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## II. Demand Letters

### A. Creditor Agency Must Send Demand Letters

Federal agencies must try to collect debts owed to them. 31 U.S.C. § 3711(a)(1); 31 CFR § 901.1(a). Collection attempts typically begin with sending the debtor a billing notice, invoice, or written demand letter. Agencies are required to make written demand for payment promptly after discovering that a debt is owed. 31 CFR § 901.2(a). Demand letters must be either mailed or hand-delivered to the debtor. *Id.* § 901.2(b)(3). Most agencies deliver these letters via first-class mail; in appropriate circumstances, however, agencies may use alternative delivery methods, including electronic delivery<sup>4</sup> or certified mail. Agencies should consult their own counsel to determine circumstances in which such alternatives would be appropriate. Agencies should mail or hand-deliver demand letters on the same day that they are dated. *Id.* § 901.2(c).

The purpose of a demand letter is to permit the debtor to voluntarily pay or resolve the debt, and to avoid the expense of further debt collection action. This differs somewhat from the purpose of due process notification, which is to provide the debtor with notification of the debt and an opportunity to dispute the debt or the agency's proposed collection actions. While demand letters and due process notices serve somewhat different purposes, an agency may include due process notification in its written demand letter. While a single demand letter generally suffices, an agency may send additional demand letters if it believes additional demand letters will result in payment or resolution of the debt. *Id.* § 901.2(a). Agencies should use "procedures that will lead to the earliest practicable determination of whether the debt can be resolved administratively or must be referred for litigation." *Id.* § 901.2(c).

While making written demand for payment should generally be the first step in the collection process, agencies may first take other appropriate actions when necessary to protect the Government's interest. *Id.* § 901.2(a). Immediate referral for litigation, for example, would be appropriate if the statute of limitations was about to expire or if the agency believed that the debtor may attempt to dissipate its assets. *Id.* § 901.2(a); *see also id.* § 904.1.

### B. Contents of Demand Letters

#### (1) *Explanation of Debt*

The demand letter must inform the debtor of the amount owed, the basis of the indebtedness, and the standards for imposing any interest, penalties, or administrative costs. *Id.* § 901.2(b).

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<sup>4</sup> If using email or text messaging to communicate with a debtor, the agency should consider, among other things, privacy concerns (e.g., whether the email might be shared with the debtor's spouse or accessible by the debtor's employer), security concerns (e.g., whether the email communication is secure), and due process concerns (e.g., is email a reasonable way to notify the debtor of their rights).



When calling a debtor, agency personnel should clearly identify themselves and their purpose for calling. Use of “desk names” (i.e., pseudonyms) is acceptable under certain circumstances, but agencies should consult with their legal counsel before using desk names.<sup>5</sup> While the Telephone Consumer Protection Act does not apply to federal agencies, agencies should also consult their legal counsel before using autodialers or pre-recorded calls. *See* 47 U.S.C. § 227.

#### **IV. Obtaining Debtor Information**

Federal agencies have a variety of resources through which to obtain information needed to pursue debtors, including contact information and information regarding a debtor’s ability to pay. In addition to the information that an agency has in its own files, for example, an agency may obtain address information from the Internal Revenue Service (IRS) for debt collection purposes. 26 U.S.C. § 6103(m)(2); 31 CFR § 901.11. Agencies may also be able to purchase access to commercial databases for the purpose of obtaining information about debtors. Agencies may contract for debtor asset and income search reports. 31 CFR § 901.5(e). Additionally, agencies may pull credit reports on debtors. 31 U.S.C. § 3711(h). Some agencies may also have authority to obtain data from the National Database of New Hires. *See, e.g.*, 42 U.S.C. § 653(j)(6), (7), (9).

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<sup>5</sup> *Cf.* 26 U.S.C. § 7804 note (authorizing employees of the Internal Revenue Service to use pseudonyms if certain conditions are satisfied).

## **B. PAYMENT AND RESOLUTION OF DEBT**

### **I. Methods of Payment**

#### **A. Generally**

Agencies generally have broad latitude to determine what methods of payment they will accept in payment of a debt. When determining the methods of payment to accept, an agency should consider, among other things, the processing costs for each method of payment and the ability of its debtor population to use each method of payment.

#### **B. Electronic Funds Transfer**

When cost-effective, practical, and consistent with statutory authority, agencies must collect funds through electronic methods, rather than cash, paper check, or other paper instruments. 31 CFR § 206.4(a); *see also* 31 CFR § 206.2 (defining electronic funds transfer). Electronic payment methods include, but are not limited to, Automated Clearing House (ACH) transfers, Fedwire® transfers, transfers made at automatic teller machines (ATM) and Point-of-Sale (POS) terminals, and credit card transactions. 31 CFR § 206.2.

#### **C. Cash, Paper Check, and Credit Card**

When appropriate, agencies may accept payment by cash<sup>6</sup> or check.<sup>7</sup> Agencies may require certain forms of payment over others. *See* I 5-2000 (“Federal entities may decide not to accept payments made in cash or by check”).<sup>8</sup> Agencies generally may not accept credit card payments for delinquent debts or current loan obligations.<sup>9</sup>

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<sup>6</sup> “United States coins and currency . . . are legal tender for all debts . . . .” 31 U.S.C. § 5103. However, nothing requires the Government to accept payments in cash. *See Picano v. Emerson*, 353 Fed. App’x 733, 735 (3d Cir. 2009); *Tenn. Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 458 (6th Cir. 2009). In addition, collecting payments through electronic methods helps save agencies money and benefits the public as a whole. *See* ELECTRONIC COMMERCE (ECOMMERCE), available at <https://fiscal.treasury.gov/ecommerce-collections>; ECOLLECTIONS, available at <https://www.fiscal.treasury.gov/ecollections>.

<sup>7</sup> I TFM § 5-2000, available at <https://tfm.fiscal.treasury.gov/v1/p5/c200.html> (providing agencies with instructions on how to deposit domestic checks and cash).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 5-7100, available at <https://tfm.fiscal.treasury.gov/v1/p5/c700.html> (describing the prohibition on using credit cards for repayment of debt obligations).

## D. Non-Monetary Forms of Payment

In certain circumstances, agencies may accept in-kind payment in satisfaction of a debt.<sup>10</sup> However, given the additional costs of valuing and selling property received in exchange for satisfaction of a debt, agencies should consider whether more efficient methods of payment are available or appropriate.<sup>11</sup> Agencies should also ensure that accepting property or services in satisfaction of a debt does not run afoul federal procurement or other laws.

## **II. Collection in Installments**

### A. Partial Payments

#### *(1) Application of Partial Payments*

##### a) Interest, Penalties, and Administrative Costs

If a debtor makes a partial payment of a debt (or the agency collects only a portion of the debt), the partial payment must “be applied first to any contingency fees added to the debt, second to outstanding penalties, third to administrative costs other than contingency fees, fourth to interest, and last to principal.” 31 CFR § 901.9(f).

##### b) Multiple Debts

When a debtor owes multiple debts to an agency, the agency should consider how to apply voluntary payments and other collections. If a debtor specifies the debt to which the voluntary payment relates, the agency generally should adhere to this designation.<sup>12</sup>

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<sup>10</sup> 31 CFR § 900.5 (“Claims may be paid in the form of money or, when a contractual basis exists, the Government may demand the return of specific property or the performance of specific services”).

<sup>11</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, B-229068.4 (1998), *available at* <https://www.gao.gov/products/437514#mt=e-report> (permitting acceptance of property as part of compromise but cautioning that “care would have to be taken to assure that the property, when reduced to cash, after expenses incident to sale, would in fact provide the government an adequate payment”).

<sup>12</sup> *St. Paul Fire & Marine Ins. Co. v. United States*, 309 F.2d 22, 25 (8th Cir. 1962) (stating that the creditor should apply a voluntary payment in the manner that the debtor indicates); *Md. Cas. Co. v. S. Norfolk*, 54 F.2d 1032, 1038 (4th Cir. 1932) (“The rules as to application of payments are well settled. The right to direct the application belongs in the first instance to the debtor.”); *cf.* 31 CFR § 901.3(c)(4) (providing that agencies should apply amounts recovered by non-centralized administrative offset to debts in accordance with the best interests of the United States).

If the voluntary payment exceeds the amount owed on the designated debt, the agency should consider whether it may apply the overpayment to an unrelated debt.<sup>13</sup> In making this determination, the agency should be aware that, if it decides to refund the overpayment rather than apply it to a delinquent debt, the payment representing the refund would likely be subject to offset for any debts referred to the Treasury Offset Program (TOP).<sup>14</sup>

If the debtor fails to specify the debt to which the voluntary payment should be applied, the agency generally may apply the payment in its own discretion.<sup>15</sup> If one of the debts is less collectable than the others (e.g., unsecured, expired statute of limitations for judicial enforcement, etc.), the agency should consider applying the payment to the least collectable debt.<sup>16</sup>

## (2) Effect on Statute of Limitations

An agency should determine whether any partial payment and/or written acknowledgment of a debt by a debtor restarts the tolling of the statute of limitations period for judicial enforcement and should update its records accordingly. *See* 28 U.S.C. § 2415(a) (providing that, generally, actions brought by the United States involving a contract are barred six years after the right of action accrues and, in the case of a later partial payment or written acknowledgment of the debt, the right of action accrues again at the time of each such payment or acknowledgment).

## B. Installment Payment Agreements

“Whenever feasible, agencies shall collect the total amount of a debt in one lump sum.” 31 CFR § 901.8(a). Sometimes, however, debtors are financially unable to pay the debt all at once. In such circumstances, an agency generally may (and sometimes must) accept installment payments. *Id.*

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<sup>13</sup> *See* 31 U.S.C. § 3711(a) (requiring affirmative collection action); 31 CFR § 901.1(a) (requiring collection action); *L. B. Mfg. Co.*, B-186852, 1976 U.S. Comp. Gen. LEXIS 1904 (Oct. 21, 1976), available at <https://www.gao.gov/assets/410/402594.pdf> (finding that an agency’s duty to take collection action compelled it to apply an overpayment made by a debtor to an unrelated debt even though the overpayment had been made as a result of agency error).

<sup>14</sup> *See* 31 U.S.C. § 3716(c); 31 CFR § 285.5(e)(1); *see also infra* Part III.D.

<sup>15</sup> *St. Paul Fire & Marine Ins. Co.*, 309 F.2d at 25 (stating that the creditor may determine how to apply a voluntary payment if the debtor fails to indicate a preference); *Md. Cas. Co.*, 54 F.2d at 1038 (holding that the creditor may determine how to apply a payment, if not specified by the debtor).

<sup>16</sup> *See* 31 CFR § 901.3(c)(4) (“When collecting multiple debts through non-centralized administrative offset, agencies should apply recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, particularly the applicable statute of limitations”).

### (1) *When Agencies Must Enter Into Installment Payment Agreements*

Although constitutional due process does not include the right to negotiate a repayment agreement, in certain circumstances, debtors have a statutory right to the opportunity to enter into a written repayment agreement under terms agreeable to the head of the agency before the agency takes certain collection actions. *See, e.g.*, 5 U.S.C. § 5514(a)(2)(C) (federal salary offset); 31 U.S.C. § 3711(e)(1)(D)(i) (consumer credit bureau reporting); 31 U.S.C. § 3716(a)(4) (administrative offset); 31 U.S.C. § 3720D(b)(4) (administrative wage garnishment). If the debtor wishes to exercise this right, the debtor generally will have to demonstrate an inability to immediately pay the entire debt. *See* 31 CFR §§ 901.8(a) (setting forth the circumstances under which a debt can pay in installments), 902.2(a)(1) (setting forth compromise standards, which apply to installment payment agreements which compromise the time period over which the debt must be paid). If the debtor does so within the time period specified in the agency's notice, then the debtor may be entitled to enter into a written repayment agreement, provided that the agreement be on terms acceptable to the head of the agency. 5 U.S.C. § 5514(a)(2)(C); 31 U.S.C. §§ 3711(e)(1)(D)(i), 3716(a)(4), 3720D(b)(4).

If the debtor and agency enter into such an agreement prior to the expiration of the applicable due process period specified in the agency's notice, then the debt generally will not be considered delinquent. *See* 31 CFR § 285.12(a) (definition for "delinquent" indicating that a debt is not delinquent for purposes of mandatory referral to Treasury if "other payment arrangements satisfactory to the creditor agency have been made"); *Id.* § 285.13(e)(1)(iii)-(iv) (stating that repayment agreements resolve delinquency for the purpose of the bar on delinquent debtors from receiving federal financial assistance).

### (2) *When Agencies May Enter Into Installment Payment Agreements*

If the agency provides the debtor with notice of the opportunity to enter into a repayment agreement, but the debtor fails to exercise the opportunity, the agency may pursue collection. Even though the debtor may no longer be entitled to this opportunity as a matter of due process after the agency initiates collection, the agency retains discretion to enter into installment payment agreements if the debtor can demonstrate an inability to pay the debt in a lump sum. *Id.* §§ 901.8(a), 902.2(a)(1). The agency should make clear in the repayment agreement whether it resolves the delinquency or precludes the use of any delinquent debt collection tools.

### (3) *Basis for Installment Payment Agreements: Inability to Pay*

Generally, an agency should only consider entering into an installment payment agreement with a debtor when the debtor is unable to pay the debt in one lump sum. *Id.* If a debtor represents such an inability, the agency should obtain financial statements from the debtor and "independently verify such representations whenever possible." *Id.* Agencies may also consider whether debtors who can demonstrate that they receive governmental need-based assistance (such as through Supplemental Security Income, Temporary Assistance for Needy

Families, the Supplemental Nutrition Assistance Program, or Medicaid) might be eligible for installment payment agreements without having to complete full financial statements.

#### (4) *Installment Payment Agreement Terms*

After determining that an installment payment agreement is warranted, agencies should “obtain a legally enforceable written agreement from the debtor that specifies all the terms of the arrangement.” 31 CFR § 901.8(a). Agencies should determine whether, in appropriate circumstances, the requirement that the payment agreement be “written” can be satisfied by entering into a verbal agreement with the debtor on a recorded line.

