencies with debts owed to federal agencies.

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[19] To be valid, the "transfer" or "assignment" of claims against the United States must meet the requirements of the Anti-Assignment Act, 31 U.S.C. § 3727. If the requirements of the Anti-Assignment Act are not satisfied, the assignment of a payment is not valid unless the government waives the Anti-Assignment Act and agrees to accept the assignment. Agencies should not accept assignments if doing so would cause it to lose its right of offset. *United States v. Shannon*, 342 U.S. 288, 291-92 (1952) (stating that a recognized purpose of the Anti-Assignment Act was to preserve the United States' right of setoff); *Walker v. Astrue*, Civ. No. 09-960, 2011 U.S. Dist. LEXIS 100138, at *4-5 (M.D. Ala. 2011) (recognizing that a purported assignment of Equal Access to Justice fees by litigant to litigant's attorney could run afoul of the Anti-Assignment Act and that, while the check payment must be made out to the litigant, it can be mailed to the litigant's attorney).

Fiscal Service uses TOP to process centralized offsets, including administrative offsets and tax refund offsets. 31 CFR § 285.5(a)(1). TOP is not synonymous with centralized offset; rather, TOP is a computerized matching program that automates the process of comparing federal and certain state payments with delinquent debts owed to federal agencies and states. When a debt is referred to Fiscal Service by a creditor agency for centralized offset, it is included in the TOP database. TOP is programmed to apply the offsets in compliance with all applicable statutes and regulations, as they apply to the payments, the debts, and the offset itself. *See generally* 31 CFR § 285.5. In addition to collecting federal nontax debts, TOP collects federal tax debts, child support debts, and other debts owed to states.

(3) Role of the Creditor Agency

a) Submit Delinquent Debts to Fiscal Service

The DCIA requires federal agencies to refer legally enforceable nontax debts that are over 120 days delinquent to Fiscal Service for the purpose of offset. 31 U.S.C. § 3716(c)(6)(A). While federal agencies are required to refer debts 120 delinquent to Fiscal Service for offset purposes, they are encouraged to refer debts earlier, if they have satisfied the prerequisites. 31 CFR § 285.5(d)(2) (permitting early referral); 67 Fed. Reg. at 78937 (encouraging agencies to submit debts as earlier as possible so as to maximize collections). Prior to submitting a debt to Fiscal Service for the purpose of offset, the creditor agency must ensure it has satisfied all applicable prerequisites. *See generally* 31 U.S.C. § 3716; 31 CFR § 285.5. These pre-referral requirements include promulgating applicable regulations, determination that the debt is past due, valid, and legally enforceable, providing the debtor with all appropriate due process, and certifying to Fiscal Service that these requirements have been satisfied. *Id.*

While an agency should generally be able to satisfy the pre-referral requirements by the 120th day of delinquency, if a debt which is over 120 days delinquent is considered not legally enforceable solely because it is under review, the agency will satisfy its requirement to submit the debt to Fiscal Service for collection by offset if it submits the debt within 30 days of completing the review. 31 CFR § 285.5(d)(1); 67 Fed. Reg. at 78937. These 30 additional days are necessary because immediate transfer of a debt to Fiscal Service following a decision on an appeal might be impractical. 67 Fed. Reg. at 78937. In this additional time period, the creditor agency should work to affirmatively collect the debt, including providing debtors with an opportunity to pay the debt or to enter into a repayment plan with the creditor agency before offset action is taken. *See* 31 U.S.C. § 3711(a) (agencies have an affirmative duty to collect). Once the creditor agency determines that a debtor is unlikely to pay the debt or enter into a repayment plan, however, it should submit the debt to Fiscal Service immediately. 67 Fed. Reg. at 78937.

b) Creditor Agency Regulations

Prior to initiating any offset action, each creditor agency must prescribe regulations regarding the agency's offset procedures. 31 U.S.C. § 3716(b); 31 C.F.R §§ 285.2(c);

285.5(d)(4) , 285.7(d)(2). Agencies can satisfy the requirement to prescribe regulations by simply adopting, without change, the governmentwide offset regulations promulgated by Treasury or the Department of Justice (DOJ). 31 U.S.C. § 3716(b)(1). Alternatively, agencies can promulgate their own regulations, so long as they are consistent with the governmentwide regulations. *Id.* § 3716(b)(2). Agency regulations need not specify in "exacting detail" the offset procedures. *Allison v. Madigan*, 951 F.2d 869, 871 (8th Cir. 1991) (rejecting plaintiff's claim that administrative offset regulations were insufficiently detailed).

c) Certifying Debt

Prior to submitting a debt to Fiscal Service for offset purposes, the creditor agency must certify to Fiscal Service that the debt is past-due (i.e., delinquent), that the debt is valid and legally enforceable, and that the debtor has been provided with due process. 31 U.S.C. § 3720A(b)(5) (tax refund offset); § 3716(c)(1)(A) (administrative offset); 31 CFR § 285.2(d)(1) (tax refund offset); § 285.4(d) (benefit payment offset); § 285.5(d)(6) (administrative offset); *but see* § 285.7(d)(3)-(4) (permitting agencies to submit debts prior to certification provided they provide certification before a disbursing official offsets a salary payment). Agencies are also required to update information previously submitted to Fiscal Service or recall the debt from Fiscal Service in the event that they learn that the certification was improper or if they learn that the debt subsequently became ineligible for offset (such as a subsequent bankruptcy filing by a debtor). 31 CFR § 285.2(d)(4), § 285.5(d)(7), (10). The precise facts to which an agency certifies upon referral are set forth in an annual certification agreement between the referring creditor agency and Fiscal Service. 67 Fed. Reg. at 78938.

d) Responsibility for Collection

When a creditor agency submits a debt to Fiscal Service for offset purposes, the creditor agency remains responsible for collecting and administering debt. 31 U.S.C. § 3711(g); 31 CFR § 285.5(d)(10); 67 Fed. Reg. at 78938-9. This includes maintaining accurate records, accounting for all collections and accruals, and engaging in aggressive debt collection action. An agency generally satisfies its requirement to engage in aggressive debt collection action by referring the debt to Fiscal Service's Cross-Servicing Program, a full-service debt collection program.

(4) Role of the Payment Agencies and Disbursing Agencies

a) Payment Agencies

i. Certifying Payments

Agencies make payments by certifying on a payment voucher to the disbursing official that a payment is due to be paid to a particular person. 31 U.S.C. §§ 3325, 3528. The payment voucher must be prepared and submitted in the manner prescribed by the disbursing official. *Id.*; 31 CFR § 285.5(e)(8)(i). Among other things, the payment voucher must include the name and the taxpayer identification number (TIN) of the person entitled to the payment. 31 U.S.C. § 3325(d); 31 CFR § 285.5(e)(8)(i); *see also* 31 U.S.C. § 7701; Fiscal Service, TIN Policy, *available at* http://www.fms.treas.gov/tinpolicy/tin.pdf. Because TOP works by matching the names and TINs of payees with the names and TINs of debtors, without a valid name and TIN, the payment will not be properly offset for debts owed by the payee. 31 CFR § 285.5(c)(2); *see also* 142 Cong. Rec. H4046-01 (daily ed. Apr. 25, 1996) (statement of Rep. Horn[20]) (including TINs on payment vouchers "will facilitate offset and increase collections").

If a paying agency informs Fiscal Service that a payment should not have been made (and thus the offset should not have occurred), Fiscal Service will notify the creditor agency. 31 CFR §§ 285.2(g) and 285.5(i)(2). The creditor agency must then return the erroneously offset funds to the disbursing official. *Id.*

ii. Determination of Whether Payment is Eligible for Offset

The paying agency is responsible for determining whether the payment is eligible for centralized offset. 31 CFR § 285.5(e)(8)(ii). As discussed above, paying agencies may only indicate that a payment is exempt from offset if the payment is exempted by statute or by action of the Secretary of the Treasury. If an agency believes any of its payments are exempt by statute from centralized administrative offset, the agency should notify Fiscal Service so that Fiscal Service can make any necessary adjustments to the payment process to ensure such payments are not offset. TOP EXEMPTION STANDARDS.

iii. Restriction on Making Payments via Credit Card

Generally, agencies may not make a credit card payment to a person who owes a delinquent debt. When agencies pay a payee with a credit card, federal funds are disbursed to the credit card company to pay the credit card bill. The credit card company then pays the payee. Because credit card payments are not disbursed by the federal agency directly to the payee, these payments are not automatically

[20] Available at http://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/dca/dmhorn.txt.

matched through TOP.[21] Therefore, prior to issuing a credit card payment, paying agencies are required to determine whether the payee owes a delinquent federal debt by checking the System Award Management (formerly the Central Contractor Registration), except for payments below the micro-purchase threshold. 48 CFR § 32.1108(b)(2)(i).

iv. No Liability for Erroneous Offsets

A paying agency cannot be held liable for an offset on the basis that the debt was invalid or that sufficient due process was not provided or on the basis that the payment was not made. 31 U.S.C. § 3716(c)(2)(A); 31 CFR §§ 285.5(d)(10), (e)(9); *see also Curtin v. United States*, 2014 U.S. Dist. LEXIS 83167, *2-3 (M.D. Pa. June 18, 2014) (overruling the debtor objections to the magistrate's determination that he "received the benefit of the settlement payment through the reduction of his outstanding and pre-existing debts").

b) Disbursing Officials

i. Conducting Offsets

The disbursing official plays a key role in the offset process. 31 U.S.C. § 3716(c)(1)(A). A disbursing official is an officer charged with the duty of paying out public money. When a paying agency submits a certified payment voucher, the disbursing official will disburse the money in the manner specified by the payment voucher. 31 U.S.C. § 3321; 31 CFR § 901.3(b)(2). The disbursing agency, which is responsible for disbursing a payment, has a legally distinct role from the paying agency, which owes the payment. Fiscal Service is responsible for disbursing the great majority of federal payments, but other agencies (including the Department of Defense and the U.S. Postal Service), have disbursement authority as well. *Id.*

When a payment is being made, the disbursing official is responsible for comparing the payee's name and taxpayer identifying number (TIN) with the names and TINs on the debt records in TOP. 31 CFR § 285.5(c)(2); 31 CFR § 901.3(b)(2). If there is a match and all other requirements for offset have been met, the payments are reduced, in whole or in part, to collect the debt. 31 U.S.C. § 3716(c); 31 CFR 285.5(c)(2) and 901.3(b)(2).