There is no required format for installment payment agreements, but agencies should consider including the following provisions:

- *Payment Obligations.* Installment agreements should specify the total amount the debtor will pay under the agreement, the frequency of payments, the amount of each payment, and the payment method. The size and frequency of the installment payments should “bear a reasonable relation to the size of the debt and the debtor’s ability to pay.” *Id.* § 901.8(b).
- *Method of Payment.* Installment agreements should specify how payments may be made (e.g., instructions on how to make electronic payments or where to mail checks). If payments will be made by preauthorized debit (PAD), the agency should ensure it has provided the debtor required notifications regarding the PAD, including how the debtor can cancel or alter the PAD, when the debits will be initiated, and the size and frequency of such debits. *See, e.g.,* 12 CFR § 205.10.
- *Continued Collection.* Installment agreements should specify whether and to what extent the agency may collect the debt through other methods during the term of the agreement, including whether the agency may collect through offset and, if so, whether and how such collections will impact the debtor’s future payment obligations.
- *Amount Owed; Order of Application.* Installment agreements should specify the total amount owed, including a breakdown between principal, interest, penalties, and administrative costs. They should also contain an explanation of how the agency will apply payments under the agreement. *Id.* § 901.9(f) (“[A]mounts received by the Government shall be applied first to any contingency fees added to the debt, second to outstanding penalties, third to administrative costs other than contingency fees, fourth to interest, and last to principal”).
- *Acknowledgment; Release of Claims Against United States.* Installment agreements should contain an acknowledgment by the debtor of the debt and an acknowledgment that



there are no defenses, offsets, or counterclaims with respect to the debt.<sup>17</sup> They should also contain a provision through which the debtor releases the United States from any and all claims arising prior to the execution of the agreement. *See* 31 CFR § 902.7.

- *Acceleration.* Installment agreements should contain a provision that accelerates the debt in the event of default. *Id.* § 901.8(a).
- *Overpayments.* Installment agreements should specify that agency will apply excess payments to future payments due under the agreement or to other debts owed by the debtor to the United States.
- *Time is of the Essence.* Installment agreements should state that time is of the essence with respect to the debtor's payment obligations and provide the agency with the right to terminate the agreement (and, as noted above, accelerate the debt) in the event timely payment is not received.
- *Material Representations.* If the agency relied on representations from the debtor when agreeing to enter into an installment payment agreement (such as financial statements made by the debtor), the agency should list those material representations in the agreement.
- *Default/Termination.* Installment agreements should specify the conditions that constitute an event of default and what rights the parties have to terminate the agreement. The agreements should also specify that, in the event the agency does not exercise a termination right in a particular circumstance (e.g., by accepting a late payment), the agency has not waived its right to do so in the future.
- *Collateral.* When appropriate, agencies should obtain security for deferred payments. *Id.* § 901.8(c).

#### (5) *Unauthorized Installment Payment Agreements*

For a discussion of unauthorized agreements, including agreements entered into without authority, by mistake, or induced by fraud, see Part III.B.III.C.2.e, below,

#### C. Acceptance of Partial Payments Without an Agreement

Even if an agency has not entered into a payment agreement with the debtor, an agency may nevertheless accept partial payments. *See id.* § 901.9(f). An agency's acceptance of a voluntary partial payment (or payments), however, does not constitute an agency's acceptance of an installment agreement with the debtor.

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<sup>17</sup> Such an acknowledgment may benefit the agency in the event the agency must defend its right to collect the debt in court and may also re-toll the statute of limitations. *See supra* Part III.B.II.A.2.

### III. Compromise

#### A. Definition

A compromise is an agreement between two or more parties in which each party surrenders something of value.<sup>18</sup> Given that compromises should involve “mutual concessions,” claims should not be compromised for \$0 or for amounts previously collected (unless the debtor is making some other valuable concessions); if an agency believes that the debtor should pay nothing on a debt, the agency should consider whether it has authority to terminate collection on the debt (*see* Part IV.E of this Treatise) or to waive the debt.<sup>19</sup>

#### B. When Agencies Must Enter into Compromise Agreements

In general, agencies are never required to compromise a debt with a debtor. That is, even when an agency has authority to compromise a debt, debtors are generally not entitled to a compromise.<sup>20</sup>

#### C. When Agencies May Enter into Compromise Agreements

##### (1) *General Authority*

Absent statutory authority, agencies may not compromise valid debts. *See* Part I.A.II.A of this Treatise. Subject to certain exceptions and limitations, Congress has granted agencies the authority to compromise debts, if there is a basis for doing so. 31 U.S.C. § 3711(a)(2) (providing general compromise authority); 31 CFR § 902.2(a) (outlining the permissible bases for compromise).

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<sup>18</sup> *Compromise*, Black's Law Dictionary (11th ed. 2019) (defining “compromise” as “an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other”).

<sup>19</sup> Waiver is similar to compromise in that a debt that has been waived no longer exists. However, an agency’s authority to compromise a debt is distinct from its authority to waive a debt. A waiver does not require “mutual concessions.” *Waiver*, Black's Law Dictionary, (11th ed. 2019) (defining “waiver” as “[t]he voluntary relinquishment or abandonment . . . of a legal right or advantage”). Agencies must have specific authority to waive debts. Waiver standards differ depending on the specific authority, but often require a determination that recovery would be against equity and good conscience and/or not in the best interest of the United States. *See, e.g.*, 2 U.S.C. § 4593; 5 U.S.C. § 5584; 10 U.S.C. § 2774; 31 U.S.C. § 3717(h); 32 U.S.C. § 716.

<sup>20</sup> 31 U.S.C. § 3711(a)(2) (providing that an agency “may” compromise certain debts); 31 CFR § 900.8 (stating that the regulations applicable to compromise do not create any private rights of action); *see also In re Zandford*, No. 05-13305, 2006 Bankr. LEXIS 1398, at \*3 (Bankr. D. Del. July 18, 2006) (holding that the regulations applicable to compromise cannot be used by the debtor “as either a sword or a shield”).

## (2) Limitations on Authority

### a) Misconduct, Penalties, and Agency-Specific Statutes and Regulations

Even when a valid basis for compromise exists, agencies may not or, for policy reasons, should not compromise certain claims:

- An agency may not compromise a 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); *see also* 31 CFR § 900.3(a) (stating that “[o]nly the Department of Justice has the authority to compromise, suspend, or terminate collection activity on such claims”).
- An agency should not compromise “statutory penalties, forfeitures, or claims established as an aid to enforcement and to compel compliance” unless compromising the debt is consistent with “the agency’s enforcement policy in terms of deterrence and securing compliance.” 31 CFR § 902.3.

There are several agency- and debt-specific limitations on compromise authority. *See, e.g.*, 31 U.S.C. § 3711(b)(2) (barring the Secretary of Transportation from compromising debts arising from certain railroad safety violations for less than \$500); 8 U.S.C. § 1253(c)(1)(C) (prohibiting the Attorney General from compromising certain civil penalties associated with undocumented individuals).

### b) Accountable Officials

If an accountable official (including an agency official that certifies or disburses payments) improperly certifies or disburses a payment, that official may be personally liable for the amount of that payment.<sup>21</sup> Therefore, before compromising a debt owed as a result of accountable officer liability or relieving the accountable officer of such liability, an agency should consult its legal counsel to determine whether it has authority to do so and the impacts of doing so.<sup>22</sup>

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<sup>21</sup> *See, e.g.*, 31 U.S.C. §§ 3528, 3325; 10 U.S.C. § 2773a.

<sup>22</sup> 31 U.S.C. § 3711(a)(2) (purporting to limit an agency’s general compromise authority for debts that arise “out of an exception the Comptroller General makes in the account of an accountable official.”); *id.* § 3711(c) (stating that if an agency compromises an overpayment debt with the overpaid debtor, the accountable official is not liable for the portion of the debt that the agency fails to recover). Sections 3527 and 3528 of title 31 of the United States Code purport to authorize the Comptroller General to relieve accountable officials (including officials that certify or disburse payments) from liability arising from improper payments. *Id.* § 3527-28. However, the Department of Justice’s Office of Legal Counsel has opined that depriving the Executive Branch of the ability to relieve accountable officials of liability is an unconstitutional invasion of the Executive’s responsibility to execute the laws. *See generally* Comptroller General’s Authority to Relieve Disbursing and Certifying Officials From Liability, 15 Op. O.L.C. 80 (1991), *available at* <https://www.justice.gov/file/23321/download>; U.S. GOV’T ACCOUNTABILITY

Notwithstanding any possible liability for accountable officials, the agency retains its duty to collect the claim from the overpaid debtor.<sup>23</sup>

c) Claims Based on Fraud, Misrepresentation, Violations of Antitrust Laws

In general, only Department of Justice (DOJ) has the authority to compromise false claims, claims that appear to involve fraud or misrepresentation, or claims that appear to be based on conduct that violates the antitrust laws. 31 U.S.C. § 3711(b)(1); 31 CFR § 900.3(a). There may be exceptions for agencies with independent litigating authority, depending on the scope of that authority.

d) Limitation on Amount

An agency's general compromise authority is limited to claims that are no more than \$100,000 in principal ("or such higher amount as the Attorney General may from time to time prescribe"<sup>24</sup>). 31 U.S.C. § 3711(a)(2); 31 CFR § 902.1.<sup>25</sup> In determining whether a claim exceeds the \$100,000 cap, agencies may not subdivide a debtor's liability arising from a particular transaction to "avoid the monetary ceiling." 31 CFR § 900.6.

If an agency believes that the compromise of a claim exceeding \$100,000 is appropriate, the agency must seek approval from DOJ. *Id.* §§ 902.1(b); 904.2(c). Once an agency refers a claim to DOJ, DOJ has exclusive authority to compromise the claim and the referring agency must direct all inquiries concerning the claim to DOJ. *Id.* § 904.1(b).

Agencies need not obtain DOJ approval to reject a compromise offer. *Id.* § 902.1(b). However, if an agency is contemplating "a firm, written, substantive compromise offer," but is uncertain whether to accept, it may refer the offer to DOJ for consideration. *Id.* § 902.5. DOJ will either "act upon such an offer or return it to the agency with instructions or advice." *Id.*

e) Unauthorized Compromise Agreements

i. Ultra Vires; Agency Error; Restrictive Endorsements

Compromise agreements made by agents or other third parties (including private collection contractors, fiscal or financial agents, and agency employees) without

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OFFICE, TRANSFER OF CLAIMS SETTLEMENTS & RELATED ADVANCE DECISIONS, WAIVERS, & OTHER FUNCTIONS, B-275605 (1997), available at <https://www.gao.gov/assets/200/198248.pdf> (describing the transfer of certain functions from the Comptroller General to the Office of Management and Budget and other executive agencies).

<sup>23</sup> 31 U.S.C. § 3711(a)(1) (requiring agencies to collect their debts); 31 CFR § 901.1(a) (same).

<sup>24</sup> With regard to debts that have been transferred to Treasury's Cross-Servicing program, DOJ has delegated to Fiscal Service the authority to compromise claims of up to \$500,000. See Letter from Christopher Kohn, Dir., U.S. Dep't of Justice Commercial Litig. Branch, to Richard L. Gregg, Comm'r, U.S. Dep't of the Treasury Fin. Mgmt. Serv. (Sep. 3, 2003) (on file with recipient); see also Part III.C.II, below.

<sup>25</sup> As stated above, there may be exceptions for agencies with independent litigating authority, depending on the scope of that authority.

authority or by mistake generally will not bind the Government. Unlike private parties, who can be bound by the unauthorized actions of their agents, the Government generally will not be constrained by the unauthorized actions of its agents.<sup>26</sup>

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<sup>26</sup> *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 415-18, 424 (1990) (holding that erroneous advice provided by an agency employee did not entitle claimant to a payment not authorized by law); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947) (finding that an agency lacked the authority to insure the crops so the agency official's prior assurances that the crops were insurable were unenforceable); *Hachikian v. FDIC*, 96 F.3d 502, 505 (1st Cir. 1996) (finding no evidence that debtor's obligations were settled and noting that the official's miscommunication could not bind the agency); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) (finding that no contract existed where the plaintiff failed to show that "any individual with contracting authority exercised that authority to bind the United States"); *United States v. Vonderau*, 837 F.2d 1540, 1541-42 (11th Cir. 1988) (holding that an agency was not estopped from collecting debt when an agency employee without authority incorrectly informed debtor, who detrimentally relied on the information, that it would not proceed with debt collection action after a period of six months); *Square One Armoring Servs. Co. v. United States*, 162 Fed. Cl. 331, 340-41 (2022) (finding that the contracting officer's representative "lacked actual authority under the terms of the New Contract to authorize new payment (or overpayment) for jobs built to Old Contract specifications" and that "it is well-established that 'apparent authority will not suffice to hold the government bound by the acts of its agents'"); *Thomas Creek Lumber & Log Co. v. United States*, 36 Fed. Cl. 220, 239-41 (Fed. Cl. 1996) (holding that deposit of checks containing restrictive endorsements that payment was for "all amounts owed" did not discharge the remaining balance of the outstanding debts because individuals processing check payments received in the lockbox did not have delegated authority to accept compromises); *McDonald v. United States*, 13 Cl. Ct. 255, 263 (Cl. Ct. 1987) (stating that the agency did not delegate compromise authority to its loan servicer, so the agency could not be held to have accepted debtor's lesser payment as full payment even though the deposited check indicated it was for full payment); *Kennedy v. United States*, 1990 U.S. Dist. LEXIS 17546, at \*15-17 (N.D. Ill. Dec. 27, 1990) (determining that an agency was not bound by an attempted compromise made by a debtor who relied on a purported settlement with an employee lacking compromise authority, even though the agency deposited checks indicating that the payment was intended as payment in full); *United States v. Bloom*, 925 F. Supp. 426, 435-36 (E.D. La. 1996) (finding that an agency was not deemed to have made a compromise offer when its letter misstated the amount of the debt as significantly lower than the actual amount owed, because the debtor should have known that this was an error and the agency lacked authority to make such an offer), *aff'd*, 112 F.3d 200 (5th Cir. 1997); *see also* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); Part I.A.II.A of this Treatise (discussing appropriations principles applicable to agency debt collection activities); *but see USA Petroleum Corp. v. United States*, 821 F.2d 622, 625-27 (Fed. Cir. 1987) (invoking estoppel to restrict the Government's recovery of certain overpayments from a contractor, because the Government was aware of the overpayments, remained silent while the contractor relied on the contract's provisions, and "the contractor was not negligent and dutifully followed the terms of the contract"); *Deltona Corp. v. Alexander*, 682 F.2d 888, 891 (11th Cir. 1982) (suggesting that there may be some circumstances where the Government may be estopped due to the "affirmative misconduct" of an agent (internal quotation marks omitted)); *Strickland v. United States*, 382 F. Supp. 2d 1334, 1347-48 (M.D. Fla. 2005) (noting that an agency could be determined to have institutionally ratified an unauthorized agreement, but only in rare circumstances).

## ii. Induced by Fraud

Compromises obtained through fraud are voidable, and the agency may rescind the compromise agreement.<sup>27</sup> The perpetrator of the fraud may also be subject to civil and criminal penalties.<sup>28</sup>

## iii. Consequences of Unauthorized Compromise Agreements

If an agency becomes aware of a compromise agreement that was unauthorized, procured by fraud, or entered into by mistake, it should consult its counsel on whether the agreement is void or voidable,<sup>29</sup> on whether the agency may retain any funds received from the debtor pursuant to a rescinded compromise,<sup>30</sup> and on whether the agency may (or must) continue its collection efforts.