A disbursing official cannot be held liable for conducting an offset on the basis that the debt was invalid or that sufficient due process was not provided. 31 U.S.C. § 3716(c)(2)(A); 31 CFR § 285.5(e)(9); *see also Johnson v. U.S. Dep't of Treasury*, 300 F. Appx 860, 862-63 (11th Cir. 2008) (finding that Treasury, as the disbursing agency, had no role in determining the validity of the debt and that

[21] The payments disbursed by the United States to the credit card company, however, would be matched through TOP for debts owed to the United States by the credit card company.

relief against Treasury would therefore be improper); *Lepelletier v. U.S. Dep't of Educ.*, Civ. No. 09-1119 (RJL), 2009 WL 4840153, 2009 U.S. Dist. LEXIS 117491, at *2-3 (D.D.C. Dec. 14, 2009) (finding that Treasury, as the disbursing agency, was an improper party to plaintiff's suit in which plaintiff disputed the propriety of the offset to collect his student loan debt).

ii. Warning Notice to Debtor

Before offsetting a recurring payment[22] or periodic benefit payment, a disbursing official must send a warning notice to the payee. 31 U.S.C. § 3716(c)(7)(B); 31 CFR § 285.5(g)(1); 31 CFR 285.4(f).[23] The warning notice must state in writing when offsets will begin and the anticipated amount of the offset, which can be stated as a percentage of the payment. 31 CFR § 285.5(g)(1). This warning notice need only be sent once. If Fiscal Service suspends the offset of a periodic payment to satisfy a tax levy, Fiscal Service is not required to re-notify the debtor prior to re-commencing offset. 31 U.S.C. § 285.5(g)(2).

The latest that this notification may be sent to the debtor is the date that the person is scheduled to receive the payment, or as soon as possible after that, but no later than the date of the offset. 31 U.S.C. § 3716(c)(7)(B). This notification may be combined with the notification that an offset has been taken. 31 CFR § 285.5(g)(1).

iii. Post-Offset Notice to Debtor

The agency conducting the offset must send each payee a notice upon the occurrence of an offset. 26 U.S.C. § 6402(d)(1)(C) (tax refund offset); 31 U.S.C. § 3716(c)(7)(A) (administrative offset); 31 CFR § 285.2(e) (tax refund offset), 31 CFR § 285(f)(2) (benefit payment offset); 31 CFR § 285.5(g)(3) (administrative offset), 31 CFR § 285.7(i) (salary offset). The notification must contain a description of the payment and the amount offset, the identity of the creditor agency, and contact information for the creditor agency for questions regarding the debt. *Id*. In the case of an offset of a joint tax payment, the notice must also instruct the non-debtor spouse how to secure his/her proper share of the offset payment.

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[22] "*Recurring payment* means a payment to an individual that is expected to be payable to a payee at regular intervals, at least four times annually. The term 'recurring payment' does not include payments made pursuant to a Federal contract, grant or cooperative agreement." 31 CFR § 285.5(b).

[23] Per guidance issued by the Social Security Administration (SSA), before offsetting a monthly SSA benefit payment, Fiscal Service will send two warning notices to the payee, including a 60-day notice and a 30-day notice. GN 02410.300.

iv. Offset and Warning Notice Distinguished from Due Process Notice

The notices described above are not due process notices; rather, they are informational notices. 70 Fed. Reg. at 3144 (describing the notices as a "courtesy"). Due process notices are the notices sent to the debtor by the creditor agency prior to referring the debt to Fiscal Service for offset purposes. Failure to send a warning or offset notice will not affect the validity of the offset. 31 U.S.C. § 3716(c)(7)(B); 31 CFR §§ 285.4(f) and 285.5(g)(1).

v. Disbursing Official: Notice to Paying and Creditor Agencies

Fiscal Service is required to notify each creditor agency of all offsets made to collect that agency's debt. 31 CFR §§ 285.2(e)(2) and 285.5(h)(1). The notification must include the full name and TIN of the debtor whose payment was offset, the total amount collected by the offset, and the amount of fees charged by Fiscal Service and other disbursing officials. *Id*. Due to laws limiting the disclosure of information, this notification generally should not include the source of the payment from which the amounts were collected. *Id.* This notification allows the creditor agency to keep accurate records, without disclosing unnecessary information (such as the source of the payments), which may be subject to the Privacy Act, 26 U.S.C. § 6103, or other laws. *See id.* When a non-Treasury disbursing official performs the offset, the official must inform Fiscal Service, so that Fiscal Service can notify the creditor agency. 31 CFR § 285.5(h)(2).

Fiscal Service will also notify a payment agency that an offset has occurred. § 285.2(e)(3), § 285.5(h)(3). These notifications will include the same information as the notification of offset to the debtor, thereby allowing the payment agency to refer questions about the offset to the creditor agency. *Id*.

(5) Fees

Fiscal Service is authorized to charge agencies a fee sufficient to cover the costs of performing centralized offset. 31 U.S.C. § 3716(c)(4) (authorizing Treasury to charge a fee for administrative offset services); 31 U.S.C. § 3720A(d) (authorizing Treasury to charge a fee for tax refund offset services); 5 U.S.C. § 5514(a)(1) (authorizing agencies that perform salary offset to charge a fee); 31 CFR 285.4(g) (describing Treasury's authority to charge fees); 31 CFR 285.5(j) (describing Treasury's authority to charge a fee for the full costs of implementing the centralized offset program, including fees charged by other disbursing officials); 31 CFR 285.7(j) (describing the authority of agencies that provide centralized salary offset services to charge fees). Creditor agencies are responsible for paying these fees, which can be collected through a deduction of the amounts collected through offset or by billing the creditor agency. *Id.* Creditor agencies are generally required to charge debtors for the costs of collection, including such fees. 31 U.S.C. § 3717(e)(1).

(6) Order of Priority

Debtors owe more than one debt. In such cases, the statutory scheme determines how to apply eligible payments. If there are two or more debts within a certain priority category, the overpayment is applied against such debts "in the order in which such debts accrued." 26 U.S.C. § 6402(d)(2) (describing the priorities for tax refund offset). To the extent a type of debt is eligible for collection by offset from a particular payment, the priority scheme is set forth below:

- *First*. Federal tax debts have first priority. 26 U.S.C. § 6402(a) (governing offset of tax payments); 31 CFR § 285.5(f)(3)(i) (governing nontax payments); 5 U.S.C. § 5514(d) (governing salary payments); 31 CFR § 285.7(h) (governing salary payments); 26 CFR § 301.6402-1 (governing tax payments).

- *Second*. Any remaining amount is then applied to past-due child support. 26 U.S.C. § 6402(c) (governing tax payments); 31 CFR § 285.5(f)(3)(ii)(A) (governing nontax payments); 31 CFR § 285.7(h) (governing salary payments).

- *Third*. Federal nontax debts have next priority. 26 U.S.C. § 6402(d)(2) (governing tax payments); 31 CFR § 285.5(f)(3)(ii)(B) (governing nontax payments).

- *Fourth*. State tax debts, followed by other state debts, have last priority. 31 CFR § 285.5(f)(3)(ii)(C) (governing nontax payments); *see also* 26 U.S.C. § 6402(e)(3) (governing tax payments to collect state income tax debts); 26 U.S.C. § 6402(f)(2) (governing tax payments to collect state unemployment insurance compensation debts).

- *Fifth*. If any amount of the payment is left over after satisfying the above-listed categories of debts, the remaining balance is paid to the payee.

(7) Computer Matching and Privacy Protection Act of 1988

The centralized offset process involves the automated matching of systems of records: delinquent debt records and payment records. Under the Privacy Act of 1974, as amended, when agencies are engaged in computer matching activities, they must comply with the Computer Matching and Privacy Protection Act of 1988 (CMPPA). In general terms, the CMPPA requires that agencies engaging in an automated match enter into a matching agreement, obtain approval of these agreements from each agency's Data Integrity Board, deliver reports to Congress and the Office of Management and Budget regarding the matching program, and independently verify all match findings before taking an adverse action. 5 U.S.C. § 552a(a)(8), (o), (p).

In the context of centralized administrative offset, Treasury has the authority to waive certain CMPPA requirements for matches between delinquent debt records and payment records. 31 U.S.C. § 3716(f)-(g); 31 CFR § 285.5(k). Specifically, Treasury has waived the requirements that agencies enter into written agreements and independently verify match

information prior to taking adverse action, provided that the creditor agencies certify in writing that they have provided the individuals with the due process required by 31 U.S.C. § 3716(a). 31 U.S.C. § 3716(f) (permitting the Secretary of Treasury to waive certain CMPPA requirements); Treasury Directive 16-14 (Jan. 9, 2014) (delegating to Fiscal Service the authority to waive these requirements); 31 CFR § 285.5(k) (waiving certain CMPPA requirements). Similarly, in the context of tax refund offset, the provisions of the CMPPA do not apply because the CMPPA explicitly excludes from the definition of "matching program" matches performed for the purpose of tax administration or tax refund offset. 5 U.S.C. § 552a(a)(8)(B)(iv).

(8) Salary Offset Match Consortium

As required by statute, Treasury established and maintains an interagency consortium to implement salary offset through TOP and promulgated regulations for salary offset. 5 U.S.C. § 5514(a)(1); 31 CFR 285.7(a)(4), (c). Pursuant to Treasury's regulation, the consortium initially included all agencies that disbursed federal salary payments, including the Department of Defense, the United States Postal Service, government corporations, and agencies with Treasury-designated disbursing officials. 31 CFR 285.7(c). The membership of the consortium may be changed by Treasury, and Treasury is responsible for the ongoing coordination of the consortium's activities. *Id.*

VII. Non-Centralized Offset

A. Generally

While agencies are required to submit their delinquent debts to Fiscal Service for centralized offset, they can also collect their debts through non-centralized offset. 31 U.S.C. § 3716(a); 31 CFR § 901.3(a)(3), (c). The rules that apply to centralized offset may, in some circumstances, be more limited than what can be accomplished through non-centralized offset. *See* 31 CFR § 285.5(b) (for centralized administrative offset purposes, the term "debt" does not include tax debts or debts arising under the tariff laws or certain portions of the Social Security Act). Therefore, if an agency cannot collect a debt through centralized offset, it should consider whether the debt can be collected through non-centralized offset (including statutory and common law offset).