Alternatively, if it is within the agency's authority to do so, it may ratify the compromise agreement.<sup>31</sup> For example, if an agency's private collection contractor had authority to enter into compromise agreements, but exceeded the parameters of its authority, the agency may ratify the contractor's attempted compromise if the agency would have approved the compromise had proper procedures been followed.

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<sup>27</sup> 31 U.S.C. § 3711(c) (“A compromise . . . is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact.”); *see also First Nat’l Bank v. Pepper*, 454 F.2d 626, 632-33 (2d Cir. 1972) (noting that a compromise agreement is vulnerable to rescission if induced by fraud, mistake or duress); *United States v. Silliman*, 167 F.2d 607, 612 (3d Cir. 1948) (“It seems to us that if Congress had intended to provide that the Government should be remediless against the perpetrator of a fraud upon it and hereby create an exception to the thoroughly well-established rule that fraud renders transactions which it induces voidable, it would have said so in clear and unmistakable terms.” (internal quotation marks omitted) (quoting *In re Bowen*, 138 F.2d 22, 23 (3d Cir. 1943))).

<sup>28</sup> *See, e.g.*, 18 U.S.C. §§ 1001, 1621; *see also* 31 CFR § 902.2(g) (providing that financial statements should be executed under penalty of perjury).

<sup>29</sup> *See, e.g., Total Med. Mgmt. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997) (“A contract which is ‘plainly illegal’ is a nullity and void *ab initio*.”); *Fluor Enters. v. United States*, 64 Fed. Cl. 461, 493, 495-96 (2005) (finding that, although the contracting officer lacked authority to enter into certain contractual provisions, making those provisions void *ab initio*, the contractor fully performed and was entitled to reasonable compensation for its services); *Hall v. United States*, 19 Cl. Ct. 558, 560 (1990) (finding a sales contract void because it was unauthorized and noting that, even if authorized, it would have been voidable due to unilateral mistake), *aff’d*, 918 F.2d 187 (Fed. Cir. 1990) (mem.).

<sup>30</sup> *See, e.g., McDonald*, 13 Cl. Ct. at 261 (“Retention or cashing of the debtor’s check can, in *some* circumstances, operate as an acceptance by the creditor or the debtor’s offer [of compromise.]”); *Chesapeake & Potomac Tel. Co.*, 654 F.2d 711, 716-17 (Ct. Cl. 1981) (finding that where the amount owed was not in genuine dispute, the plaintiff’s act of cashing checks tendered did not result in a binding accord and satisfaction).

<sup>31</sup> *Strickland*, 382 F. Supp. 2d at 1346 (“The government may be bound by an unauthorized agreement if a government agent with authority subsequently ratifies it”).

## D. General Considerations

### (1) *Payment Agreement Terms*

For a discussion of some terms that should be contained in compromise agreements, see Part III.B.II.B.4, above, which lists certain provisions agencies should consider including in installment payment agreements.

### (2) *Joint and Several Liability*

When two or more debtors are jointly and severally liable for a debt owed to an agency, the agency “should ensure that a compromise with one debtor does not release the agency’s claim against the remaining debtors.” 31 CFR § 902.4(b).

The amount of a compromise with one debtor has no binding or precedential effect on the amount required from other debtors liable for the debt. *Id.* Overall, if multiple debtors are jointly and severally liable for the same claim, the agency should conduct distinct evaluations when deciding whether to compromise the claim against each debtor, especially if the basis for the compromise is the debtor’s ability to pay. *Id.*

### (3) *Finality*

A compromise “is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact.” 31 U.S.C. § 3711(c). In addition:

a compromise . . . should be implemented by means of a mutual release, in which the debtor is released from further non-tax liability on the compromised debt in consideration of payment in full of the compromise amount and the Government and its officials, past and present, are released and discharged from any and all claims and causes of action arising from the same transaction that the debtor may have.

31 CFR § 902.7. Even without an explicit mutual release, “the debtor is still deemed to have waived any and all claims and causes of action against the Government and its officials related to the transaction giving rise to the compromised debt” unless that result is otherwise prohibited by law. *Id.*

### (4) *Compromises Payable in Installments Generally Disfavored*

Generally, agencies should not accept compromises payable in installments. *Id.* § 902.2(f) (advising against acceptance of compromises payable in installments because it is “not an advantageous form of compromise in terms of time and administrative expense”); *see also id.* § 901.8 (“Whenever feasible, agencies shall collect the total amount of a debt in one lump sum”).

While disfavored, there is no prohibition on compromises paid in installments, so if accepting payment of a compromise in installments is the most effective means of collection or necessitated by the debtor's financial circumstances, agencies generally may do so. *Id.* § 902.2(f).

#### (5) Reporting Discharged Indebtedness to the IRS as Gross Income

As further discussed in Part IV.F.II of this Treatise, agencies must report any discharge of indebtedness of at least \$600 on Form 1099-C to the IRS. 26 CFR § 1.6050P-1(a)(1); *see also* 26 U.S.C. §§ 108, 6050P; 31 CFR § 903.5(c); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-129, POLICIES FOR FEDERAL CREDIT PROGRAMS AND NON-TAX RECEIVABLES (rev. 2013), *available at* <https://fiscal.treasury.gov/files/dHEWPDDJHPH/circ-k29-upd-0113.pdf>.

### E. Bases for Compromise

Agencies may only compromise a debt when there is a legal basis for doing so. 31 U.S.C. § 3711(a)(2), (d). The Federal Claims Collection Standards set forth several permissible reasons to compromise a debt. 31 CFR § 902.2(a); *see also* *Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes*, 38 Op. Att'y Gen. 98, 99 (1934) (noting that an agency cannot compromise a debt simply because “a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity”).

As noted above, with regard to debts owed jointly and severally by more than one debtor, the compromise standards generally should be considered separately for each debtor liable on a debt. That is, in general, a compromise agreement affects one debtor's liability on the debt, and not any other debtor's liability on a debt. 31 CFR § 902.4(b).

Generally, agencies need only rely on a single basis when determining whether to enter into a compromise agreement. Sometimes, however, an agency may consider factors in conjunction.

#### (1) Debtor's Inability to Pay

##### a) Factors to Consider

Agencies may compromise a debt if the Government cannot collect the full amount because “[t]he debtor is unable to pay the full amount in a reasonable time.” *Id.* § 902.2(a)(1).

When evaluating a debtor's inability to pay the claim, agencies should consider the following:

- age and health of the debtor;
- present and potential income;
- inheritance prospects;
- possibility that the debtor has concealed or improperly transferred assets; and



- availability of assets or income that the Government may realize through enforced collection.

*Id.* § 902.2(b). No single factor is dispositive, and agencies have the discretion to evaluate these and other relevant factors in determining whether to accept a compromise offer over which they have jurisdiction. *Id.*

#### b) Calculation of Appropriate Compromise Amount

A compromise based on a debtor’s inability to pay “should be for an amount that bears a reasonable relation to the amount that can be recovered by enforced collection procedures, [taking into account] the exemptions available to the debtor and the time that collection will take.” *Id.* § 902.2(c).

#### c) Documentary Substantiation

Before accepting a compromise offer based in whole or part on a debtor’s inability to pay, the agency should verify the debtor’s inability to pay by using a credit report<sup>32</sup> or other financial information. 31 CFR § 902.2(a)(1), (c), (g). This should include “a current financial statement from the debtor, executed under the penalty of perjury, showing the debtor’s assets, liabilities, income and expenses.” *Id.* § 902.2(g). An agency may use its own form of financial statement for this purpose or may rely on DOJ’s forms. *Id.* The level of substantiation required should depend on, among other things, the amount of the debt and the amount of the proposed compromise. For example, an agency may require a simple verbal statement from the debtor regarding ability to pay for a \$100 debt for which the debtor will pay \$90 under a compromise agreement, whereas an agency may require substantial formal documentation regarding a debtor’s finances for a \$1 million dollar debt, for which the debtor will pay \$500,000 under a compromise agreement. An agency should record its decision to compromise a debt, the basis on which it made the compromise, and the manner in which it calculated the appropriate offer amount.

### (2) Agency’s Inability to Collect

#### a) Factors to Consider

An agency may also compromise a debt if it believes that it cannot collect the full amount because “[t]he Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings.” *Id.* § 902.2(a)(2). When evaluating compromise offers on this basis, agencies “should consider the applicable exemptions available to the debtor under state and Federal law in determining the Government’s ability to enforce collection,” as certain forms of property may be exempt from forced liquidation

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<sup>32</sup> Agencies are authorized to “obtain a consumer report (as that term is defined in section 603 of the Fair Credit Reporting Act (15 U.S.C. § 1681(b)) or comparable credit information on any person who is liable for the claim.” 31 U.S.C. § 3711(h)(1).

proceedings. *Id.* § 902.2(c). In addition, agencies may “consider uncertainty as to the price that collateral or other property will bring at a forced sale in determining the Government’s ability to enforce collection.” *Id.* Although administrative debt collection tools generally do not have a time limitation, agencies may also consider applicable statutes of limitation for judicial enforcement. *See id.* § 903.3(a)(4) (permitting termination of collection action if “enforcement of the debt is barred by any applicable statute of limitations”).

b) Calculation of Appropriate Compromise Amount

The compromise amount should be “reasonable [in] relation to the amount that can be recovered by enforced collection procedures” and should give due consideration to any exemptions available to the debtor and the time and effort involved in collecting the debt through enforced collection proceedings. *Id.* § 902.2(c).

c) Documentary Substantiation

An agency should record its decision to compromise a debt based on its inability to collection. In doing so, the agency should record the basis on which that compromise was made, and the manner in which it calculated the compromise amount.

(3) *Costs of Collection*

a) Factors to Consider

An agency may compromise a debt when the “cost of collecting the debt does not justify the enforced collection of the full amount.” *Id.* § 902.2(a)(3). To determine whether this standard applies, agencies should consider whether they can use administrative collection tools in a cost-effective manner. For debts with a low balance, “[c]ollection costs may be a substantial factor.” *Id.* § 902.2(e). The Federal Claims Collection Standards also instruct agencies to conduct periodic comparisons of costs incurred and amounts collected to “establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, [and] assist in evaluating offers in compromise.” *Id.* § 901.10.

However, agencies should always “consider whether continued collection of the debt, regardless of cost, is necessary to further an enforcement principle, such as the Government’s willingness to pursue aggressively defaulting and uncooperative debtors.” *Id.* § 902.2(e).

b) Calculation of Appropriate Compromise Amount

When compromising on this basis, the amount of the compromise should be equivalent to what the Government could collect in a reasonable amount of time, using a reasonable amount of resources. *See id.* § 902.2(c). The amount, however, “may reflect an appropriate discount for the administrative and litigative costs of collection, with consideration given to the time it will take to effect collection.” *Id.* § 902.2(e).

c) Documentary Substantiation

When compromising a debt on this basis, an agency should record its decision to compromise, the basis on which the compromise was made, and its calculation of the compromise amount (including any discount it applied to reflect the costs of collection).

(4) *Doubtful Litigation Prospects*

a) Factors to Consider

Agencies may compromise debts if the Government may not collect the full amount because “[t]here is significant doubt concerning the Government’s ability to prove its case in court for the full amount claimed, either because of the legal issues involved or because of a bona fide dispute as to the facts.” *Id.* § 902.2(d); *see also id.* § 902.2(a)(4).

b) Calculation of Appropriate Compromise Amount

In these circumstances, the compromise amount should take into account the likelihood of successfully reducing a claim to judgment, and the availability of necessary witnesses and other evidentiary support. *Id.* § 902.2(d). Furthermore, “[i]n determining the litigative risks involved, agencies should consider the probable amount of court costs and attorney fees . . . that may be imposed against the Government if it is unsuccessful in litigation. *Id.*

c) Documentary Substantiation

As with all compromise offers, an agency should record its decision to compromise the debt, identify the basis on which it agreed to the compromise, and document the way in which it calculated the appropriate amount for the compromise.



## II. FISCAL SERVICE'S CROSS-SERVICING PROGRAM

### A. What is Cross-Servicing?

Cross-Servicing refers to the program in which Fiscal Service takes debt collection action on behalf of federal agencies for debts that have been referred to it under 31 U.S.C. § 3711(g). 31 U.S.C. § 3711(g)(5); 31 CFR § 285.12(a); I TFM § 3-5035.10. This includes actions to service, collect, compromise,<sup>36</sup> or suspend or terminate collection action<sup>37</sup> on referred nontax debt. Fiscal Service uses a variety of tools in its Cross-Servicing program to collect debts, including: sending demand letters; placing collection calls; negotiating payment or compromise agreements; administratively garnishing wages; reporting debts to credit bureaus; and referring debts to the TOP for offset purposes, to private collection contractors for administrative collection, and to DOJ for enforced collection through litigation. I TFM § 3-5035.10.

Fiscal Service takes actions in its Cross-Servicing program only as permitted by the federal agency that referred the nontax debt. *Id.* While Fiscal Service generally requires that each agency permit it to use all available debt collection tools, the agency can, in appropriate circumstances, opt out of certain collection tools. *Id.* § 3-5030.30. Once a debt is referred to Fiscal Service, the agency should cease all collection activity and communication with the debtor and refer all inquiries by the debtor to Fiscal Service; however, the debt remains on the books and records of the agency, and the agency remains responsible for ensuring the continued validity and enforceability of the debt. 31 CFR § 285(c)(1); I TFM § 3-5030.50c.

### B. Requirement to Refer Debts; Consequences of Non-Referral

Unless exempted from the requirement, federal agencies must refer any eligible nontax debt to Fiscal Service once the debt becomes 180 days delinquent.<sup>38</sup> And, agencies that rely on the Cross-Servicing program to satisfy the 120-day notice requirement for purposes of administrative offset must refer eligible nontax debts to Fiscal Service no later than 120 days after the debts become delinquent.<sup>39</sup>

While federal agencies generally must refer delinquent nontax debts to Fiscal Service's Cross-Servicing program, the requirements create no private rights for debtors. An agency's failure to

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<sup>36</sup> Fiscal Service generally has the authority to compromise debts with a principal balance of up to \$500,000, and may also compromise debts with a principal balance over \$500,000 after obtaining approval from DOJ. 31 U.S.C. § 3711(a)(2), (g)(1)(B), (g)(4)-(5); I TFM § 3-5015.30; Letter from Christopher Kohn, Dir., DOJ's Commercial Litig. Branch, to Richard L. Gregg, Comm'r, U.S. Dep't of Treasury Fin. Mgmt. Serv. (Sept. 3, 2003) (on file with Fiscal Service).

<sup>37</sup> Fiscal Service is also authorized to suspend or terminate collection action of referred debts with a principal balance of up to \$500,000, and may also suspend or terminate collection action of larger debts after obtaining approval from DOJ. 31 U.S.C. § 3711(a)(3), (g)(1)(B), (g)(4)-(5); I TFM § 3-5015.40.