Non-centralized offsets include inter-agency offsets (i.e., ad hoc offsets conducted in cooperation with the payment agency) and intra-agency offsets (i.e., offsets conducted when the creditor and payment agency are the same agency). 31 CFR § 901.3(c). Non-centralized offset can take place under statute or common law. *Id.*

B. Statutory Authority to Conduct Non-Centralized Offsets

Federal agencies have long had the statutory right to administratively offset federal payments to collect federal debts. *E.g.*, Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (among other things, providing federal agencies with statutory administrative offset authority); *In re Offset under statutes other than Debt Collection Act of 1982*, 64 Comp. Gen.

142 (1984) (stating that Pub. L. No. 97-365 supplemented but did not replace pre-existing statutory offset authorities). As used in the non-centralized offset context, "[t]he term 'administrative offset' is a general term embracing all offsets accomplished by other than judicial process." 64 Comp. Gen. 142.

In the context of statutory, non-centralized administrative offset, before requesting that a payment agency conduct an offset, the creditor agency must adopt regulations. 31 CFR § 901.3(c)(2). These regulations must require that the offset take place only after the creditor agency has provided the debtor with due process and has certified to the payment agency that the debt is past-due, legally enforceable in the amount stated, and that it has complied with its regulations. 31 CFR § 901.3(c)(2); *see also* 5 CFR § 550.1109 (describing the requirements for non-centralized salary offset). While many laws permit administrative offset (both centralized and non-centralized), "when effecting offset under a statute which does not provide its own procedures, . . . agencies should comply with the procedures prescribed by section 10 of the Debt Collection Act of 1982, as implemented by [the Federal Claims Collection Standards]." 64 Comp. Gen. 142.

C. Common Law

(1) Historical Right of Common Law Offset

Offset, in both the private sector and government context, has a long common law history, and offset under the common law continues to be an important remedy for federal agencies. *In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269, 1277 (9th Cir. 1992) ("Setoffs have a long and venerable history, dating back to Roman and English law"); *In re Davis*, 889 F.2d 658, 661, n.5 (5th Cir. 1989) (noting that the "historical antecedent of the doctrine of setoff dates back to the Roman Empire and is based on the common sense notion that 'a man should not be compelled to pay one moment what he will be entitled to recover back the next'"). Offset, or setoff, originated as a common law right, based on principles of equity. *See, e.g., Tatelbaum*, 10 Cl. Ct. at 211; *Monroe Retail, Inc. v. RBS Citizens N.A.*, 589 F.3d 274, 285 (6th Cir. 2009). Courts have recognized the common law right of the United States to collect debts through offset in a variety of contexts. *See, e.g., Munsey Trust Co.*, 332 U.S. at 239 (offset of contractor payments); *Aetna Cas. & Sur. Co. v. LTV Steel Co.* (*In re Chateaugay Corp.)*, 94 F.3d 772, 778-9 (2d Cir. 1996) (tax refund offset); *Woods v. United States*, 724 F.2d 1444, 1448 (9th Cir. 1984) (recoupment of overpayments); *Collins v. Donovan*, 661 F.2d 705, 708 (8th Cir. 1981) (offset of benefit payments). Under the common law, courts have recognized not only that federal agencies have the right to collect debts through offset, but that they may have a duty to do so. *E.g., Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941); *Fansteel Metallurgical Corp.*, 172 F. Supp. 268, 270 (Ct. Cl. 1959).

(2) Elements of Offset

A setoff requires: "(i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff." *Strumpf*, 516 U.S. at 19. Creditors—both private

citizens and governmental agencies alike—have the right to employ offset under the common law:

> The United States possess[es] the general right to apply all [payments due to an officer in its service] to the extinguishment of any balances due [to it by such an officer] on any other account, whether owed by him as a private individual, or [in an official government capacity]. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.

Gratiot, 40 U.S. at 370.

The right of offset "allows entities that owe each other money to apply their mutual debts against each other." *Strumpf*, 516 U.S. at 18; *see also Studley*, 229 U.S. at 528 (the right of setoff circumvents "the absurdity of making A pay B what B owes A"). Mutuality generally requires that the debts be due to and from the same persons, in the same capacities.

For mutuality purposes, the "same person" means a single legal entity. The United States is considered to be one party for purpose of setoff. *Compagnie Noga D'Imp. et D'Exp., S.A. v. Russian Fed'n*, 361 F.3d 676, 688 (2d Cir. 2004); *HAL, Inc. v. United States* (*In re HAL, Inc.)*, 122 F.3d 851, 853 (9th Cir. 1997); *Turner v. SBA* (*In re Turner)*, 84 F.3d 1294, 1298 (10th Cir. 1996). While the United States is generally considered to be one party for the purpose of setoff, the same party requirement is strictly construed as to debtors. Separate legal entities with common ownership or parent-subsidiary relationships, for example, will generally be separate parties for setoff purposes, unless the separate entities hold themselves out as a single party. *See McCall Stock Farms, Inc.*, 14 F.3d at 1566 (allowing offset against payment to corporation for debts of its principals after piercing the corporate veil); *MNC Commercial Corp. v. Joseph T. Ryerson & Son, Inc.*, 882 F.2d 615, 618 (2d Cir. 1989) (stating that "a subsidiary's debt may not be set off against the credit of a parent"); *In re K Town, Inc.*, 171 B.R. 313, 319 (Bankr. N.D. Ill. 1994) (although common law limits setoff to "identical legal entities," a contractual right to setoff between two accounts can provide the requisite mutuality for setoff); *Mid-South Metals*, B-230158, 1991 WL 73104, 1991 U.S. Comp. Gen. LEXIS 291 (Comp. Gen. Mar. 1, 1991) (allowing offset against payment to corporation for debts of its principals after piercing the corporate veil).

Joint payments (i.e., payments to two or more payees), however, generally cannot be offset under common law authority for a debt owed by only one of the payees. As the Supreme Court stated:

> Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition.

Gray v. Rollo, 85 U.S. 629, 632 (1874) (quoting Justice Story's treatise on Equity Jurisprudence); *see also Federal Deposit Ins. Corp. v. Mademoiselle of California*, 379 F.2d 660, 663 (9th Cir. Cal. 1967) (permitting offset, but noting that, in general, a separate debt cannot be setoff a joint demand).

For mutuality purposes, persons are in the "same capacity" if they stand in the same relationship. *Braniff Airways v. Exxon Co.*, 814 F.2d 1030, 1036 (5th Cir. 1987) (stating that, "[f]or mutuality to exist, 'each party must own his claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally'") (citation omitted). For example, a person acting in his individual capacity is not in the same relationship as that same person acting in his capacity as a trustee. *See Wiand v. Meeker*, 2014 U.S. App. LEXIS 13700, *5 (11th Cir. 2014) (finding no right to setoff because "[a]n individual's role as trustee is legally distinguishable from his individual identity"); *Auburn Chevrolet-Oldsmobile-Cadillac, Inc. v. Branch*, 2009 U.S. Dist. LEXIS 18222, *34 (N.D.N.Y Mar. 10, 2009) (describing that "same capacity" requires that each person "must owe the other in his own name and not as a fiduciary"); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 59 (3d Cir. 1990) (finding mutuality requirement met because "[each party] contracted with the other, each breached a contractual obligation to the other and owes the other as a result"). Debts do not need to arise from the same transaction to be considered "mutual." *In re Express Freight Lines, Inc.*, 130 B.R. 288, 291 (Bankr. E.D. Wis. 1991) (distinguishing setoff from recoupment).

(3) Due Process Requirements

Generally, prior to conducting an offset under the common law, agencies must provide the debtor with notice and an opportunity to dispute. While determining the precise nature of constitutionally sufficient due process is situational, the standard requirements are notice and an opportunity to be heard. This section discusses the minimum protections provided for by the Constitution.[24] A more detailed explanation of due process is provided in Part I.B. of this *Treatise*.

a) Constitutionally Sufficient Notice

i. Contents of Notice

A deprivation of property requires that a person be given notification with sufficient detail regarding the proposed action. Federal agencies must provide notice reasonably calculated to notify a debtor about the proposed offset of future payments, the debtor's rights, and how the debtor may exercise those rights. The notice must be sufficiently clear so that the debtor can understand the proposed action. *Games*, 737 F. Supp. at 1379 (offset notice's description about how to obtain a review was sufficient, even accepting plaintiff's "allegation that the accompanying regulations were indecipherable to a layman"). The notice should

[24] Cases involving statutory offset are instructive because due process for statutory offset must also comply with minimum constitutional due process standards.

also inform the debtor of what rights the debtor has to contest the proposed action (as well as how to exercise such rights). The extent to which the notice should inform the debtor of possible defenses may depend on the circumstances. *Anderson v. White*, 888 F.2d 985, 992 (3d Cir. 1989) (noting that the Supreme Court has never required notices to "contain a list of potential defenses or explain available hearing procedures in intricate detail"); *Games*, 737 F. Supp. at 1376 (finding that agencies are not required to specifically advise debtors of their right to retain an attorney); *Kandlbinder v. Reagen*, 713 F. Supp. 337, 340 (W.D. Mo. 1989) (explaining that in context of tax refund offset, providing the debtor with list of possible defenses might have done more harm than good); *Knisley v. Bowman*, 656 F. Supp. 1540, 1554 (W.D. Mich. 1987) (finding that due process does not require that the notice list all possible defenses but that listing common defenses would be "better practice"); *Wagner v. Duffy*, 700 F. Supp. 935, 943 (N.D. Ill. 1988) (finding that due process requires that the tax refund intercept notice provide the debtor with a list of common defenses); *Smith v. Onondaga Cnty. Support Collection Unit*, 619 F. Supp. 825 (N.D.N.Y. 1985) (finding that due process was insufficient where notice failed to list possible defenses or appeal procedures and debtor was not given an opportunity for a hearing); *Nelson v. Regan*, 560 F. Supp. 1101 (D. Conn. 1983) (finding that the notice did not satisfy due process because it failed to list "the possible defenses an individual might have to the interception of tax refunds or the availability of regular procedures in which to challenge the offset"), *aff'd*, 731 F.2d 105 (2d Cir.), cert. denied, 469 U.S. 853, 105 S. Ct. 175 (1984).

ii. Method of Notification

While actual notice is not required in the offset context, a letter mailed to the debtor's last known address is generally adequate. *See Omegbu*, 118 F. App'x at 991 (stating that "by sending notice by mail to his last known address, the [agency] complied with the constitutional requirements that [it] provide notice reasonably calculated to apprise [the debtor] of the offset, and to provide him an opportunity to present his objections"); *SEC v. Fonecash, Inc.*, 795 F.Supp.2d 73, 77-78 (D.D.C. 2011) (where SEC sent notification to debtor's pre-incarceration address after he was released from prison, court held that notice should have been sent to the prison address, which was the address last provided by debtor to SEC).

In certain circumstances, an agency may be required to conduct some due diligence to determine whether mailing notice to the debtor's last known address is "reasonably calculated" to inform the debtor of the offset. When a debtor has not kept the agency apprised of the debtor's most recent address, courts are likely to consider the agency's efforts to determine the proper address to be adequate, even if the actual notice never reaches the debtor. *See Shabtai v. U.S. Dep't of Educ.*, Civ. No. 0-8437, 2003 WL 21983025, 2003 U.S. Dist. LEXIS 14398 at *23-25 (S.D.N.Y. Aug. 20, 2003) (debtor failed to update agency with new address, so notice sent to the address for debtor in the agency's database was sufficient); *Setlech v. United States*, 816 F. Supp. 161, 167 (E.D.N.Y. 1992)

(notice sent to most current address known to the agency was sufficient where there was no indication that the letter was returned as "undeliverable"), *affirmed* 17 F.3d 390 (2d Cir. 1993).

If an agency learns that notice was ineffective, however, it may be required to take reasonable additional steps to provide notice, if any such steps are available and practicable. In *Jones v. Flowers*, for example, the State of Arkansas mailed a notice of intent to sell a tax debtor's real property and the notice was returned unclaimed. 547 U.S. 220, 235 (2006). The court found that the state should have taken additional reasonable steps, since it was practicable for it to do so. *Id.* Because *Jones* was decided in the context of the sale of real property—a significant type of taking—it is unlikely that the same level of notification would be required for a mere offset. *See id.; see also Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998) (in a forfeiture proceeding, when the government knows or can easily ascertain where a person may be found, it must direct its notice there, and not to some other address where the designee formerly resided).

iii. Timing of Notice

Generally, notification should be provided prior to the offset. In some circumstances, however, it might be appropriate to provide the debtor with a post-deprivation notice and opportunity to dispute. *Wisdom*, 713 F.2d at 425 (8th Cir. 1983) (in case where the agency collected debt by applying funds from debtor's retirement account, finding that "[c]learly due process does not mandate a prior hearing in this case" because "[t]he deprivation was of property neither then available to [debtor] nor being used by him for necessities of life"); *Atwater*, 452 F. Supp. at 631 (in the context of the offset of back wages and retirement payments, "the Government's interest in protecting the treasury by prompt recovery of past debts is outweighed by the slight incremental cost of providing at least [a limited form of a pre-deprivation hearing]"); *see also* 31 CFR § 901.3 (where there is insufficient time before a payment would have to be made to provide for prior notice and an opportunity for review, an agency can conduct the offset first, and as soon as practicable thereafter, provide the debtor due process).

iv. Right to Review Records

Debtors must have an opportunity to inspect the agency's records regarding the debt. While the agency is generally not required to produce every single relevant record in response to a debtor's request to review the agency's records, it must provide the debtor with information sufficient to support the agency's determination regarding the debt. *See Housing Authority of County of King v. Pierce*, 711 F. Supp. 19, 22-23 (D.D.C. 1989) (while "[d]iscovery is not a *sine qua non* of due process," the agency's failure to comply with "minimal discovery requests" resulted in its failure to provide sufficient constitutional due process).

b) Constitutionally Sufficient Opportunity to be Heard

i. Agency Review of its Records

A deprivation of property also requires that a person be afforded an opportunity to be heard. This requires that a person be afforded a "timely and meaningful" hearing. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Coral Gables Convalescent Home, Inc. v. Richardson*, 340 F. Supp. 646, 650 (S.D. Fla. 1972) (finding insufficient due process due to "the failure to afford plaintiff at least a post-reduction hearing"). One court defined the term "hearing" as follows:

> any confrontation, oral or otherwise, between an affected individual and an agency decisionmaker sufficient to allow the individual to present his case in a meaningful manner. Hearings may take many forms, including a "formal," trial-type proceeding, an "informal discuss(ion)" . . . or a "paper hearing," without any opportunity for oral exchange.

Gray Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir. 1980). The Supreme Court has recognized that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the . . . proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971). The requirement that the debtor have the "opportunity to be heard" does not mean that the debtor is entitled to a formal, trial-like hearing. *Califano v. Yamasaki*, 442 U.S. 682, 695-96 (1979) (in a case involving the recoupment of erroneous overpayments, the Court stated that oral hearings are not required in case involving "relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes"); *Anderson*, 888 F.2d at 994-95 (because "the precise choice of hearing procedures is better left to the persons administering [the offset program]"); *Atwater*, 452 F. Supp. at 630-31 (explaining that "[a] full evidentiary hearing prior to termination may not be required, but an effective opportunity to press one's claim prior to administrative action must still be available"); *Pierce*, 711 F. Supp. at 23-24 (holding that neither a trial-type hearing nor an oral hearing was required for agency to exercise its right of recoupment). In circumstances where the determination involves issues of credibility or veracity, however, an oral hearing may be required. *Califano*, 442 U.S. at 696. This review must be conducted by an impartial decision maker. *Richardson*, 340 F. Supp. at 651.

ii. Timely Reviews

An administrative review should be conducted in a timely fashion. Anderson, 888 F.2d at 996 ("A timely opportunity to be heard is at the core of the due process guarantees"). When feasible, this review should be conducted prior to any offset. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (in the context of a civil forfeiture of real property, a pre-deprivation hearing is required, absent exigent circumstances).

iii. Inform Debtor of the Results

After conducting a requested administrative review, the agency must inform the debtor of the results of the review. *Anderson*, 888 F.2d at 995-96 (due process requires notification of the decision regarding the contested offset); *Shlikas*, 2010 U.S. Dist. LEXIS 88371, at *19 (agency failed to provide sufficient due process when debtor received no response to his request for a hearing and the agency submitted no evidence that it actually undertook a review); *Pierce*, 711 F. Supp. at 24 (agency must provide proof that it has actually considered the debtor's challenge and must provide a "reasonably detailed statement" of the reasons underlying its final decision). The agency, however, need only communicate the basic reason(s) for its decision. As one court explained, this communication:

> need not amount to a full opinion or even formal findings of fact and conclusions of law. In order to satisfy procedural due process, [an agency] need only provide a minimal, and perhaps even symbolic, recitation of the factors it took into account in arriving at its final determination. Such a meager showing might well be rejected on appeal as inadequate under the arbitrary and capricious test, but the problem would not be one of due process.

Pierce, 711 F. Supp. at 24 (internal quotations and citations omitted).

iv. Debtor Must Exercise Right to Review

Debtors must be provided with the opportunity to be heard. If a debtor does not properly exercise this right, the agency is not required to provide a hearing. *See Johnson v. Spellings*, Civ. No. PJM 07-671, 2008 WL 8183822, 2008 U.S. Dist. LEXIS 118676 at *12 (D. Md. July 11, 2008) (debtor's failure to properly request a hearing precludes any argument that he was denied an opportunity to be heard).

(4) Common Law Exists Independently of Statutory Authority

Common law setoff rights generally exist independently of, and in addition to, statutory offset rights. *See, e.g.*, 31 U.S.C. 3716(d) ("Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law"); 142 Cong. Rec. H4046-01 (daily ed. Apr. 25, 1996) (statement of Rep. Horn[25]) (stating that "the Debt Collection Improvement Act is not intended to prohibit the use of any existing authority to perform administrative offset under statute or common law"). Generally, common law setoff and recoupment rights will only be unavailable where Congress has explicitly overridden common law. *See, e.g.*, 38 U.S.C. § 5301(a)(1) (protecting Veterans benefits from offset); 5 U.S.C. § 5514(a)(1) (imposing limits on the percent of current pay that may be offset).

[25] Available at http://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/dca/dmhorn.txt.

Statutes "are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054-55 (Fed. Cir. 1993) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); *see also Johnson v. All-State Constr., Inc.*, 329 F.3d 848, 853 (Fed. Cir. 2003) ("the government's set-off right can be defeated only by explicit language"); *Mt. Sinai Hospital, Inc. v. Weinberger*, 517 F.2d 329, 338 (5th Cir. Fla. 1975) (discussing the effect of the Medicare Act on the common law right of recoupment, and finding that the Act complements rather than displaces or supersedes the common law recoupment right). The extent to which the Debt Collection Act (and other debt collection statutes) limited federal agencies' common law authority must be analyzed on a case-by-case basis.[26]

[26] *Compare United States v. York*, 909 F. Supp. 4, 9 (D.D.C. 1995) ("the government cannot avoid the terms of the [Debt Collection Act] or the [Federal Debt Collection Procedures Act] by asserting it has common law authority for its action when it cannot support its position with case law") *with In re Chateaugay Corp.*, 94 F.3d at 779 (agency possessed a common law right to setoff debtor's tax refunds because the terms of the tax refund statute did not apply), *McCall Stock Farms, Inc.*, 14 F.3d at 1566 (finding that the intent of the Debt Collection Act was to expand federal agencies' authority to collect debts via offset, rather than restrict existing authority under the common law), *Cheney*, 995 F.2d at 1054-55 (same), *Allied Signal, Inc. v. United States*, 941 F.2d 1194, 1198 (Fed. Cir. 1991) (offset of claims from the same contract (i.e., recoupment) was not governed by the DCA); *Amoco Prod. Co. v. Fry*, 904 F. Supp. 3, 10 (D.D.C. 1995) (DCA supplemented common law right to offset), *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 296 (Fed. Cir. 1985) (Federal Claims Collection Act was not meant to abrogate common law offset rights), *Senator Percy*, 1984 WL 43976, 1984 U.S. Comp. Gen. LEXIS 1738 (U.S. Comp. Gen. 1984) (explaining the basis for its determination "that the Debt Collection Act does not abrogate pre-existing common law rights beyond the extent required by its terms"), *and Debt Collection—Admin. Offset and Interest Against State and Local Gov'ts*, 1983 WL 27149, 1983 U.S. Comp. Gen. LEXIS 648 (Comp. Gen. Aug. 23, 1983) (holding that the administrative offset and interest provisions of the Debt Collection Act are not exclusive).