<sup>38</sup> Compare 31 U.S.C. § 3711(g)(1) and 31 CFR § 285.12(c)(2) (mandating referral of all nontax debts that are 180 days delinquent) with 31 U.S.C. § 3711(g)(2) (enumerating limited circumstances under which 31 U.S.C. § 3711(g)(1) "shall not apply" to otherwise eligible debts).

<sup>39</sup> 31 CFR § 285.12(c)(2), (g); I TFM § 3-5030.40a.

comply with the mandatory referral requirement does not impact the validity or enforceability of the debt.<sup>40</sup>

However, failure to timely refer debts may negatively impact the collectability of a debt. Moreover, any agency's failure to comply with the statutory and regulatory requirements may result in audit risk or a negative report to Congress. *See* 31 U.S.C. § 3716(c)(6)(B) (requiring Fiscal Service to report to Congress an agency's failure to refer debts for administrative offset purposes).

### C. Referral Prerequisites and Other Agency Responsibilities

#### (1) *Certification Requirements*

The mere referral of a debt to Fiscal Service's Cross-Servicing program does not implicate any constitutional procedural due process protections for the debtor.<sup>41</sup> However, Fiscal Service requires that the agency complete certain due process requirements before referring a debt to the Cross-Servicing program so that Fiscal Service can begin collection immediately upon referral.<sup>42</sup>

Upon referring a debt to the Cross-Servicing program, the agency must certify that the debt is "valid, legally enforceable, and that there are no legal bars to collection" and that the agency has "complied with all prerequisites to a particular collection action under the laws, regulations or policies applicable to the debt." 31 CFR § 285.12(i); *see also* I TFM § 3-5030.20. An agency's failure to complete the referral prerequisites does not excuse the agency from the mandatory referral requirement described above.

#### (2) *Recall Ineligible Debts*

An agency must recall a debt it referred to Fiscal Service if the debt becomes ineligible after referral or if the agency determines that the debt was improperly referred. 31 CFR § 285.12(i); I TFM § 3-5030.50d. For example, the agency must recall a debt when the debtor files for bankruptcy and an automatic stay is in effect or if the agency discovers that it incorrectly certified the debt. 31 CFR § 285.12(i); I TFM § 3-5030.50d. If an agency requests that Fiscal Service return a referred debt, Fiscal Service may deny the request if it

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<sup>40</sup> *Zandford v. SEC*, 2012 U.S. Dist. LEXIS 24201, at \*10-11 (D. Del. 2012) ("The regulations [promulgated pursuant to the DCIA] do not provide for a private right of action . . ." (citing 31 CFR § 900.8)); *see also In re Zandford*, 2006 Bankr. LEXIS 1398, at \*3 (Bankr. D. Del. 2006) ("[T]he regulations prohibit the Debtor from using these agency operating procedures as either a sword or a shield" and an agency's failure to refer a debt to Treasury does not affect the agency's standing to assert a claim in a bankruptcy case).

<sup>41</sup> Mere referral of a debt does not result in deprivation of property and thus does not require due process. *See supra* Part I.B.

<sup>42</sup> 31 CFR § 285.12(i); I TFM §§ 3-5030.40b; *Johnson v. U.S. Dep't of Treasury*, 300 F. App'x 860, 862-63 (11th Cir. 2008) (holding that Treasury was legally obligated to collect the debt an agency referred after certifying it had provided due process, notwithstanding receiving notice that the debtor may be experiencing financial hardship or that the debt may not be valid).

determines that return is inappropriate. Allowance of a return, however, does not constitute a determination by Fiscal Service that the return is appropriate. I TFM § 3-5035.50.

After the agency recalls a debt (or after Fiscal Service returns a debt to the agency), the agency resumes responsibility for servicing and collecting the debt in accordance with established laws and procedures, or for determining whether termination of collection action is appropriate. *Id.* §§ 3-5030.50d, 3-5035.50. If the recalled (or returned) debt later becomes eligible for referral and is not exempt from the referral requirement, the agency must re-refer the debt to Fiscal Service. *See id.* § 3-5030.40a, 3-5030.50d.

### (3) *Provide Sufficient Information*

Upon referral, agencies must provide Fiscal Service with certain basic information about the referred debt and the associated debtor(s). *Id.* § 3-5030.40b, 3-5030.50b. Moreover, if Fiscal Service requests additional information on a referred debt or debtor, the agency must reply within 30 business days. *Id.*

## D. Exemptions to the Referral Requirement

Several classes of debt are exempt from the Cross-Servicing referral requirement. Agencies must refer all debts that are not exempt (as well as debts that once were exempt from referral but, due to changed circumstances, no longer are) to the Cross-Servicing program. If a debt is exempt from the Cross-Servicing referral requirement and the agency chooses not to refer the debt to the Cross-Servicing program, it must still refer the debt to the TOP unless the debt is also exempt from TOP.

### (1) *Statutory Exceptions*

#### a) Less than 120 or 180 Days Delinquent

Federal agencies must refer debts that are 180 days delinquent to the Cross-Servicing program. 31 U.S.C. § 3711(g)(1); 31 CFR § 285.12(c)(2). Moreover, agencies that rely on the Cross-Servicing program to submit referred debts for centralized offset (i.e., TOP) on its behalf must refer the debts by no later than 120 days after the debts become delinquent. 31 CFR § 285.12(c)(2), (g); I TFM § 3-5030.40a.

Agencies may (but are not required to) refer eligible debts that are less than 120 (or 180) days delinquent to the Cross-Servicing program, and Fiscal Service strongly encourages agencies to refer as early as possible. I TFM § 3-5030.40a; *see also* 31 CFR § 285.12(i).

#### b) In Litigation

If a debt is in litigation, it is exempt from the Cross-Servicing referral requirement. Once the litigation concludes, agencies must refer debts more than 120 (or 180) days delinquent to the Cross-Servicing program within 30 days after the date of the final decision. 31 CFR § 285.12(c)(3); *see also* 64 Fed. Reg. 22,906, 22,907 (Apr. 28, 1999)

(explaining that the purpose of the additional 30 days is to allow the debtor to pay or enter into a repayment agreement). However, if an agency determines that a debtor is unlikely to pay the debt or enter into a repayment plan within 30 days of the final decision, it should refer the debt to Fiscal Service immediately. 64 Fed. Reg. at 22,907.

i. Litigation Initiated by the Agency

If an agency determines that a debt is more collectible through judicial rather than through administrative remedies, it should consider referring the debt to DOJ for enforced collection (or, if it has independent litigation authority, initiating litigation itself) rather than referring the debt to the Cross-Servicing program.<sup>43</sup> “[A]ny debt or claim that is in litigation” is not subject to the mandatory referral requirements. 31 U.S.C. § 3711(g)(2)(A)(i); 31 CFR § 285.12(d)(1)(i). A debt is “in litigation” if it “has been referred to the Attorney General for litigation by the creditor agency” or if the agency has initiated litigation. 31 CFR § 285.12(d)(2)(i).

If the agency refers the debt to DOJ or initiates litigation itself, the debt would not only be exempt from the Cross-Servicing referral requirement, but would also be ineligible for referral, because it is impractical for more than one agency to be servicing the same debt simultaneously.

Referring a debt to the Cross-Servicing program does not foreclose the Government’s ability to judicially enforcing the debt. Cross-Servicing will refer some debts to DOJ for enforced collection on behalf of the agency.

ii. Debts Subject to the Bankruptcy Automatic Stay

“[A]ny debt or claim that is in litigation” is not subject to the mandatory referral requirements. 31 U.S.C. § 3711(g)(2)(A)(i); 31 CFR § 285.12(d)(1)(i). A debt is “in litigation” if it is subject to “bankruptcy proceedings.” 31 CFR § 285.12(d)(2)(i)(B).

If a debt is subject to the protection of the automatic stay or has been discharged in bankruptcy, the debt is not eligible for referral to the Cross-Servicing program. *Id.* § 285.12(i) (requiring creditor agency receiving notice that debtor has filed for bankruptcy protection to notify the Fiscal Service of this change in status of the debt’s legal enforceability); I TFM § 3-5030.50d (requiring agencies to recall referred debts subject to the protection of the automatic stay); I TFM § 3-5035.50 (permitting Fiscal Service to return a debt to a creditor agency if the debtor has filed for bankruptcy).

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<sup>43</sup> While the Cross-Servicing program can refer a debt to DOJ on the agency’s behalf, *see* I TFM § 3-5035.10, an agency should consider whether a direct referral to DOJ would be most pragmatic if it has already determined that litigation is appropriate.



### iii. Litigation Initiated by the Debtor

If the debtor initiates litigation regarding a debt before the agency refers the debt to the Cross-Servicing program, the debt is exempt from the mandatory referral requirement. 31 U.S.C. § 3711(g)(2)(A)(i); 31 CFR § 285.12(d)(1)(i), (2)(B). The mere fact that a debtor initiates litigation after the agency referred the debt, however, does not render the debt exempt. However, the agency may recall a debt subject to litigation from the Cross-Servicing program if the agency believes its certification may have been erroneous or as otherwise agreed to by Fiscal Service. *See* I TFM §§ 3-5030.50d, 5035.50.

### c) In Foreclosure

“[A]ny debt or claim that is in . . . foreclosure” is not subject to the mandatory referral requirements. 31 U.S.C. § 3711(g)(2)(A)(i); 31 CFR § 285.12(d)(1)(i). A debt is “in foreclosure” if the collateral securing the debt is subject to either judicial foreclosure proceedings or nonjudicial liquidation, and the agency anticipates the proceedings or liquidation will generate proceeds that could be applied to the debt. 31 CFR § 285.12(d)(2)(ii).

Agencies may refer debt secured by collateral to the Cross-Servicing program. However, if the agency believes the collateral is valuable, the agency should consider foreclosing on the collateral prior to referral, as the Cross-Servicing program does not initiate foreclosure proceedings. Agencies should also consult with their legal counsel to determine whether and how collection actions may affect their rights with regard to the collateral.

### d) Scheduled for Sale

In certain circumstances, a debt is exempt from the mandatory referral requirement if it will be disposed of under an asset sales program. 31 U.S.C. § 3711(i), (g)(2)(A)(ii); 31 CFR § 285.12(d)(3).

### e) At a Private Collection Contractor

A debt may not be referred to the Cross-Servicing program if it has been referred to a private collection contractor for a period of time determined by Treasury. 31 U.S.C. § 3711(g)(2)(A)(iii); 31 CFR § 285.12(d)(1)(iii).

As with most other exemption categories, this exception only applies while the contractor remains responsible for attempting to collect the debt. The debt must be referred to the Cross-Servicing program once the contractor has concluded its collection efforts. *See id.*

## f) At a Debt Collection Center

Treasury, acting through Fiscal Service, is authorized to designate agencies or units within agencies as debt collection center (DCCs) to collect federal nontax debts, as well as to withdraw such designations. 31 U.S.C. § 3711(g)(3), (g)(10); 31 CFR § 285.12(a), (f); I TFM 3-5400, *available at* <https://tfm.fiscal.treasury.gov/v1/p3/c540.html>. DCCs must operate in accordance with Treasury standards. I TFM 3-5400.

A debt is exempt from the Cross-Servicing referral requirement if it has been referred to a DCC for collection in accordance with established procedures and for a Treasury-approved period of time. 31 U.S.C. § 3711(g)(2)(A)(iv); 31 CFR § 285.12(d)(1)(iv), (f). A debt is not eligible for referral to Cross-Servicing while being serviced by a DCC but may be referred to Cross-Servicing after having been serviced by a DCC.

## g) Collectible Through Internal Offset

Debts that an agency expects to collect in full through internal offset within three years of the initial date of delinquency are exempt from the Cross-Servicing referral requirement. 31 U.S.C. § 3711(g)(2)(A)(v); 31 CFR § 285.12(d)(1)(v), (4).

While such debts may be exempt, an agency may nevertheless refer them to the Cross-Servicing program. If an agency does so, however, it should ensure that it promptly notifies the Cross-Servicing program of any changes to the debt balance resulting from internal agency offsets.

## h) Agency has Suspended or Terminated Debt Collection

If an agency suspends collection action on a debt pursuant to 31 U.S.C. § 3711(a)(3) and 31 CFR § 903.2, the debt is exempt from the requirement to refer the debt to the Cross-Servicing program until the agency lifts the suspension.

Similarly, if an agency terminates collection action on a debt pursuant to 31 U.S.C. § 3711(a)(3) and 31 CFR § 903.3, the debt is exempt from the Cross-Servicing referral requirement.

(2) *Treasury-Granted Exemptions; Eligibility Requirements*

## a) Generally

In addition to the exemptions set forth by statute, Treasury may grant additional exceptions and establish eligibility requirements. For example, Treasury can grant exemptions for classes of debt at the request of an agency.<sup>44</sup> Treasury can also create

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<sup>44</sup> 31 U.S.C. § 3711(g)(2)(B) (authorizing the Secretary to exempt “any class of debts” at the request of another agency, or on his or her own initiative). A request for exemption by an agency may be made in writing only by the

exemptions to ensure that its collection efforts remain consistent with the purposes of the DCIA, including cost-effective collection.<sup>45</sup>

b) Serviced by Third Parties

By regulation, Treasury exempted from the Cross-Servicing referral requirement debts being collected by third parties, such as private lenders or guarantee agencies because such debts are already in efficient collection systems and referral to Fiscal Service could interfere with those collection efforts. 31 CFR § 285.12(d)(1)(vi); 64 Fed. Reg. at 22,907.

c) Debts Less than \$25

Because referring low-dollar debts may not be cost-effective, Treasury exempted from the Cross-Servicing referral requirement debts totaling “less than \$25 (including interest, penalties, and administrative costs), or such other amount as Fiscal Service may determine.” 31 CFR § 285.12(c)(4). Treasury is authorized to change this minimum threshold at any time. *Id.* § 285.12(c)(2).

d) Being Collected Through Administrative Wage Garnishment

Treasury also exempted from the Cross-Servicing referral requirement debts being collected through administrative wage garnishment (AWG) if the agency: (1) had received actual collections through its use of AWG; and (2) expects the debt to be collected through AWG within three years.<sup>46</sup>

e) Out of Business

Because debts owed by entities that are no longer in business and have dissolved in accordance with law are generally not collectible, the Cross-Servicing program does not service such debts. I TFM § 3-5035.50 (listing reasons that the Cross-Servicing program

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head of the agency, its Chief Financial Officer, or its Deputy Chief Financial Officer. This does not include the head of a subordinate organization within a department or agency; the heads of such organizations must submit requests through the head of their parent agency. 31 CFR § 285.12(d)(5). The written request must clearly identify the class of debts for which the exemption is sought, and it must explain how exemption is in the best interest of the Government. *Id.* Treasury exercises its discretion to grant exemptions pursuant to established standards which require the consideration of: (1) whether the exemption is the best means to protect the Government’s financial interests; (2) whether the referral of the debts would interfere with the goals of the program under which the debts arose; and (3) whether the exemption would be consistent with the purposes of the DCIA. *Id.*; see also I TFM 3-5200 available at <https://tfm.fiscal.treasury.gov/v1/p3/c520.html>.