E. ADMINISTRATIVE WAGE GARNISHMENT

[forthcoming]

F. USE OF PRIVATE COLLECTION CONTRACTORS

[forthcoming]

G. CREDIT BUREAU REPORTING

[forthcoming]

H. BARRING DELINQUENT DEBTORS

[forthcoming]

PART IV: SUSPENSION & TERMINATION OF COLLECTION ACTION

(July 2014)

TABLE OF CONTENTS

A. INTRODUCTION

Federal agencies must actively collect claims owed to them. Agencies may, however, suspend collection action or terminate it entirely for debts that meet certain criteria. "Suspension" and "termination" refer generally to ceasing active collection efforts, such as sending demand letters, placing collection calls, issuing wage garnishment orders, and initiating litigation, as distinguished from passive collection efforts, such as administrative offset and credit bureau reporting. The concepts of suspension and termination of debt collection action are legally distinct from the concepts of compromise and waiver. This chapter discusses the rules generally applicable to the suspension and termination of collection activity, and explains the distinctions between the two terms and other, related terms.

Before the enactment of the Federal Claims Collection Act of 1966, Pub. L. 89-508, 80 Stat. 308 ("FCCA"), most federal agencies had no authority to stop actively collecting claims owed to the United States.[1] As stated in a 1966 Senate Committee on the Judiciary Report, agencies could not "terminate or suspend efforts to collect a claim even when the very futility of these efforts serve to add to the cost of Government and therefore compound the loss to the United States." S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533. This odd result was caused by the "inflexibility in the law" that restricted agencies' authority to compromise debts and to terminate or suspend collection action on such debts. *Id*. To address this problem, Congress enacted the FCCA, which granted agency heads the power to suspend or terminate collection action on non-fraud claims of not more than $20,000 "pursuant to regulations prescribed by [the agency] and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General." FCCA at § 3, 80 Stat. at 309; *see also* S. Rep. No. 89-1331, at 2-4. The FCCA explicitly stated that none of its provisions should be interpreted to "increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims." Pub. L. No. 89-508, 80 Stat. 308, 351 (1966). Thus, the FCCA did not diminish any existing authorities for the few agencies that could already compromise debts and suspend or terminate debt collection action on their own. S. Rep. No. 89-1331, at 3; Letter from Attorney General, to the Vice President, U.S. Senate, 2 (Mar. 10, 1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2539. Rather, the FCCA provided agencies with the needed flexibility to appropriately deal with their claims. *Id.*

Since then, the monetary cap on federal agencies' authority to suspend or terminate active collection of claims has been increased to $100,000. Pub. L. No. 101-552, § 8(b), 104 Stat. 2736, 2746-47 (1990) (amending 31 U.S.C. § 3711(a)(2)). Agencies' general statutory suspension and termination authority is codified at 31 U.S.C. § 3711(a)(3), and the corresponding regulations, now jointly promulgated by the Attorney General and the Secretary of the Treasury, are codified at 31 CFR Part 903. 31 U.S.C. § 3711(a)(3), (d)(2); 31 CFR Part 903.

[1] The Federal Claims Collection Standards (FCCS), 65 Fed. Reg. 70,390 (Nov. 22, 2000), were promulgated to implement the FCCA. The FCCS are codified in 31 CFR Parts 900-904.

B. TERMINOLOGY

I. Suspension of Debt Collection Action

An agency suspends collection action when it determines to cease active collection efforts temporarily, because the agency cannot locate the debtor, the debtor's financial condition is expected to improve, or the debtor has requested a waiver of the debt. 31 U.S.C. § 3711(a)(3); 31 CFR § 903.2(a).

II. Termination of Debt Collection Action

An agency terminates collection action when it ceases active collection efforts for the foreseeable future. An agency may terminate collection action if it has determined that the costs of collection are likely to exceed the amount that can be collected or because further collection efforts are legally inappropriate. 31 CFR § 903.3(b). Termination of active collection does not preclude passive collection efforts. *Id.* Nor does termination prevent an agency from pursuing active collection if there is a change in the debtor's status or if a new collection tool becomes available. 31 CFR § 903.3(b)(2).

III. Active Collection

Active collection refers to the agency's attempts to collect the debt through activities such as sending demand letters, placing collection calls, issuing administrative wage garnishment orders, or initiating litigation. It does not include passive collection actions, such as centralized offset through the Treasury Offset Program or reporting a debt to a credit bureau. Agencies must determine that a debt has met the criteria for suspension or termination if it intends to collect the debt solely through passive means.

IV. Distinction from Write-off

The legal concepts of "suspension" and "termination" are separate and distinct from the accounting concepts of "write-off." Write-off, including the classifications of "currently not collectible" and "close-out," is an accounting action governed by the Office of Management and Budget (OMB) Circular A-129. 31 CFR § 900.1(d); OMB Circ. A-129,[2] Sec. V.E; Managing Federal Receivables.[3] The write-off of a debt is simply the "removal of the debt from the agency's accounting records." FCCS, 65 Fed. Reg. at 70,391. Generally, write-off is mandatory for debts delinquent more than two years. OMB Circ. A-129, Sec. V.E. Agencies should continue cost-effective collection efforts after the agency writes off a debt, unless it determines that suspension or termination of debt collection action is appropriate. *Id.*

[2] Office of Mgmt. & Budget, Circular A-129 (revised), Policies for Federal Credit Programs and Non-Tax Receivables (Jan. 2013) [hereinafter OMB Circular A-129].
[3] U.S. Dep't of the Treasury, Managing Federal Receivables, Chap. 7 (2005), *available at* http://www.fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_guidance_mfr.htm.

To illustrate this concept, an agency may write off a debt at the two-year delinquency date, as required by OMB Circular A-129, yet continue active collection because it has not exhausted all appropriate debt collection tools. Similarly, an agency may determine to suspend or terminate active collection on a debt without writing off the claim; an agency might do this if it is realizing significant collections through a passive tool such as the Treasury Offset Program, but the agency has determined that active collection is not appropriate under the standards set forth in the FCCS. 31 CFR § 903.3(b)(3).

V. Distinction from Waiver

"Waiver" has been defined as "the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage." *See* Black's Law Dictionary, Seventh Edition, West Group (1999). Agencies may only waive collection of claims if they have specific statutory authority to do so. Suspension and termination, by contrast, do not relinquish the Government's rights with respect to the debt or debtor. *See* 31 CFR Part 903. They merely reflect a decision that further collection action is not warranted, and agencies are not legally precluded from revisiting that decision and resuming collection at a later time. *Id.*

C. GENERAL PRINCIPLES APPLICABLE TO SUSPENSION & TERMINATION

I. General Authority to Suspend or Terminate Debt Collection Action

Agencies have an affirmative obligation to attempt to collect amounts owed to them. 31 U.S.C. § 3711(a)(1). Specifically, agencies must "aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency." 31 CFR § 901.1. Agencies must therefore identify statutory authority to cease collection action, whether temporarily or permanently.

While agencies have an affirmative duty to collect, Congress specifically authorized agencies to suspend or terminate debt collection action for debts with a principal balance of $100,000 or less, "when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered." 31 U.S.C. § 3711(a)(2)-(3); 31 CFR § 903.1. The $100,000 cap is calculated "after deducting the amount of any partial payments or collections" that the agency has received, and before the application of any interest, penalties, or costs. 31 CFR § 903.1(b). If an agency determines that suspension or termination of collection of a claim exceeding $100,000 is appropriate, the agency must refer the debt to the Civil Division or other appropriate litigating division in the Department of Justice (DOJ), using the Claims Collection Litigation Report (CCLR). 31 CFR § 903.1(b); *see also* 31 CFR §904.2(c). This "referral should specify the reasons for the agency's recommendation." 31 CFR § 903.1(b).

Some agencies with independent litigating authority also have the authority to terminate or suspend collection action for debts more than $100,000. Each agency must review its statutes to determine what authority Congress granted. If the agency's statute does not provide authority to terminate, then the authority still rests with the Attorney General. S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533 (noting that, aside from DOJ, few agencies have the authority to suspend and or terminate debt collection action); *see also* 28 U.S.C. § 516 (except as otherwise authorized, DOJ has sole litigating authority for the United States); 31 U.S.C. § 3711(a) (providing the Attorney General with the authority to set the maximum amount of a claim that can be compromised); *United States v. LaCroix*, 166 F.3d 921, 923 (7th Cir. 1999) (DOJ, not the U.S. Department of Housing and Urban Development, had authority to settle the litigation); Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *The Attorney General's Role as Chief Litigator for the United States*, 1982 OLC LEXIS 34 (1982) (describing the plenary and exclusive authority of DOJ to litigate and settle claims, including exceptions to that authority, and stating that "[i]ncluded within [DOJ's] broad grant of plenary power over government litigation is the power to compromise and settle litigation").

II. Agency-Specific Authorities

Unless a more specific statute or regulation governs, an agency's determination of whether to suspend or terminate active collection action on a claim is governed by 31 U.S.C. § 3711(a)(3) and the FCCS. 31 U.S.C. § 3711(a)(3) (providing agencies with limited authority to suspend and

terminate debt collection action); 31 U.S.C. § 3711(d) (stating that agencies act under the FCCS and agency-specific regulations); 31 CFR § 900.1(a) (stating that the FCCS apply unless agency-specific statute or regulation applies); 31 CFR § 900.4 (same); 31 CFR Part 903 (describing governmentwide standards for suspension and termination of debt collection action). Each agency should be familiar with its own statutes and implementing regulations, including whether these laws provide greater or lesser authority than the FCCS to suspend or terminate active collection on claims. For example, some agencies have the authority to suspend or terminate active collection of a claim owed by a person who died while on active duty, without regard to the $100,000 cap or the FCCS. 31 U.S.C. § 3711(f). Similarly, by authority granted directly by the Attorney General, the U.S. Department of the Treasury (Treasury), Bureau of the Fiscal Service (Fiscal Service)[4] may terminate (and, by extension, suspend) collection action on claims that have been referred to Fiscal Service under 31 U.S.C. § 3711(g) and which have a principal balance under $500,000. Letter from Christopher Kohn, Director, DOJ's Commercial Litigation Branch, to Richard L. Gregg, Commissioner, Fiscal Service (Sep. 3, 2003) (on file with recipient).

III. Authorities Regarding Fraud and Antitrust Claims

Absent independent statutory authority, only DOJ has the authority to determine how to proceed to collect any claim "that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws." 31 U.S.C. § 3711(b)(1). Accordingly, only DOJ has the authority to terminate or suspend collection action on fraudulent claims, regardless of the amount. 31 CFR § 900.3. As such, if an agency believes that a claim involves fraud or misrepresentation, or is based on conduct in violation of the antitrust laws, it must "promptly refer the case to the Department of Justice for action" using a CCLR. 31 CFR § 900.3. Some agencies may have explicit statutory authority to suspend or terminate active collection action on certain subsets of such claims. Otherwise, only DOJ has the authority to act on these claims.

IV. Effect on Claims with Joint and Several Liability

When two or more debtors are jointly and severally liable for a debt, the agency "should pursue collection activity against all debtors, as appropriate." 31 CFR § 902.4. If an agency accepts a compromise offer from one debtor, for example, it should ensure that this compromise "does not release the agency's claim against the remaining debtors." *Id.* Similarly, when deciding whether to suspend or terminate active collection on a claim owed by multiple debtors, agencies should analyze the factors for each debtor independently. *See id.* If suspension or termination of collection action is appropriate with regard to only one debtor, collection action against the co-debtors should continue. *See id.*

[4] Fiscal Service was created by the consolidation of the Financial Management Service and the Bureau of the Public Debt on October 7, 2012.

V. Discretionary Action

The suspension or termination of debt collection action does not affect the Government's right to collect, or the debtor's obligation to pay, a debt. Suspending or terminating collection action, or re-initiating collection after an agency has made such a determination, thus, does not create a private right of action on the part of the debtor or any other party. 31 CFR § 900.8 (stating that the FCCS do not create any private rights of action). Similarly, the failure of an agency to comply with the FCCS is not "available to any debtor as a defense" to non-payment. 31 CFR § 900.8; *see also Dept't of the Army v. Blue Fox*, 525 U.S. 255 (1998) (noting that absent explicit waiver of sovereign immunity, the federal government is shielded from suit); *Heckler v. Chaney*, 470 U.S. 821 (1985) (explaining that an agency's decision regarding enforcement of civil or criminal matters is generally not reviewable by a court); *In re Zandford*, No. 05-13305, 2012 U.S. Dist. LEXIS 24201, at *11 (D. Del. Feb. 27, 2012) (stating that "the regulations prohibit the Debtor from using these agency operating procedures as either a sword or a shield") (citation omitted); *Berdeaux v. U.S. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 99573 (finding that plaintiff failed to allege how an agency's discretionary denial of a compromise constituted a cause of action). In fact, the FCCS specifically provide that "[t]ermination of collection activity ceases *active* collection of the debt" and that the termination of collection activity does not preclude the agency from retaining a record of the account for the purposes of: (1) selling the debt; (2) pursuing collection at a subsequent date; (3) offsetting against future income or assets; or (4) screening future applicants for prior indebtedness. 31 CFR § 903.3(b) (emphasis added).

An agency's determination to suspend or terminate active collection action on a claim does not prevent the agency from revisiting this determination and pursuing active collection action in the future. 31 CFR § 903.5(a) (stating that "[w]hen collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date."); 31 CFR 903.3(b) (stating that termination does not preclude an agency from selling debt or undertaking future collection). Unlike the compromise of a debt, the suspension or termination of debt collection action neither affects the rights of the debtor nor precludes the agency from revisiting its determination. *Id.* Suspension and termination decisions do not have the same kind of finality as decisions to compromise a claim. *Id.* Whereas compromises are "final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact," 31 U.S.C. § 3711(c), suspension and termination determinations are revocable. 31 CFR § 903.3(b); 31 CFR § 903.5(a) ("[w]hen collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date . . .").

D. STANDARDS FOR SUSPENSION OF DEBT COLLECTION ACTION

Although federal agencies operate under a broad mandate to "aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency," such agencies also have express statutory and regulatory authority to temporarily suspend collection of these debts. 31 CFR § 901.1; *see also* 31 U.S.C. § 3711(a). An agency's determination to suspend active collection action on a claim does not bar the agency from resuming active collection at a later time, or from utilizing passive collection tools during the period of the suspension.

Generally, the agency's determination regarding whether to suspend active collection is discretionary, but there are some situations where suspension is mandatory. Given the affirmative duty to aggressively collect the debts they are servicing, agencies must comply with the FCCS when suspending collection action. The FCCS permit suspension when: "(1) The agency cannot locate the debtor; (2) The debtor's financial condition is expected to improve; or (3) The debtor has requested a waiver or review of the debt." 31 CFR § 903.2(a). Moreover, agencies must suspend debt collection action when legally required by a statute, including statutes that require suspension when an agency is conducting a review or when certain debt collection actions are precluded due to bankruptcy. 31 CFR § 903.2(c)-(d); *see, e.g.*, 11 U.S.C. § 362 (generally requiring creditors to cease collection action upon debtor's filing of a bankruptcy petition).

A determination of whether to suspend collection efforts should be made on a case-by-case basis. FCCS, 65 Fed. Reg. 70,391, 70,394 (Nov. 22, 2000). An agency may suspend active collection action on a class of claims, however, if one or more of the suspension standards applies to all claims within the class. *Id.* (providing that "[n]othing in the FCCS prohibits suspension of collection activity by the agency for groups or categories of debtors when appropriate"). For example, the suspension of debt collection efforts on certain types of consumer debt might be appropriate for every debtor located in a geographic area affected by a natural disaster.

I. Inability to Locate the Debtor

An agency may suspend active collection of a claim if "[t]he agency cannot locate the debtor." 31 CFR § 903.2(a)(1). To invoke this justification for suspension of collection action, agencies must first undertake diligent efforts to locate the debtor. *See* 31 U.S.C. § 3711(a) (requiring agencies to attempt collection); 31 CFR § 901.1 (requiring aggressive collection action). The 1984 version of the FCCS provided a more detailed explanation of this justification, providing that an agency could suspend collection "when the debtor cannot be located after diligent effort and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim, with due consideration for the size and amount which may be realized thereon." FCCS, 49 Fed. Reg. 8,889, 8,903 (Mar. 9, 1984). The 2000 FCCS amended the regulations to "provide agencies with greater latitude to adopt agency-specific regulations, tailored to the legal and policy requirements applicable to the various types of Federal debt." FCCS, 65 Fed. Reg. at 70,390. What will constitute diligent efforts to locate a

debtor will depend on the circumstances. *See id.; see also To the U.S. Army Fin. and Accounting Ctr., Dep't of the Army*, 62 Comp. Gen. 91, 98-99 (1982) (holding that "one letter that was returned unclaimed . . . does not constitute diligent collection action").[5]

II. Debtor's Ability to Pay

Alternatively, an agency may suspend active collection of a claim if "[t]he debtor's financial condition is expected to improve." 31 CFR § 903.2(a)(2). The FCCS further provide that agencies may only suspend active collection based on this standard when "the debtor's future prospects justify retention of the debt for periodic review and collection activity" and one of the following conditions is met: "(1) The applicable statute of limitations has not expired; or (2) Future collection can be effected by administrative offset . . . ; or (3) The debtor agrees to pay interest on the amount of the debt on which collection will be suspended, and such suspension is likely to enhance the debtor's ability to pay the full amount of the principal of the debt with interest at a later date." 31 CFR § 903.2(b). The 2000 FCCS provided agencies with more leeway to adopt their own agency-specific regulations tailored to their own policy requirements, compared with the 1984 FCCS. 65 Fed. Reg. at 70,390. The Comptroller General interpreted this standard under the proposed version of the 1984 FCCS (48 Fed. Reg. 23,249 (May 24, 1983)):

> this section authorizes agencies to temporarily suspend collection activity due to the hardship condition of the debtor, in conjunction with the reasonable anticipation that the debtor's financial condition will improve in the not-too-distant future. This could be authorized even though the debtor is currently receiving Government benefits. . . . As is always the case, agencies should adhere to a 'rule of reason' when exercising discretion under the FCCS. Whatever action is taken must be calculated to adequately protect the Government's interests. For example, we do not believe that it would be appropriate to . . . temporarily suspend collection if the agency lacked reasonable grounds to support the expectation that the debtor's financial condition will improve in the not-too-distant future. Nor should such steps be taken in the absence of the debtor's demonstration that immediate repayment, whether voluntary or involuntary, would impose a real and unreasonable hardship.

Soc. Sec. Admin., 62 Comp. Gen. 599, 603-04 (1983) (finding that the Social Security Administration had appropriate authority to suspend collection "based upon a reasonable expectation in the particular case that the financial condition of the indebted beneficiary [would] significantly improve in the not-too-distant future").

[5] Opinions of the Comptroller General are not binding on federal agencies in the debt collection context. General Accounting Office Act of 1996, Pub. L. 104-316, § 115(g), 110 Stat. 3826, 3835; Todd David Peterson, Deputy Assistant Attorney General, *Administrative Settlement of Disputes Concerning Determinations of Mineral Royalties Due the Government*, Office of Legal Counsel, 1998 OLC Lexis, 32, 14-15 (1998) (stating that GAO opinions provide useful guidance but are not binding on federal agencies); *see generally Bowsher v. Synar*, 478 U.S. 714 (1986).