<sup>45</sup> See 31 U.S.C. § 3711(g)(10) (authorizing the Secretary to prescribe rules, regulations, and procedures for the Cross-Servicing program).

<sup>46</sup> See MEMORANDUM FOR CFOs FROM RICHARD L. GREGG, COMM’R, FIN. MGMT. SERV. (Aug. 18, 2005). The rationale for this exemption is twofold: (1) the exemption is consistent with the DCIA’s purposes of maximizing the collection of delinquent debts and minimizing the cost of collection by encouraging early use of AWG; and (2) the exemption parallels the statutory exemption for debts being collected through internal offset. *Id.*

will return a debt to an agency, including when an entity debtor is no longer in business and has dissolved in accordance with applicable law).

f) Deceased

While agencies generally may collect debts owed by deceased debtors, the Cross-Servicing program currently does not service such debts. *Id.* § 3-5035.50 (listing reasons that the Cross-Servicing program will return a debt to an agency, including when an individual debtor is deceased).

g) Owed by a Foreign Sovereign

While not explicit in the relevant statutes or regulations, debts owed by foreign sovereigns are exempt from the Cross-Servicing referral requirement. *See* Part II.A of this Treatise; *cf.* 31 CFR §285.5(d)(3)(iii) (excluding debts owed by foreign sovereigns from the TOP's mandatory referral requirement).

h) Agency-Specific Exemptions

Treasury has also granted several exemptions that are specific to a class of debts owed to certain agencies, including for: (1) Social Security Administration's Supplementary Security Income debt and debt of former child support beneficiaries in the Old-Age, Survivors, and Disability Insurance Program; (2) Small Business Administration's disaster loans and collateralized business loans in active workout; (3) Department of Education's delinquent and defaulted student loans; and (4) Health and Human Services' health professions debt and debt stemming from unfiled cost reports.

### E. Fees

Fiscal Service is authorized to charge agencies a fee sufficient to cover the costs of the services provided in its Cross-Servicing program. 31 U.S.C. § 3711(g)(6); 31 CFR §§ 285.12(j), 901.1(f); I TFM § 3-5040.10. Fiscal Service and other debt collection centers may calculate fees in any manner designed to cover up to the full cost of providing these services, including based on a percentage of collections received on account of a debt while it was being serviced under this section or a flat fee based on actions taken under this section by Fiscal Service or another debt collection center with regard to a debt or group of debts. *Id.* Such fees may be determined based on overall program costs and need not be based on costs related to the collection of a specific debt. *Id.* Federal agencies are responsible for paying these fees, which can be collected by withholding a portion of the amounts collected through the Cross-Servicing program. 31 U.S.C. § 3711(g)(7); I TFM § 3-5040.10a. Generally, agencies must charge debtors for the costs of collection, including fees charged by Fiscal Service. 31 U.S.C. § 3717(e)(1); 31 CFR § 901.9(a); I TFM § 3-5040.20.

### III. REFERRAL TO THE CENTRALIZED RECEIVABLES SERVICE

#### A. What is the Centralized Receivables Service?

CRS is a service Fiscal Service provides to federal agencies to assist in the management of nontax receivables from the time the receivables are established until they are paid, resolved, or referred to Fiscal Service's delinquent debt collection programs (i.e., the Cross-Servicing program and TOP). 31 CFR 285.12(a), (b). Fiscal Service is authorized to provide CRS services to federal agencies under 31 U.S.C. § 3711(g) and 31 CFR 285.12(b).

On behalf of participating agencies, CRS will send invoices to debtors, provide due process notices and opportunities, work with the participating agencies on any disputes regarding the debt, conduct early delinquent debt collection activities (e.g., collection calls and reminder letters), and refer debts that are unpaid and/or unresolved to the Cross-Servicing program.

#### B. Discretionary Referral

Agencies have the option to refer their debts to CRS but are not required to do so.

#### C. Referral Prerequisites and Other Agency Responsibilities

##### *(1) Certification Requirements*

Upon referring a debt to CRS, the agency must certify that, among other things, the debt is "valid and legally enforceable." I TFM § 3-3030.20.

##### *(2) Cancellation of Ineligible Debts*

An agency must cancel (i.e., remove from CRS) a debt that was referred to CRS if the debtor has filed for bankruptcy and the automatic stay is in effect, the debt is not enforceable, the debt is not valid or has been paid in full, or the creditor agency discovers any other reason that would render its certification invalid. *Id.* § 3-3030.60. An agency may, in its discretion, cancel a debt for other reasons. However, once a debt is referred by CRS to the Cross-Servicing program, the agency may no longer cancel the debt. As described in section C.II above, however, the agency can recall the debt from the Cross-Servicing program, as permitted by I TFM 3-5000.

Once a debt is cancelled, the agency resumes responsibility for servicing the debt (including referring it to the Cross-Servicing program and/or TOP) or suspending or terminating collection action. If, prior to the cancellation, Fiscal Service and the debtor entered into a payment agreement and that payment agreement remains un-breached, the creditor agency generally must abide by the terms of the payment agreement after cancellation.

##### *(3) Provide Sufficient Information*

Agencies must provide Fiscal Service with certain basic information about the referred debt and the associated debtor(s). *Id.* § 3-3030.10, 3030.50.

## D. Fees

Currently, Fiscal Service provides CRS at no cost to participating federal agencies. However, Fiscal Service is authorized to charge a fee sufficient to cover the costs of its CRS services pursuant to 31 U.S.C. § 3711(g)(6).

## **IV. REFERRAL TO THE DEPARTMENT OF JUSTICE**

### A. Enforced Collection

The conduct and supervision of litigation on behalf of federal agencies is generally centralized within DOJ.<sup>47</sup> As such, DOJ assists agencies with the collection of debt as the United States' primary litigator.<sup>48</sup> DOJ may decline to accept a debt that the agency refers for litigation if the referral does not meet DOJ's requirements, or if DOJ otherwise determines that the case is not appropriate for litigation.<sup>49</sup>

Once a debt is referred to DOJ, DOJ has exclusive jurisdiction over the debt and, unless otherwise agreed, the referring agency must discontinue its own efforts to collect the debt and must refrain from having any contact with the debtor. 31 CFR § 904.1(b).

### B. Eligible Debts

Generally, a debt must be at least \$2,500 to be eligible for enforced collection by DOJ, though as a practical matter given the costs of litigation, DOJ typically initiates litigation only on debts with a higher dollar value. *Id.* § 904.4(a). DOJ will accept referrals of lower dollar debts in appropriate circumstances, including when an enforcement issue is at stake. *Id.* § 904.4(b).

Moreover, the debt should be well within the statute of limitations for judicial enforcement and, ideally, the debt should be no more than one year delinquent. *Id.* § 904.1(a).

### C. Required Referral

Agencies must promptly refer to DOJ for litigation any eligible debts where the agency: (1) has taken affirmative collection action, and (2) cannot compromise the debt, or suspend or terminate collection activity. *Id.* § 904.1(a).

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<sup>47</sup> See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 4-1.100, available at <https://www.justice.gov/jm/jm-4-1000-assignment-responsibilities>.

<sup>48</sup> See U.S. DEP'T OF JUSTICE, FISCAL YEAR 2016 ANNUAL REPORT ON DEBT COLLECTION RECOVERY ACTIVITIES OF THE DEP'T OF JUSTICE FOR CIVIL DEBTS REFERRED FOR COLLECTION, available at <https://www.justice.gov/jmd/page/file/1214971/download>.

<sup>49</sup> See U.S. DEP'T OF JUSTICE, NATIONWIDE CENT. INTAKE FACILITY BRIEFING MATERIAL FOR FED. AGENCIES (Aug. 2017), available at <https://www.justice.gov/file/996091/download>.

#### D. Discretionary Referral

If an agency has not yet exhausted its efforts to collect a debt through administrative means and determines that it may not or should not terminate debt collection action, the agency may consider referring the debt to DOJ for enforced collection through litigation.

The agency may refer eligible debts to DOJ instead of referring them to Fiscal Service’s Cross-Servicing program in appropriate circumstances.<sup>50</sup> In determining whether direct referral to DOJ (instead of Cross-Servicing) is appropriate, agencies should consider a variety of factors, including: dollar amount of debt; complexity of legal issues (e.g., whether a precedential issue is at state); whether the debtor disputes the validity of the debt; whether an enforcement issue is at stake; whether the debtor has the financial ability to pay; whether the debtor has assets that can only be reached through judicial means; and whether the debt can be collected more efficiently through administrative means.

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<sup>50</sup> 31 U.S.C. § 3711(g)(2)(A)(i) (identifying debts “in litigation” as an exception to the requirement that agencies refer all debts more than 180 day delinquent to the Cross-Servicing program).

## **D. OFFSET**

### **I. Introduction**

Offset (also called “setoff”) is a complex area 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 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. 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.

### **II. “Offset” Defined**

#### **A. “Offset” and “Setoff”**

The terms “offset” and “setoff” are generally interchangeable. The right of setoff has long been available to parties under the 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 withhold its \$25 payment and apply this amount to 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 various federal laws. 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



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, 1440-41 (7th Cir. 1993). Unlike setoff, recoupment is only available where the mutual debts arise out of the same transaction or occurrence. *Bull*, 295 U.S. at 261-262; *Coplay Cement*, 983 F.2d at 1440. 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, 1012 (9th Cir. 2000) (finding that the agency’s overpayments to a 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, 875-76 (3d Cir. 1984) (in the bankruptcy context, the recoupment of prepetition social security overpayments from postpetition social security payments was impermissible); *Tavener v. United States (In re Vance)*, 298 B.R. 262, 267-68 (Bankr. E.D. Va. 2003) (in the 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. Offset terms discussed in this chapter include:

- “Administrative offset” means offset conducted pursuant to 31 U.S.C. § 3716(a) and (c).<sup>51</sup> It includes the offset of federal nontax payments to collect three types of debts—federal nontax, child support, and other debts owed to states. It also includes the offset of state payments to collect federal nontax debts. Payments offset under the administrative offset authority include contractor payments, certain benefit payments, current pay,

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<sup>51</sup> 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 (and other overlapping authorities). This is because there are more specific statutes that apply to the offset of federal tax refund payments (26 U.S.C. § 6402 and 31 U.S.C. § 3720A).

retired military pay, final lump sum payments of federal salary, and federal retirement annuity payments. Administrative offset can be accomplished through various means, including internal offset, centralized offset through TOP, or inter-agency offset.

- “Centralized offset” means the collection of debts through the TOP pursuant to 31 U.S.C. §§ 3716 and 3720A, and regulations promulgated at 31 CFR part 285, subpart A. The offset occurs after the payment agency has certified the amount of the payment. Centralized offsets are conducted by disbursing officials.
- “Common law offset” means any offset authorized under the common law. It generally means an internal or interagency offset, rather centralized offset through a disbursing official.
- “Interagency offset” means an offset conducted through the cooperation of two or more agencies under any legal authority.
- “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 and interagency 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.
- “State payment offset” means the offset of state payments to collect federal nontax debts pursuant to a reciprocal agreement entered into between Treasury and a state as authorized by 31 U.S.C. § 3716(h), 31 CFR § 285.6, and applicable state law.
- “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. 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). A federal payment is any payment certified on a payment voucher to a federal disbursing official. 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 offset. *See*

*Bosarge v. United States Dep't of Educ.*, 5 F.3d 1414, 1420 (11th Cir. 1993) (permitting offset of tax refund payment, including an earned income tax credit, notwithstanding a state's personal property exemption); *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); *United States v. \$3,174.00*, 928 F.Supp.2d 1040, 1043-44 (E.D. Wis. 2013) (finding that the return of funds seized but not forfeited is subject to offset); 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").<sup>52</sup>

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); *Boughton v. U.S. Bank N.A.*, No. 1:20-cv-00542-KWR-SCY, 2021 U.S. Dist. LEXIS 64553, at \*8 (D.N.M. Apr. 2, 2021) (finding that the overdraft fees applied to a checking account containing Social Security disability income pursuant to a voluntary contract with bank was not a "judicial or quasi-judicial mechanism" similar to execution, levy, attachment, and garnishment); 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").

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<sup>52</sup> 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.



administrative offset).<sup>54</sup> 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, are 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. *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 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.

#### (4) *Tariff Payments*

Amounts payable under the tariff laws of the United States are excluded from offset under 31 U.S.C. § 3716. 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.

#### (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 part 550, subpart K; 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. § 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

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<sup>54</sup> 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 offset).

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 while the debt is still outstanding, “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 been 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%. 31 U.S.C. § 3716 (generally requiring 100% offset of federal nontax payments); 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 offset under 31 U.S.C. § 3716, including for travel reimbursement payments).

#### b) Disposable Income Defined

For the purpose of salary offset, 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 by law to be withheld” do not include garnishments for child support or alimony. 5 CFR § 550.1103. Nor do they include commercial garnishments. *Id.* Such amounts do, however, 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

Like other federal payments, most federal benefit payments<sup>55</sup> 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. For example, given the explicit provisions of 31 U.S.C. § 3716, the following federal benefit payments are generally subject to mandatory offset:

- Payments under the Social Security Act<sup>56</sup>
- Payments under part B of the Black Lung Benefits Act<sup>57</sup>
- Payments administered by the Railroad Retirement Board (other than tier 2 benefit payments)<sup>58</sup>

However, payments under the Black Lung Benefits Act (other than payments made under Part B), and payments under Longshore and Worker’s Compensation Act are generally not subject to offset. *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. Regarding the offset of payments under the Social Security Act, the provisions of sections 205(b)(1), 809(a)(1), and 1631(c)(1) of the Social Security Act (regarding hearings)<sup>59</sup> do not apply to any administrative offset executed 31 U.S.C. § 3716 against benefits authorized by title II,<sup>60</sup> VIII,<sup>61</sup> or title XVI<sup>62</sup> of the Social Security Act, respectively.

Unlike most other federal payments, the amount which can be offset from payments to an individual under the Social Security Act, part B of the Black Lung Benefits Act, or any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits), 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.*<sup>63</sup> In addition, each

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<sup>55</sup> 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).

<sup>56</sup> 31 U.S.C. § 3716(c)(3)(A)(i)(I); *see also* *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).

<sup>57</sup> 31 U.S.C. § 3716(c)(3)(A)(i)(II).

<sup>58</sup> *Id.* § 3716(c)(3)(A)(i)(III).

<sup>59</sup> 42 U.S.C. §§ 405(b)(1), 1009(a)(1), and 1383(c)(1).

<sup>60</sup> Federal Old-Age, Survivors, and Disability Insurance Benefits

<sup>61</sup> Special Benefits for Certain World War II Veterans

<sup>62</sup> Supplemental Security Income for the Aged, Blind, and Disabled

<sup>63</sup> While 31 U.S.C. § 3716 permits aggregating all benefit payments received by a debtor in calculating the \$750 threshold, Fiscal Service currently calculates the floor separately for all covered benefit payments due to the operational complexity of aggregation. 63 Fed. Reg. 44986, 44986-7 (1998) (describing the phased implementation of benefit offset).

such benefit payment can only be offset up to 15%. 31 CFR § 285.4(e)(ii).<sup>64</sup> 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*, 641 F. App'x 683, 683 (9th Cir. 2016) (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.

### (7) Civil Service Retirement Payments

Federal civil service retirement annuity payments may (and generally must) be offset for the collection of federal nontax debt. 31 U.S.C. § 3716; 31 CFR § 285.5(e)(1). By regulation, Treasury exempted 75% of each retirement annuity payment from centralized 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. *See, e.g.*, 15 U.S.C. § 1673(a)(1) (limiting garnishments of disposable pay to 25%); 67 Fed. Reg. at 78940-41 (explaining Treasury'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. *Id.* at 78940-41.

### (8) Settlements and Judgments

Judgments and settlements that are paid by the United States are subject to centralized 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 payments 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); *Ikeliowu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998) (recognizing the right of the United States to setoff

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<sup>64</sup> 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. 31 CFR § 285.4(e)(ii).



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) (holding that a court would not enforce the terms of a settlement agreement between the IRS and a former employee against the Department of Education, and so the offset of the IRS settlement payments to satisfy a student loan debt did not violate the settlement agreement). That is, while the Attorney General has broad discretion and plenary authority to settle disputes, the Attorney General, in representing a federal agency, is bound by the same laws that govern the agency. *Executive Bus. Media Inc.*, 3 F.3d at 762.

Additionally, neither the agency entering into the settlement agreement nor the Attorney General are legally obligated to inform a plaintiff that settlement funds may be subject to offset. *See Washington v. United States*, No. 2:18-cv-00748 (D. Ariz. Jan. 3, 2020); *Fobke v. United States*, 2:15-cv-00781 (D. Ariz. Oct. 20, 2017); *Walker v. United States*, No. 3:13-cv-0205, 2014 U.S. Dist. LEXIS 76780, at \*14 (M.D. Pa. June 3, 2014)).

### 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. Congress has, at times, expressly exempted certain tax payments from offset, such as advanced child tax credit payments authorized by the American Rescue Plan Act. *See, e.g.*, Pub. L. No., § 9601(c), 135 Stat. 142 117-2 (2021).

#### (1) *Joint Taxpayers*

Tax refund payments are often made jointly to two persons (e.g., husband and wife). As with other joint payments, a joint tax refund payment is subject to offset for a debt of either person. 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 IRS to claim the portion of the tax refund to which the non-debtor spouse is entitled. 31 CFR § 285.2(f); 67 Fed. Reg. at 78939-40; Form 8379, Injured Spouse Allocation.

## (2) Disclosure Limitations

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 § 285.6. 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. States participating in this reciprocal offset program must enter into an agreement with Fiscal Service. This agreement, among other things, sets forth which state payments will be eligible for offset to collect federal nontax debts.

## **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 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 (and generally may submit them earlier).

### 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 purposes of Subchapter II, Chapter 37 of Title 31 of the United States Code); see also 31 CFR §§ 285.2(a) (definition of debt for centralized offset of tax refund payments); 285.5(b) (definition of debt for centralized offset of federal nontax payments). For purposes of centralized offset, an eligible debt must be past-due and legally enforceable. 31 CFR § 285.2(b)(1), (d)(1), 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. 31 CFR §§ 285.2(b)(1), (d)(1), 285.5(d)(3)(i). Debts subject to the automatic stay or discharge injunction due to bankruptcy are not legally enforceable for offset purposes. *Id.* § 285.5(b).

## (2) Agency Determination

To be eligible for offset, a debt generally must be determined to be due by an agency official. 31 U.S.C. § 3701(b); 31 CFR § 285.5(a), (b). 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”); 31 CFR § 285.5(b) (definition of “legally enforceable”).

## (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. Prior to collecting a debt through offset, agencies generally must provide the debtor with due process.

Offsets conducted pursuant to statute or common law must 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.

## C. Excluded Debts/Debtors

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

### (1) 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, at \*3 (Comp. Gen. May 9, 1995) (stating that “interagency claims are not subject to remedies otherwise available for the collection of such debts”).

### (2) Foreign Sovereigns

Foreign sovereigns are 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, but not privately owned foreign corporations or foreign individuals. Treasury 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.

### (3) *Tax and Tariff Debts*

Debts arising under the Internal Revenue Code or the tariff laws of the United States are also not be considered debts for the purpose of statutory offset, as that term is used in this Treatise. 31 U.S.C. § 3701(d)(1), (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.

### (4) *Debts arising under certain portions of the Social Security Act*

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).

### (5) *Hardship*

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 reduction generally may 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.*

#### D. 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.<sup>65</sup> 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 that a debt can be collected through centralized offset “irrespective of the amount of time the debt has been outstanding”); *Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1110 (10th Cir. 2021) (stating that the DCIA “contains no limitations period preventing [] debt collection”). Moreover, a defense of laches against the United States will generally fail. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (stating that the sovereign is exempt from the consequences of its laches); *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 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, at \*19 (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).

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<sup>65</sup> 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 once again became eligible to be collected via administrative offset. *See id.*; 74 Fed. Reg. 27707, 27707-08 (2009). Prior to collecting 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); *id.* § 285.2(d)(6)(ii) (similar); *id.* § 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.

## VI. Centralized (Disbursing Official) Offset

Fiscal Service has the operational responsibility for TOP, through which federal agencies can collect delinquent debts through the centralized offset of federal tax and nontax payments.<sup>66</sup> 31 U.S.C. § 3716(c); 31 U.S.C. § 3720A(h); 31 CFR § 901.3; 31 CFR §§ 285.2, 285.4-285.7. 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 offset of federal nontax payments); 31 CFR § 285.5(d) (same); *see also Anand v. U.S. Nat'l Sec. Agency*, No. 5:05-cv-469 (FJS/GJD), 2006 U.S. Dist. Lexis 82165, at \*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 through offset of 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.

### A. Administrative Offset

#### (1) *Creditor Agency Must Use Centralized Administrative Offset*

Creditor agencies are required to use centralized offset of federal nontax payments and certain state payments 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).

#### (2) *Creditor Agency Must Satisfy Prerequisites to Centralized 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 generally suffices. *See McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1570 (Fed. Cir. 1993) (interpreting similar language under an agency's regulation and finding that the agency was not required to foreclose on collateral, mediate, or file suit before initiating offset).

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<sup>66</sup> TOP also includes programs to collect certain state debts (including the State Reciprocal, Child Support, 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).

## 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). Agencies must also provide the debtor with written notice of the type and amount of the claim, and an explanation of the debtor's rights. *Id.* § 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. *But see Christensen v. United States*, 05-cv-4060, 2006 U.S. Dist. LEXIS 26224, at \*19 (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)(6) (requiring "[w]ritten notification"); *Setlech v. United States*, 816 F. Supp. 161, 162, 166-67 (E.D.N.Y. 1993) (holding that an agency must give notice of referral for offset that is "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" (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) and finding mail service to provide reasonable notice). Actual notice is not required, as long as the agency can prove that its notice was sent to the debtor's last known address. 31 CFR § 285.5(d)(6) (requiring that notice be sent to the "debtor's most current address known to the agency"); *Omegbu v. U.S. Dep't of Treasury*, 118 F. App'x 989, 991 (7th Cir. 2004) (notice mailed to debtor's last known address was sufficient); *Nelson v. Diversified Collection Servs.*, 961 F. Supp. 863, 868 (D. Md. 1997) (stating that "[t]he key to the analysis, however, is whether the notice was mailed, not whether it was received"); *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); *see also* Part I.B.II.B(2) of this Treatise.

Notice must be given at least sixty days prior to submission of the debt for offset. 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 statutorily 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). A written review or “paper hearing” will generally suffice. 31 U.S.C. § 3716(a)(3); 31 CFR § 285.5(d)(6)(ii)(C). 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. *Id.* § 285.5(d)(6)(ii)(C); *id.* § 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 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 must allow a debtor to pay a debt over time pursuant to a repayment agreement if necessitated by the debtor’s financial situation. 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 terms of the proposed repayment agreement are 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. *Id.* Agencies should also establish procedures to ensure that the terms of repayment agreements are based on a debtor’s ability to pay and the size of the debt. *Id.*



f) Additional Due Process Required for Salary Offset

Prior to offsetting federal salary payments, agencies are generally required to provide due process rights that go 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<sup>67</sup> 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. *See* 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

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<sup>67</sup> If referring the debt to TOP for centralized administrative offset, 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).

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 the 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 the 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. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c). In these circumstances, a hearing is generally not required. 5 U.S.C. § 5514(a)(3); 5 CFR § 550.1104(c).

## B. Tax Refund Offset<sup>68</sup>

### (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 CFR § 285.2(b)(1).<sup>69</sup>

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<sup>68</sup> 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. 26 U.S.C. § 6402(a); 26 CFR § 301.6402-1.

<sup>69</sup> 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) (“[A]ny agency subject to section 9 of the Act of May 18, 1933 (16 U.S.C. 831h), owed such a debt may . . . notify the Secretary of the Treasury at least once each year of the amount of such debt.”); 31 CFR § 285.2(b)(1).

## (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 CFR § 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. 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); *see also McCall Stock Farms, Inc.*, 14 F.3d at 1570 (interpreting similar language under an agency's regulation and finding that the agency was not required to foreclose on collateral, mediate, or file suit before initiating 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 CFR § 285.2(d)(1)(B), (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 CFR § 285.2(d)(1)(B).

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 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. *In re Huff*, 343 B.R. 136, 143 (W.D. Pa. 2006) (stating that actual notice is not required 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)(3); 31 CFR § 285.2(d). Agencies must consider any evidence presented and inform the debtor of the results of their review. 31 U.S.C. § 3720A(b)(3); 31 CFR § 285.2(d).

### (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); *Craig v. United States*, No. 1:20-cv-02538-TWP-MJD, 2021 U.S. Dist. LEXIS 216408, at \*10-11 (S.D. Ind. Nov. 8, 2021) (stating that section 6402(g) was a jurisdictional bar that prevents federal courts from reviewing claims regarding the interception of a tax refund payment under 6402(e)); *Hicks v. United States*, 130 Fed. Cl. 222, 231 (2017) (finding that suit against Treasury for carrying out its statutory obligation was prohibited but that plaintiff could still sue the creditor agency); *Mihretu Bulti Dasisa v. Dep’t of Treasury*, 951 F. Supp. 2d 45, 46 (D.D.C. 2013) (same); *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

### (1) Payment Has Been Made

When a payment is offset, the payment 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 bank account of the person entitled to payment (PEP). 31 U.S.C. § 3716(c)(2); 31 CFR §§ 285.5(d)(10)(i), (ii), (v), § 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.

## (2) Person Entitled to Payment

### a) Generally

Payments are generally subject to offset for debts owed by the PEP.<sup>70</sup> *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); *Harrington v. Berryhill*, 906 F.3d 561, 566 (7th Cir. 2018) (recognizing the *Ratliff* precedent and finding it lacked jurisdiction to consider the claims of the plaintiffs' attorneys); *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 person or persons entitled to payment (PEP or PEPs) 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)(8).

### b) Joint Payments

A payment made jointly to two or more persons is subject to offset for a debt of either person. *Id* § 285.5(e)(4); *see also id.* § 285.2(f). 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 who is receiving a payment with a debtor requests a refund of monies that were offset from a joint payment for the debtor's debt, the payment agency must determine whether the legal presumption was correct, 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); Form 8379, Injured Spouse Allocation (form through which the non-debtor spouse can contact IRS to claim the portion of the tax refund to which the non-debtor spouse is entitled).

### 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; 31 CFR § 285.5(e)(6); *see also* I TFM 3-6100 (describing how centralized administrative offset works with payments that have been assigned by the party that the United States is legally required to pay).<sup>71</sup> Such payment will also be subject to offset to collect the delinquent debts of the assignor, unless:

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<sup>70</sup> In most instances, the person entitled to payment is also the payee. However, if a PEP directs the payment to be made to a different person (i.e., a separate payee), unless the PEP has assigned the payment to that payee, the payment will be subject to offset for only the debts owed by the PEP, and not the separate payee. See, for example, paragraph d, regarding representative payees, below.

<sup>71</sup> Available at <https://tfm.fiscal.treasury.gov/v1/p3/c610.html>.

(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;<sup>72</sup> 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) *see also* 31 U.S.C. § 3716; I TFM 3-6100.

#### 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.*

### (3) 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); 3720A(c); 26 U.S.C. § 6402(d). Treasury’s Fiscal Service is responsible for Treasury’s implementation of these debt collection provisions. Treasury Directive 16-14 (Dec. 17, 2019).<sup>73</sup> 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

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<sup>72</sup> 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).

<sup>73</sup> Available at <https://home.treasury.gov/about/general-information/orders-and-directives/td16-14>.

is uniquely suited to perform centralized offset by matching payments made by various federal agencies with debts owed to federal agencies.

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 id.* § 285.5. In addition to collecting federal nontax debts, TOP collects federal tax debts, child support debts, and other debts owed to states.

#### (4) Role of the Creditor Agency

##### a) Submit Delinquent Debts to Fiscal Service

Federal agencies are required 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 days 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, determining 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 (explaining that these 30 additional days are necessary because immediate referral of a debt to Fiscal Service following a decision on an appeal might be impractical). During this additional time, the creditor agency should work to collect the debt, including by providing debtors with an opportunity to pay the debt or to enter into a repayment plan. *See id.*; 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 CFR §§ 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 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)(4) (permitting agencies to submit debts to TOP 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 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 affirmative debt collection action. *See id.*





automatically matched through TOP.<sup>75</sup> Therefore, prior to issuing a credit card payment, payment agencies are required to determine whether the PEP owes a delinquent federal debt, for example, by checking the System Award Management (formerly the Central Contractor Registration). *See* 31 U.S.C. § 3716(c); *see also* 48 CFR § 32.1108(b)(2)(i).

#### iv. No Liability for Erroneous Offsets

A payment 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 Harrington v. Berryhill*, 906 F.3d 561, 564, 566 (7th Cir. 2018) (finding that, by reducing plaintiffs' payments and applying the reduction to outstanding debts, the litigants were paid their fee awards); *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 payment agency submits a certified payment voucher, the disbursing official will disburse the money in the manner specified by the payment voucher. *Id.* § 3321; 31 CFR § 901.3(b)(2). The disbursing agency, which is responsible for disbursing a payment, has a legally distinct role from the payment agency, which owes the payment. Fiscal Service is responsible for disbursing the great majority of federal payments, but other certain agencies, have disbursement authority as well.