To suspend active collection of a claim under this standard, the agency must both (1) conduct a review of the debtor's financial condition, and (2) determine whether at least one of the three factors listed above is met. *See USDA Collection of Excess Advance Deficiency Payments on 1832 Corn and Grain Sorghum Crops*, 65 Comp. Gen. 245, 251 (1986) (holding that "although the availability of future offset activity is relevant to suspension of collection under [the FCCS], it must be tied to an appropriate evaluation of the financial condition of the debtor (or appropriate class of debtors)"). Both determinations are required for an agency to appropriately suspend active collection action on a claim based on the debtor's current financial condition. 31 CFR § 903.2(b).

III. Requests for Waiver or Administrative Review

If a debtor requests a waiver or administrative review of the debt, agencies may suspend debt collection action. *See* 31 CFR § 903.2. Agencies should examine the law governing the debt to determine whether suspension of debt collection action is required. If not, agencies should apply the general factors applicable to suspension set forth in this chapter to determine if suspension is authorized. Suspension of debt collection action due to a pending waiver request or administrative review, however, will not necessarily suspend the accrual of interest, penalties, and costs. *See* 31 CFR § 901.9(h) (requiring agencies to "set forth in their regulations the circumstances under which interest and related charges will not be imposed for periods during which collection activity has been suspending pending agency review"); 31 CFR § 903.2(b)(3) (allowing suspension for current inability to pay if the debtor agrees to pay interest).

Some agencies have specific statutes that prohibit the agency from continuing debt collection action until after the agency has made a waiver determination or conducted its review, including both active and passive collection activity. 31 CFR § 903.2(c)(1). If the agency is subject to such a statute, it must suspend collection action "during the time required for consideration of the debtor's request for waiver or administrative review of the debt." *Id.*; *see also Califano v Yamasaki*, 442 U.S. 682 (1979) (holding that collection on claims under mandatory waiver statutes is barred until the agency appropriately determines that the waiver request is denied). Suspension will generally be required where a statute requires that an agency waive a debt if certain circumstances are met, as opposed to where the statute merely permits the agency to waive a debt if certain circumstances are met. *See id.*

An agency "ordinarily should suspend collection action upon a request for waiver or review" if the agency is prohibited from issuing refunds of amounts collected during its review process. 31 CFR § 903.2(c)(3). An agency is generally not permitted to refund amounts collected previously, unless it determines that the debt was never valid or if the agency has statutory authority to issue a refund. 31 CFR § 903.2(c)(3). If an agency lacks refund authority, it should have clear procedures on when suspension of debt collection action is appropriate. *See Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1190 (D. Ariz. 2011) (finding that the agency should have informed the debtor that collection action pending a determination on the waiver was suspended because the agency lacked the authority to issue refunds).

Some agencies have specific statutes that explicitly permit, but do not require, the agency to suspend debt collection action while it makes a determination regarding waiver or conducts its review. Even without such agency-specific statutes, however, agencies are generally not required to suspend their debt collection efforts pending an agency determination; rather, agencies may "use discretion, on a case-by-case basis" to make this determination. 31 CFR § 903.2(c)(2). An agency generally should not suspend collection action if it determines "that the request for waiver or review is frivolous or was made primarily to delay collection." *Id.* The current FCCS do not prescribe specific factors that agencies must consider when determining if suspension is appropriate in permissive waiver cases. The 1984 FCCS, which have been superseded, provided three factors: (1) whether there is "a reasonable possibility that waiver will be granted, or that the debt (in whole or in part) will be found not owing from the debtor;" (2) whether the "government's interests would be protected" if the suspension were granted; (3) whether "[c]ollection of the debt will cause undue hardship." 4 CFR § 104.2(c)(2) (1984) (former FCCS). While consideration of these factors may be useful, they are not required by the current FCCS. Agencies should have clear procedures on when suspension of debt collection action is appropriate.

IV. Automatic Stay

Finally, if an agency discovers that a debtor has filed for bankruptcy protection and an automatic stay is in effect, both active and passive collection activity on a debt generally must be suspended, pursuant to the provisions of the Bankruptcy Code. 31 CFR § 903.2(d); *see also* 11 U.S.C. §§ 362, 1201, and 1301. However, while the use of traditional debt collection tools may be prohibited, at least temporarily, an agency should consider what means are available to pursue its claim in accordance with the Bankruptcy Code, including by filing a proof of claim and preserving its rights to setoff or other collateral. *See id.* To the extent legally permitted, agencies should take the necessary steps to ensure that no funds or money are paid by the agency to the debtor until relief from the automatic stay is obtained. Agency personnel should consult with agency counsel and the Department of Justice to determine what collection actions are legally permissible.

E. STANDARDS FOR TERMINATION OF DEBT COLLECTION ACTION

When pursuing further debt collection is no longer appropriate, agencies may terminate debt collection action. Congress has granted agencies the authority to "end collection action . . . when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered." 31 U.S.C. § 3711(a)(3). The FCCS interpret and provide guidance as to when it is appropriate to terminate collection action on a claim owed to the United States. *See* 31 CFR Part 903.

Under the FCCS, before terminating collection of a claim, the agency should have pursued "all appropriate means of collection" and determined, based on these efforts, "that the debt is uncollectible." 31 CFR § 903.3(b). Because agencies have an affirmative duty to collect their debts, "termination of collection action should be viewed as a 'last resort.'" 62 Comp. Gen. at 604. The FCCS specifically list examples of the debt collection tools that an agency should use before terminating debt collection action, including: administrative offset; tax refund offset; federal salary offset; referral to Treasury, Treasury-designated debt collection centers or private collection contractors; credit bureau reporting; wage garnishment; litigation; and foreclosure. 31 CFR § 903.5(a).

Just like suspension, in order for an agency to appropriately terminate collection of a debt, an agency must do so based on a reasonable determination that one or more of the standards for termination provided in the FCCS is applicable. *See Jeffcoat*, B-212337, 1984 WL 43986 (Comp. Gen. Feb. 17, 1984) (holding that the Department of Defense could not establish regulations which terminated collection actions "simply because trainees have departed from their U.S. or overseas training activities," because, under the FCCS, "termination of claims collection activity [must] be based on an assessment of the collectability of the claim"); *see also* B-160506, 1970 WL 4917 (Comp. Gen. Apr. 10, 1970) (holding that the FCCS permit agency heads to terminate collection action only when one of the listed standards is applicable); B-152680 (Comp. Gen. Oct. 28, 1966), *available at* http://redbook.gao.gov/3/fl0013781.php (holding that unless the agency could show some valid basis for termination under the FCCS, the agency had to proceed with collection of the full amount of the debt). Given the affirmative duty to aggressively collect the debts, agencies may only terminate collection action on a claim when:

> (1) The agency is unable to collect any substantial amount through its own efforts or through the efforts of others; (2) The agency is unable to locate the debtor; (3) Costs of collection are anticipated to exceed the amount recoverable; (4) The debt is legally without merit or enforcement of the debt is barred by any applicable statute of limitations; (5) The debt cannot be substantiated; or (6) The debt against the debtor has been discharged in bankruptcy.

31 CFR § 903.3(a). Furthermore, agencies must have adequate support for their determination that one or more of these standards applies. "While section 104.3 [now 31 CFR § 903.3] provides for termination of collection activity on claims on any one of [six] stipulated bases, or a

combination thereof, it was not contemplated that any of these bases would be applied in the absence of detailed support of such application." B-117604, 1968 WL 3639, at *1 (Comp. Gen. May 27, 1968).

Termination of collection action does not preclude passive collection efforts such as administrative offset through the Treasury Offset Program or credit bureau reporting. After terminating collection action, agencies are required to sell the debt if doing so "is in the best interest of the United States," as determined by Treasury. 31 U.S.C. § 3711(i); *see also* OMB Circular A-129, Sec. IV.C.1 (stating that "agencies are required to sell any non-tax debts that are delinquent for more than one year for which collection action has been terminated, if the Secretary of the Treasury determines that the sale is in the best interest of the United States Government.").

I. Inability to Collect and Inability to Locate the Debtor

An agency may terminate collection activity when it "is unable to collect any substantial amount through its own efforts or through the efforts of others." 31 CFR § 903.3(a)(1). For example, termination of debt collection action is appropriate if a debtor died without assets or is destitute and no amount of effort will yield collection. Similarly, an agency may terminate collection action if it cannot locate the debtor after diligent efforts to do so, and if it believes that its inability to locate the debtor will continue for the foreseeable future. 31 CFR § 903.3(a)(2).

II. Cost-Benefit Analysis

The FCCA was enacted to address, among other things, the problem that "agencies [could not] terminate or suspend efforts to collect a claim even when the very futility of these efforts serve[d] to add to the cost of Government and therefore compound[ed] the loss to the United States." S. Rep. No. 89-1331, at 1. The FCCS therefore provide that a federal agency may terminate collection of a claim when the "[c]osts of collection are anticipated to exceed the amount recoverable." 31 CFR § 903.3(a)(3). In other words, agencies are only required to pursue collection actions if they can do so cost-effectively. *Id.*

In determining what constitutes cost-effective debt collection, agencies may take into consideration costs if there is a substantial likelihood that such costs will actually be incurred in a particular case. And, "agencies may (but are not required to) take the costs of administrative procedures required by law into account when deciding whether to terminate the collection of debts." *Termination of Claims Against Federal Civilian and Military Personnel Based on Costs of Collection*, 65 Comp. Gen. 893, 898 (1986) (interpreting the 1984 FCCS). Thus, if an agency believes that a particular debtor will likely request a hearing or other form of administrative review, then the agency may include the anticipated costs of this review in its determination of whether continued collection will be cost-effective. *Id.* When the claim is relatively small, "[c]ollection costs may be a substantial factor." 31 CFR § 902.2(e). As such, "[a]gency collection procedures should provide for periodic comparison of costs incurred and amounts collected" in order to "establish guidelines with respect to points at which costs of further

collection efforts are likely to exceed recoveries . . . and establish minimum debt amounts below which collection efforts need not be taken." 31 CFR § 901.10. Since advance determinations of these minimum debt amounts do not constitute case-by-case evaluations of the costs of continued collection, they should not include "the anticipated costs of administrative hearings or reviews." 65 Comp. Gen. at 900 (holding that termination of debt collection action based on anticipated costs should only take into account the costs of hearings on a case-by-case basis if there is a substantial likelihood that the costs will be incurred).