When a payment is being made, the disbursing official is responsible for comparing the name and TIN of the PEP identified on the payment voucher with the names and TINs on the debt records in TOP. 31 CFR §§ 285.5(c)(2), 901.3(b)(2). If there is a match and all other requirements for offset have been met, the payment is 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*

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<sup>75</sup> 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.

*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 relief against Treasury would therefore be improper); *Chambers v. SSA*, Civ. No. 3:19-CV-1062-K-BH, 2020 U.S. Dist. LEXIS 157704, at \*33 (N.D. Tex. Aug. 12, 2020) (finding that, because Treasury was not the creditor agency, it was the improper party for plaintiff's challenge of the offset activities); *Brooks v. Usde Fed. Offset Unit & United States Dep't of the Treasury Bureau of the Fiscal Serv.*, No. 3:19-cv-50-J-39JRK, 2020 U.S. Dist. LEXIS 240102, at \*12 (M.D. Fla. Feb. 26, 2020) (finding that Treasury should be dismissed as an improper party); *Lepelletier v. U.S. Dep't of Educ.*, Civ. No. 09-1119 (RJL), 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

By regulation, before offsetting a recurring payment<sup>76</sup> or periodic benefit payment, a disbursing official must send a warning notice to the PEP or payee. 31 CFR §§ 285.5(g)(1), 285.4(f)(1).<sup>77</sup> 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. *Id.* 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. *Id.* § 285.5(g)(2).

iii. Post-Offset Notice to Debtor

The agency conducting the offset must send each PEP or payee a notice upon the occurrence of an 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. 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), 285(f)(2) (benefit payment offset); 285.5(g)(3) (administrative offset), 285.7(i) (salary offset). 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. 26 U.S.C. § 6402(d)(3)(B)(II); 31 CFR § 285.2(e)(ii). With regard to certain benefit payments, the notice must be sent no later than the date of the offset, or as soon as practical thereafter; however, if the debtor was previously sent a warning notice,

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<sup>76</sup> 31 CFR § 285.5(b) (“*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.”)

<sup>77</sup> See also Social Security Administration, Benefit Payment Offset Guidance, GN 02410.300 (explaining that before offsetting a monthly Social Security benefit payment, Fiscal Service sends two warning notices to the payee, including a 60-day notice and a 30-day notice).

that warning notice will satisfy this timing requirement. 31 U.S.C. § 3716(c)(7)(B). Failure to send the notice will not impact the validity of the offset or result in liability for the disbursing official or payment agency. *Id.* § 3716(c)(2)(B); *see also In re Scott*, No. 14-00715, 2016 Bankr. LEXIS 397, at \*23-24 (Bankr. D.D.C. Feb. 7, 2016) (finding that Treasury acted appropriately in offsetting a payment despite sending a post-offset notice to an incorrect address, and that both the Treasury official who made the offset and the payment agent were “statutorily immunized from liability for such a mistake”).

#### 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), 285.5(g)(1).

#### v. Disbursing Official: Notice to Payment 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.* §§ 285.2(e)(2) and 285.5(h)(1). 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. 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. When a non-Treasury disbursing official performs the offset, the official must inform Fiscal Service, so that Fiscal Service can notify the creditor agency. *Id.* § 285.5(h)(2).

Fiscal Service will also notify a payment agency that an offset has occurred, thereby allowing the payment agency to refer questions about the offset to the creditor agency. *Id.* §§ 285.2(e)(3), 285.5(h)(3).

### (6) Fees

Fiscal Service is authorized to charge agencies a fee to cover the costs of offset, and 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. 31 U.S.C. §§ 3716(c)(4) (authorizing Treasury to charge a fee for administrative offset services); 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), 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); 285.7(j) (describing the authority of agencies that provide centralized salary offset services to charge fees). Creditor agencies are generally required to charge debtors for the costs of collection, including the amount of such fees. 31 U.S.C. § 3717(e)(1).

### (7) Order of Priority

Many 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); 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); 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.

### (8) 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 against individuals. 5 U.S.C. § 552a(a)(8), (o), (p).

In the context of centralized 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 (Dec. 17, 2019) (delegating to Fiscal Service the authority to waive these 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).

### (9) 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 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 interagency 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). *Id.* § 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 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, generally, 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. *Id.*; *see also* 5 CFR § 550.1109 (describing the requirements for non-centralized salary offset). While many laws permit 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 v. United States*, 10 Cl. Ct. 207, 211 (1986); *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).

### (2) *Elements of Offset*

Under the common law, 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 common law 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 (also referred to as a “single unitary creditor”) for purpose of setoff. *See, e.g., 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); *In re Chateaugay Corp.*, 94 F.3d at 779; *Turner v. SBA (In re Turner)*, 84 F.3d 1294, 1298 (10th Cir. 1996). In general, just as the United States is a unitary entity for setoff purposes, so too are states, regardless of whether or how a state may divide itself into separate departments or agencies, and corporations that have a single charter but divide themselves into separate locations or departments. However, separate legal entities with common ownership or parent-subsidary relationships, for example, will generally be separate parties for setoff purposes, unless the separate entities hold themselves out as a single party (e.g., by using the same taxpayer identification number for separate but affiliated entities when conducting business with the United States or by misusing the corporate structure). 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-230158.2, 1991 U.S. Comp. Gen. LEXIS 291, at \*9-10 (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. 1967) (permitting offset, but noting that, in general, a separate debt cannot be setoff against 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.<sup>78</sup> 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 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. *E.g.*, *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 noting that listing common defenses may be “better practice”); *Wagner v. Duffy*, 700 F. Supp. 935, 943 (N.D. Ill. 1988) (finding that due process requires that the notice warning of a tax refund offset provide the debtor with a list of common defenses); *Smith v. Onondaga Cnty. Support Collection Unit*, 619 F. Supp. 825, 830 (N.D.N.Y. 1985)

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<sup>78</sup> Cases involving statutory offset are instructive because due process for statutory offset must also comply with minimum constitutional due process standards.

(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, 1107 (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 (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 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*, 816 F. Supp. at 167 (notice sent to most current address known to the agency was sufficient where there was no indication that the letter was returned as “undeliverable”).

If an agency learns that notice did not reach the debtor, 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. at 235. 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"); *Tyson v. DOL*, Civ. No. 20-cv-147, 2021 U.S. Dist. LEXIS 234186, at \*28 (D.D.C. Dec. 7, 2021) ("[R]egardless of whether [the debtor] received adequate notice and an opportunity to be heard before the offsets were applied, the post-deprivation remedies that he received, which included an appeal and a motion for reconsideration, were sufficient to vindicate his right to due process of law"); *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); *but see Atwater v. Roudebush*, 452 F. Supp. 622, 631 (N.D. Ill. 1976) (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]").

### 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 a "timely and meaningful" opportunity to be heard. *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 an 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); *Kechijian v. Califano*, 621 F.2d 1, 5 (1st Cir. 1980) (post-deprivation hearing after offset against payments to Medicare provider satisfied due process because full relief could have been obtained at a post-deprivation hearing).

#### 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



recoupment right). The extent to which debt collection statutes may impact federal agencies' common law authority must be analyzed on a case-by-case basis.<sup>80</sup>

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<sup>80</sup> Compare *United States v. York*, 909 F. Supp. 4, 9 (D.D.C. 1995) (“[T]he 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, B-212222, 1984 U.S. Comp. Gen. LEXIS 1738 (Comp. Gen. Jan. 5, 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 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

### I. Generally

Garnishment allows a creditor to recover from a debtor through an attachment of the debtor's property in possession of a third party, and wage garnishment is when that property consists of the debtor's wages in the hands of his or her employer.<sup>81</sup> Administrative wage garnishment (AWG) is a process in which a federal agency may collect delinquent nontax debt by garnishing the wages of a delinquent debtor without first obtaining a court order. 31 U.S.C. § 3720D(a); 31 CFR § 285.11(d).

By regulation, agencies whose debts are being serviced by Treasury are generally required to use AWG as a collection tool, when appropriate.<sup>82</sup> This is consistent with Congress's intent that "every debtor that has a job or income should be in a repayment schedule."<sup>83</sup> AWG can be an extremely effective collection tool. Even the mere notification that an agency is considering commencing AWG encourages some debtors to voluntarily pay their debts, either in full or pursuant to a repayment agreement. Moreover, there is no time limitation on an agency's ability to collect through AWG.<sup>84</sup>

This chapter discusses AWG authorized by 31 U.S.C. § 3720D, which can be used by federal agencies seeking to collect delinquent federal nontax debts.<sup>85</sup>

### II. Effect of State Law

Agencies may administratively garnish the wages of an individual debtor "[n]otwithstanding any provision of State law." 31 U.S.C. § 3720D(a); 31 CFR § 285.11(b)(2). As such, the federal

<sup>81</sup> *Wash. State Dep't of Soc. & Health Servs.*, 537 U.S. at 383.

<sup>82</sup> Agencies are generally required to refer delinquent debts to the Cross-Servicing program, and the Cross-Servicing program requires agencies to authorize the use of AWG. I TFM §§ 3-5030.10, 5030.30 (regulations governing the collection of debt through the Cross-Servicing program); 31 U.S.C. § 3711(g)(9)(G).

<sup>83</sup> See 142 Cong. Rec. H4046 (daily ed. Apr. 25, 1996) (statement of Rep. Horn), *available at* <https://fiscal.treasury.gov/files/dms/dmhorn.txt>.

<sup>84</sup> See, e.g., *Horton v. United States*, No. 2022-1158, 2022 U.S. App. LEXIS 9044, at \*7 (Fed. Cir. Apr. 5, 2022); *Abdelmalik v. United States SBA*, Civil Action No. 1:17-CV-00175-YK, 2018 U.S. Dist. LEXIS 49549, at \*7-9 (M.D. Pa. Mar. 26, 2018); *In re Patel*, No. 20-30455, 2022 Bankr. LEXIS 1215, at \*4-5 (Bankr. W.D.N.C. May 4, 2022).

<sup>85</sup> Under 31 U.S.C. § 3720D, all federal agencies seeking to collect delinquent federal nontax debts may do so through AWG. This chapter does not address the administrative wage garnishment authority authorized by 20 U.S.C. § 1095a, which can be used by the Department of Education and its guaranty agencies to collect student loan debts. Cases interpreting 20 U.S.C. § 1095a, however, can be useful for interpreting 31 U.S.C. § 3720D. See *Frew v. Van Ru Credit Corp.*, No. 05-5297, 2006 U.S. Dist. LEXIS 54583, at \*12 (E.D. Pa. Aug. 7, 2006) (treating precedent under 20 U.S.C. § 1095a as persuasive when deciding a case under 31 U.S.C. § 3720D, and noting that the language of 20 U.S.C. § 1095a is nearly identical to the language of 31 U.S.C. § 3720D). This chapter also does not address court-ordered garnishments, which remain a useful tool for federal agencies. Compare 15 U.S.C. § 1673(a) (Consumer Credit Protection Act limiting court-ordered wage garnishment orders to 25% of disposable pay), with 31 U.S.C. § 3720D(b)(1) (limiting AWG withholding orders to 15% of disposable pay). Agencies should be aware of these additional authorities as they determine how best to collect their debts.



statute preempts any contrary state law and can be applied uniformly throughout the United States.<sup>86</sup>

### III. Agency-Specific Regulations

Treasury issued regulations setting forth the minimum requirements for how federal agencies may conduct AWG, including minimum requirements for conducting a hearing. 31 U.S.C. § 3720D(h); *see generally* 31 CFR § 285.11. Prior to attempting to collect a debt through AWG, agencies must prescribe procedures for the conduct of AWG hearings consistent with the hearing requirements specified in Treasury's governmentwide regulations. 31 U.S.C. § 3720D(c)(1); 31 CFR § 285.11(f)(1), (k)(2). Agencies may choose to provide greater due process protections to the debtor but must meet Treasury's minimum standards. *See* 31 CFR § 285.11(f)(1).

### IV. Due Process Requirements

As further discussed below, agencies are required to provide debtors with notice, an opportunity to dispute the existence and amount of the debt, and the opportunity to repay the debt in installments. 31 U.S.C. § 3720D(b); 31 CFR § 285.11(e), (f). While debtors are entitled to specific due process prior to the initiation of AWG, agencies are not required to duplicate notices or administrative proceedings. 31 CFR § 285.11(b)(6). In contrast to most collection tools, an agency generally must provide a paper or oral hearing, if the debtor requests one, prior to initiating AWG. *Id.* § 285.11(f).<sup>87</sup>

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<sup>86</sup> U.S. Const. art. VI, cl. 2; *Frew*, 2006 U.S. Dist. LEXIS 54583, at \*12; *Savage v. Scales*, 310 F. Supp. 2d 122, 134 (D.D.C. 2004); *Nelson v. Diversified Collection Servs., Inc.*, 961 F. Supp. 863, 872 (D. Md. 1997); *see also* Tex. Atty. Gen. Op. DM-419, available at <https://www2.texasattorneygeneral.gov/opinions/opinions/48morales/op/1996/pdf/dm0419.pdf> (Sept. 23, 1996).

<sup>87</sup> The Supreme Court has determined that the requirements of procedural due process vary depending on the circumstances. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands”). That the garnishment of wages may require a hearing where other collection actions do not is not surprising given the Supreme Court’s view that wages are “a specialized type of property presenting distinct problems in our economic system.” *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 340-342 (1969) (while making no judgment on the wisdom of garnishment policy, noting that garnishment without proper protection could “drive a wage-earning family to the wall”).

## A. Notice

At least 30 days prior to the initiation of AWG proceedings (i.e., at least 30 days before sending the employer a withholding order), the creditor agency must send written notice of its intent to initiate AWG to the debtor's last known address by first class mail. 31 U.S.C. § 3720D(b)(2); 31 CFR § 285.11(e)(1). This notice can be sent by the creditor agency, by another agency acting on behalf of the creditor agency, or a contractor or agent of either agency. This notice must inform the debtor of the nature and amount of the debt, the intention of the agency to initiate AWG proceedings, and the debtor's rights (and how to exercise those rights). 31 U.S.C. § 3720D(b)(2); 31 CFR § 285.11(e)(1). The debtor's rights include the opportunity: (1) to inspect and copy agency records related to the debt; (2) to enter into a repayment agreement; and (3) for a hearing concerning the existence or amount of the debt. 31 U.S.C. § 3720D(b); 31 CFR § 285.11(e)(2). The notice must also inform the debtor of the relevant timeframes to exercise these rights. 31 CFR § 285.11(e)(1)(iii).

An agency must keep evidence of the fact that it served this notice, including the date on which the notice was mailed. *Id.* § 285.11(e)(3). An agency meets this requirement by retaining information indicating the nature of the document to which it pertains, the mailing date of the document, and to whom the document was sent. *Id.* § 285.11(c) (defining "evidence of service"). Evidence of service may be retained electronically. *Id.*

## B. Opportunity to Dispute or Repay Debt

### (1) *Review records*

The agency must provide the debtor with the opportunity to inspect and copy records relating to the debt. 31 U.S.C. § 3720D(b)(3); 31 CFR § 285.11(e)(2)(i). Without an opportunity to view agency records, the debtor may be unable to effectively dispute the debt or the proposed collection action.