The establishment of either points of diminishing returns or minimum debt amounts should be supported by cost studies which show a "periodic comparison of costs incurred and amounts collected." 31 CFR § 901.10. There are two situations in which these cost studies are not required. First, cost studies need not be conducted to establish *de minimis* minimum debt amounts. *Dep't of the Interior*, 58 Comp. Gen. 372, 375 (1979) (holding that "there is no need to pursue collection action with respect to [claims] in amounts of $1 or less"). Second, an agency may terminate collection action on a class of claims under this standard when the size of the individual claims is small, when the administrative burden of identifying the debtors and computing the amount of the claims would be disproportionately high, and where the individual claims would be eligible for waiver consideration. *See Alaska Railroad*, B-198903, 1981 WL 23596, at *6-7 (Comp. Gen. Aug. 6, 1981) (holding that termination of collection action on a class of claims was appropriate because "the administrative costs of conducting a full audit to identify overpayments and maintaining such a large number of relatively small individual collection actions are likely to exceed the realistic estimated recovery and go far beyond the point of diminishing returns"); *Clark Air Base*, B-181467, 1976 WL 9957 (July 29, 1976) (holding that a large number of overpayment claims could appropriately be terminated when "the administrative costs of collection [were] likely to exceed the estimated recovery and would go beyond the point of diminishing returns").

In the context of the collection of certain overpayments, specifically claims arising from reasonably foreseeable overpayments by the United States, agencies must still perform an analysis despite a previous GAO decision to the contrary. GAO has previously found that the standards authorizing agencies to establish minimum debt amounts below which active collection will not be pursued "have no application in [these] cases" because authorizing such terminations "would have the effect of authorizing disbursing officers to make a known overpayment." 49 Comp. Gen. 359, 360 (1969). While agencies may consider this GAO finding as a factor in determining whether termination of debt collection action is appropriate, an agency is not precluded from establishing points of diminishing returns and minimum debt amounts to justify the termination of active collection of claims arising from reasonably foreseeable overpayments by the United States.

When administrative tools are available, agencies generally should not terminate collection action. Although the FCCS provides that termination is authorized when enforcement of the debt is barred by any applicable statute of limitations for bringing a claim in court, 31 CFR § 903.3(a)(4), this authorization presumes that the debt cannot be collected through administrative means. Since most administrative debt collection tools have no statute of limitations, they

should be employed to the extent they are cost-effective, regardless of the expiration of the statute of limitations.

III. Debt is Legally Without Merit

Agencies should terminate active collection of a claim when "[t]he debt is legally without merit." 31 CFR § 903.3(a)(4). Continuing to pursue active collection of meritless claims is not cost-beneficial to the United States. A claim is legally without merit "only if there is no legal basis for recovery by the United States." *Soil Conservation Serv.*, 68 Comp. Gen. 609, 611 (1989) (holding that termination was inappropriate because the Comptroller General could not "conclude that if the United States were to sue on this claim it would be unsuccessful"); *see also Debt Collection Due to Overpayment of Former President Ford's Staff*, B-218989, 1986 WL 63051, at *4 (Comp. Gen. Jan. 27, 1986); *Stephenson*, 65 Comp. Gen. 177, 182 (1986).

IV. Debt Cannot be Substantiated

Agencies should maintain detailed records of all claims owed to them or for which they are responsible for collecting. *See* 31 CFR § 904.3. If, however, the agency does not have adequate evidentiary support that a claim exists, it may terminate debt collection action. 31 CFR § 903.3(a)(5) (providing that agencies may terminate active collection when "[t]he debt cannot be substantiated").

V. Debt Discharged in Bankruptcy

If a debt has been discharged in bankruptcy, the agency may no longer have a right to pursue collection of the debt, and debt collection action generally should be terminated. 31 CFR § 903.3(a)(6). Termination of debt collection action on discharged debts is appropriate "regardless of the amount" of the claim. 31 CFR § 903.3(c). If an agency learns that a debtor has filed for bankruptcy protection, it should consult its legal counsel to determine what rights it retains to the debt in question and, to the extent feasible, protect the agency's right to recover the debt. Even if a debt has been discharged, the agency may be able to collect the debt through offset and recoupment, or by foreclosing on any property that secures repayment of the debt. The agency may also be able to recover through a plan of reorganization or, if the agency did not have notice of the bankruptcy case, the claim may survive the discharge. If the claim has not been referred to the Department of Justice and meets the requirements for termination, the agency may terminate collection activity without first obtaining Department of Justice approval.

VI. Exception to Termination for Enforcement Policy

Agencies have express authority to refer certain claims to DOJ for litigation "even though termination of collection activity may otherwise be appropriate." 31 CFR § 903.4. According to the FCCS, "[w]hen a significant enforcement policy is involved, or recovery of a judgment is a

prerequisite to the imposition of administrative sanctions," agencies may refer the claim to DOJ even if termination would have otherwise been appropriate. *Id.* Agencies may choose to continue pursuing collection because "countervailing Government policies dictate that collection be attempted, despite the costs." 65 Comp. Gen. at 897; *see also Lenane*, B-197146, 1980 WL 15953, at *4 (Comp. Gen. Sept. 22, 1980) (noting that "cost benefit analyses should not always be the sole determinant for the termination of claims," and that unquantifiable factors, like "the integrity of a collection program, should also be considered"). For example, an agency may be concerned that if it develops a reputation for terminating collection action of debts under $200 upon a hearing request, other debtors will request a hearing simply to benefit from the termination of collection action as well. To avoid this, the agency may choose, in its discretion, to not terminate collection action of such claims, even though in particular instances it might cost the Government more than $200 to collect the claim. In other words, an agency may thus choose not to terminate active collection efforts, even if such a termination would be the cost-efficient choice in the instant case. 65 Comp. Gen. at 897.

F. WRITE-OFF AND REPORTING DISCHARGE OF INDEBTEDNESS

I. Termination of Debt Collection Action, Discharge, and Close Out

Write-off is an accounting concept that allows agencies to accurately reflect the value of their receivables on their books. Generally, write off is mandatory for debts delinquent for more than two years. See OMB Circ. A-129, Sec. V.E, for write-off requirements. When writing off a debt, agencies classify the debts as either "currently not collectible" (CNC) or "close-out." A classification of CNC generally indicates that the agency will continue its collection efforts after write-off, while close-out indicates that the agency has terminated both active and passive debt collection activity.

Closing out a claim functions as a final disposition of the debt for agency accounting and management records. *See* OMB Circ. A-129, Sec. V.E; 31 CFR § 903.5(a); FCCS, 65 Fed. Reg. at 70,394. In other words, the agency is no longer obligated to pursue collection or monitor the debt. *See id.* The Government can (but is not required to) "re-open" the debt at any point it believes continued collection action is appropriate. 31 C.F.R § 903.3(b). The agency may maintain its debt records for this and other purposes. 31 C.F.R § 903.3(b). When an agency closes out a debt, it must release any liens of record securing the debt. 31 CFR § 903.5(d).

Write-off of a debt (and classification as either "CNC" or "close-out") has no effect on the agency's ability to assert its claim against the debtor. It is only an internal accounting and management tool.

II. Requirement to Report Discharge of Indebtedness to the Internal Revenue Service

Creditors are generally required to report a discharge of indebtedness to the Internal Revenue Service (IRS) using Form 1099-C after an "identifiable event," such as when a creditor decides to give up on its collection efforts (that is, terminates debt collection action). Discharge of indebtedness reporting provides the IRS with the information it needs to determine whether the debtor has received income as a result of the agency's decision to forego collection. See 26 U.S.C. § 6050P and 26 CFR § 1.6050P-1 for reporting requirements.

The reporting of a discharge of indebtedness on Form 1099-C does not affect the rights of the creditor to collect a debt. While the Form 1099-C is named "Cancellation of Debt," the issuance of a Form 1099-C does not actually "cancel" a debt. As such, an agency can terminate its debt collection efforts on a debt that it does not believe is collectible, issue a Form 1099-C, as required by law, and subsequently restart its collection efforts, if it later obtains new information about the debtor that indicates that the debt is collectable. *See* 26 CFR § 1.6050P-1(a) (stating in part that "*Solely for purposes of the reporting requirements of section 6050P* and this section, a discharge of indebtedness is deemed to have occurred, except as provided in paragraph (b)(3) of this section, if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, whether or not an actual discharge of indebtedness has occurred on or before the date on which the identifiable event has occurred") (emphasis added); *see also Bononi v. Bayer*

Employees Fed. Credit Union (In re Zilka), 407 B.R. 684, 689 (Bankr. W.D. Pa. 2009) (holding that "Bayer's issuance of the Forms 1099-C did not itself operate to legally discharge the debtor from further liability on each of Bayer's four claims. That is because Forms 1099-C, as a matter of law, do not themselves operate to legally discharge debtors from liability on those claims that are described in such Forms 1099-C."); *Debt Buyers' Association v. Snow*, 481 F. Supp. 2d 1, 14 (D.D.C. 2006) (stating that "a 1099-C must be issued as a result of an identifiable event regardless of whether an actual discharge of indebtedness has occurred on or before the date of such event"); IRS Info. Ltr. 2005-0207, 2005 WL 3561135 (Dec. 30, 2005) (available at http://www.irs.gov/pub/irs-wd/05-0207.pdf) (stating that "[t]he Internal Revenue Service does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection"); *United States v. Reed*, 2010 U.S. Dist. LEXIS 96079, at *5 (E.D. Tenn. Sept. 14, 2010) (explaining that the issuance of a Form 1099-C, "as a matter of law, does not operate to legally discharge a debtor from liability on the claim that is described in the form."); *Sims v. Commissioner*, 2002 Tax Ct. Summary LEXIS 78, at *4-5 (T.C. 2002) (holding that issuance of a Form 1099-C does not establish that the creditor ever actually discharged the debt). If the agency is required to report such a discharge to the IRS, it may request that Fiscal Service file such a discharge report on its behalf. 31 CFR § 903.5(c).