### (2) *Opportunity to Repay Debt*

The agency must provide the debtor with the opportunity to enter into a payment agreement under terms agreeable to the agency. 31 U.S.C. § 3720D(b)(4); 31 CFR § 285.11(e)(2)(ii). An agency should generally require that the debtor pay in accordance with his or her ability to pay. *See generally* 31 CFR § 901.8.

### (3) *Disputes*

#### a) *Timing of Request for Hearing*

If the debtor submits a written request for a hearing, the agency must provide one before commencing AWG. 31 U.S.C. § 3720D(c); 31 CFR § 285.11(f)(2). If the agency receives the debtor's written request on or before the 15<sup>th</sup> business day following the mailing of the notice, the agency may not issue a withholding order until a hearing has been held and a decision rendered. 31 U.S.C. § 3720D(c)(1); 31 CFR § 285.11(f)(4). If

the agency receives the debtor's written request after the 15<sup>th</sup> business day following the mailing of the notice, the agency must still provide a hearing to the debtor. 31 U.S.C. § 3720D(c)(2); 31 CFR § 285.11(f)(5). However, the agency is not required to delay the issuance of the withholding order unless the agency determines that the delay in filing the request was caused by factors over which the debtor had no control, or the agency receives information that the agency believes justifies a delay or cancellation of the withholding order. 31 CFR § 285.11(f)(5). Agencies must issue a hearing decision within 60 days of the date of receipt of the written request and must suspend any previously issued withholding order pending the hearing decision if a decision is not made within 60 days of receipt of the written request. 31 U.S.C. § 3720D(c)(2)-(3); 31 CFR § 285.11(f)(10).

b) Hearing Officers

A hearing official is any individual that the head of the agency determines is qualified. The hearing official may be an employee of the creditor agency<sup>88</sup> or may be the employee of another federal agency. While the hearing official may be an attorney or an administrative law judge, that is not necessary for qualifying as a hearing official. See 31 CFR § 285.11(f)(6).

c) Bases for Dispute and Burden of Proof

i. Existence or Amount

The agency must provide the debtor with the opportunity for a hearing on the agency's determination of the existence or amount of the debt. *Id.* § 285.11(e)(2)(iii). The agency has the initial burden of proving the existence or amount of the debt in dispute. *Id.* § 285.11(f)(8)(i). Thereafter, if the debtor disputes the existence or amount of the debt, the debtor must present by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. *Id.* § 285.11(f)(8)(ii).

To succeed under the "preponderance of the evidence" standard, the debtor must prove that its position is more likely than not the correct position and demands more than a mere assertion.<sup>89</sup>

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<sup>88</sup> Unlike federal salary offset, there is no requirement that the hearing official not be "under the supervision or control of the head of the agency." *Cf.* 5 U.S.C. § 5514(a)(2)(D).

<sup>89</sup> See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007) (citing to *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)); *Harrill v. U.S. Dep't of Educ.*, No. 07-385, 2009 U.S. Dist. LEXIS 7045, at \*8-9 (S.D. Ohio Jan. 30, 2009) (concluding that the debtor "failed to proffer any evidence that [the agency] acted arbitrarily or capriciously" and dismissing a suit challenging the AWG hearing decision).

ii. Financial Hardship

The agency must provide the debtor with the opportunity for an agency review (or hearing) on the basis that the proposed garnishment would cause financial hardship. 31 CFR § 285.11(f)(8)(ii). If the debtor demonstrates through a preponderance of the evidence that garnishment would cause financial hardship, the agency must make a downward adjustment to the garnishment amount. *Id.* § 285.11(k)(3).

If an agency has previously denied a debtor's claim of financial hardship, the debtor may request another hearing if the debtor can demonstrate changed circumstances, such as disability, divorce, or catastrophic illness. *Id.* § 285.11(k)(1).

iii. Continuous Employment Standard

An agency may not garnish a debtor's wages if the debtor was involuntarily separated from employment and then continuously reemployed for less than 12 months. 31 U.S.C. § 3720D(b)(6); 31 CFR § 285.11(f)(8)(ii), (j). The agency must provide the debtor with the opportunity for an agency review (or a hearing) on this basis. 31 CFR § 285.11(f)(8)(ii). The debtor has the burden to inform the agency of the circumstances of their involuntary separation from employment. *Id.* § 285.11(j).

Seasonal and temporary workers are not eligible for the continuous employment exemption because their work has a natural end, and thus, does not constitute an "involuntary" separation from employment

iv. Current on a Repayment Agreement

Agencies may not use AWG to collect a debt when a debtor is currently repaying the debt in accordance with an unbreached agreement between the agency and the debtor. 31 U.S.C. § 3720D(a). The agency must provide the debtor with the opportunity for an agency review (or a hearing) for the debtor to show that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law. *See* 31 CFR § 285.11(f)(8)(ii).

#### d) Minimal Requirements for Hearing

##### i. Paper v. Oral Hearings

Generally, agencies may conduct AWG hearings as written (i.e., paper) hearings. *Id.* § 285.11(f)(2).<sup>90</sup> However, when the issues cannot be resolved by a review of the documentary evidence, the agency must provide the debtor with a reasonable opportunity for an oral hearing. *Id.* § 285.11(f)(3)(i). If an oral hearing is required, it may be conducted by telephone or in-person, at the debtor's option. *Id.* § 285.11(f)(3)(ii). The time and location of the hearing must be established by the agency. *Id.* §§ 285.11(f)(3)(ii), (f)(7). Any travel expenses incurred by the debtor in connection with an in-person hearing must be borne by the debtor and all telephonic charges incurred during the hearing are the responsibility of the agency. *Id.* § 285.11(f)(3)(ii). Any witnesses who testify in oral hearings must do so under oath or affirmation. *Id.* § 285.11(f)(9).

##### ii. Administrative Record and Evidence

The agency must set a reasonable deadline for the submission of evidence. *Id.* § 285.11(f)(3)(iii), (f)(7). If the debtor fails to submit evidence or otherwise appear for the hearing, absent good cause, the debtor will be deemed as not having filed a timely request for a hearing. *Id.* § 285.11(f)(13).

The hearing official must maintain a record of any hearings provided. *Id.* § 285.11(f)(9).

##### iii. Hearing Decisions

The hearing decision must include a summary of the facts presented and the hearing official's findings, analysis, and conclusions. *Id.* § 285.11(f)(11). It must also include the terms of any repayment schedules, if applicable. *Id.* § 285.11(f)(11)(iii).

The hearing decision constitutes the final agency action for purposes of judicial review under the Administrative Procedures Act. *Id.* § 285.11(f)(12).

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<sup>90</sup> See also *Harter v. Paige*, 130 F. Appx. 69, 70 (8th Cir. 2005) (a “written records hearing satisfies the due process requirement [for] a meaningful opportunity to present objections” before commencing AWG); Part I.B.II.C of this Treatise.

e) Timing of Hearing Decision

The hearing official must issue a written decision within 60 days of the agency's receipt of a request for a hearing. 31 U.S.C. § 3720D(c)(3); 31 CFR § 285.11(f)(10). If an agency fails to meet this 60-day deadline, it may not issue a withholding order until it holds the hearing and renders a decision. 31 CFR § 285.11(f)(10)(i). If a withholding order has already been issued, the agency must suspend the order until it holds the hearing and renders a decision. *Id.* § 285.11(f)(10)(ii).

## V. Other Procedural Matters

### A. Employer Documents

#### (1) *Withholding Order*

After satisfying the due process requirements for collecting a debt through AWG, a creditor agency (or another federal agency acting on the creditor agency's behalf) may send a withholding order to the debtor's employer by first class mail. *Id.* § 285.11(g). The withholding order should be signed<sup>91</sup> by an official or employee of the agency responsible for collecting the debt. *Id.* § 285.11(g)(2). If the debtor makes a timely request for a hearing, the withholding order generally should be sent within 30 days of the agency's final hearing decision. *Id.* § 285.11(g)(1)(ii). If the debtor does not make a timely request for a hearing, the withholding order generally should be sent within 30 days of the expiration of the period given for making a timely hearing request (i.e., 15 business days after the agency sends its notice of intent to initiate AWG). *Id.* § 285.11(g)(1); *see also* 63 Fed. Reg. 25,136, 25,138 (May 6, 1998) (withholding order should be issued promptly after notice and an opportunity to be heard have been provided to the debtor). The agency may delay or cancel the issuance of the withholding order if the agency receives information that the agency believes justifies delay or cancellation. 31 CFR § 285.11(g)(1). The withholding order should include only the information needed for the employer to comply. 31 U.S.C. § 3720D(d); 31 CFR § 285.11(g)(2).

When issuing a withholding order, agencies must use the form prescribed by Treasury. 31 CFR § 285.11(g)(2). The form, along with templates for other AWG material, is available at <https://fiscal.treasury.gov/files/forms/SF329.pdf>. It is intended that by using standard forms, agencies make it easier for employers to recognize and comply with withholding orders. *See* 63 Fed. Reg. 25,136, 25,138 (May 6, 1998).

The agency must retain evidence of service indicating the date on which it mailed the withholding order. 31 CFR § 285.11(g)(3).

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<sup>91</sup> The withholding order must contain either the actual signature or an image of the signature of the head of the agency or his or her delegate. *Id.* § 285.11(g)(2).

## (2) Employer Certification

The creditor agency should also send the employer a certification form, which the employer must complete within the time frame prescribed on the form. *Id.* § 285.11(h). As with the withholding order, agencies must use the form prescribed by Treasury. *Id.* The employer must disclose whether the employee is currently employed by the employer, the gross amount of pay to the employee, the calculated garnishment amount, and a list of any withholding orders with priority. *See* Standard Form 329D, available at <https://fiscal.treasury.gov/files/forms/SF329.pdf>. The employer must certify that the information it provided is accurate to the best of its knowledge and belief. *Id.* The information provided on the certification form provides agencies with information necessary to monitor the employer's compliance and to anticipate the amount that can be collected through AWG so it can determine whether to pursue other collection tools. 63 Fed. Reg. 25,136, 25,138 (May 6, 1998).

## (3) Employer Worksheet

In addition to the withholding order and the employer certification form, agencies may send the employer a wage garnishment worksheet, which the employer can use to calculate the appropriate amount of the garnishment.<sup>92</sup>

## (4) Suspension and Termination Orders

Once the agency has recovered the full amount of the debt owed by the debtor, the agency must send the employer a notification to discontinue wage withholding. 31 CFR § 285.11(l)(1).

The agency must also notify the employer to suspend wage withholding when the debtor is subject to an active bankruptcy proceeding or any other circumstances that would cause the debt to be collected in violation of law. *See, e.g.*, 11 U.S.C. § 362(a).<sup>93</sup> And, if the agency has not issued a hearing decision on a debtor's late hearing request within 60 days, the agency must notify the employer to suspend wage withholding until the agency issues the hearing decision. 31 CFR § 285.11(f)(10)(ii).

In these circumstances, the agency should consider whether it should ask the employer to merely suspend garnishments until further notification, or if it should terminate them altogether. The agency's choice to terminate its initial withholding order and reissue a new withholding order at some later point in time (rather than merely suspend the initial withholding order) may impact the priority of its withholding order. It may also affect the liability of an employer who failed to comply with the initial withholding order.

If an agency's initial withholding order incorrectly listed the employee or employer, the agency must issue a new withholding order with a new date. However, if the initial

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<sup>92</sup> Standard Form 329C, available at <https://fiscal.treasury.gov/files/cross-servicing/SF329.pdf>.

<sup>93</sup> For additional information on the bankruptcy automatic stay, see Part II.D.IV of this Treatise.

withholding order merely contained a clerical error, the agency should issue a corrected withholding order with the original date. Likewise, if the agency sends follow-up copies of the initial withholding order to an employer to gain compliance, the agency should retain the date of the original withholding order.

### B. Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not apply to the collection of information during the conduct of an administrative action involving an agency against specific individuals. *See* 44 U.S.C. § 3518(c)(i)(B)(ii).

### C. Use All Available Collection Tools

An agency that is collecting a debt through AWG may, and generally should, continue to collect the debt through other debt collection tools. 31 CFR § 285.11(b)(4).

## **VI. What Can be Garnished**

### A. Non-Federal Wages

The wages that are subject to AWG generally include any wages other than those earned by federal employees from their federal employment.<sup>94</sup> Agencies can collect from federal wages earned by federal employees through federal salary offset. *See* 5 U.S.C. § 5514. Like AWG, federal salary offset permits agencies to deduct up to 15% of a debtor's disposable pay of federal employees. *See supra* Chapter D.IV.B.5 of this Treatise. Any wages earned by a federal employee from a non-federal government source are still eligible for garnishment, as it is the source of the wages that is dispositive, not the employment status of the debtor. 31 CFR § 285.11(b)(5).

### B. Disposable Pay

Disposable pay includes any part of the debtor's compensation (including salary, bonuses, commissions, vacation pay) from an employer after the deduction of health insurance premiums and any amounts required by law to be withheld (including amounts for deductions such as social security taxes and withholding taxes).<sup>95</sup> 31 CFR § 285.11(c). Disposable pay does not exclude amounts withheld pursuant to a court order. *d.*

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<sup>94</sup> *Id.* § 285.11(b)(5). Agencies should consider whether to protect wages due to a master or seaman. *See* 46 U.S.C. § 11109 (generally applying to garnishments issued by a "court").

<sup>95</sup> *Cf. Koethe v. Johnson*, 328 N.W.2d 293, 298 (Iowa 1982) (concluding that for purposes of 15 U.S.C. § 1672(b) "amounts required by law to be withheld" clearly includes deductions for federal, state, and local withholding taxes, and social security taxes); *First Nat'l Bank v. Hasty*, 415 F. Supp. 170, 174 (E.D. Mich. 1976) (holding that, under Michigan state garnishment law (MCLA § 600.4011 *et seq.*) earnings allocated to child support and alimony are included in disposable pay).



Any attempted assignment or allotment by an employee of his or her wages are void to the extent it interferes with an agency's rights to collect through AWG, with the exception of assignments or allotments made pursuant to a family support judgment or order. *Id.* § 285.11(i)(7).

The employer is responsible for calculating the employee's disposable pay and must certify its calculation to Treasury. *Id.* § 285.11(h).

### C. Amount of Garnishment

Unless the debtor agrees to a greater percentage, an agency can garnish no more than 15% of the debtor's disposable pay when collecting a debt through AWG. 31 U.S.C. § 3720D(b)(1); 31 CFR § 285.11(i)(2)(i), (4). If a debtor owes more than one debt, agencies can garnish up to 25% of disposable pay.<sup>96</sup>

The debtor has the right to a reduction in garnishment to the extent of demonstrated financial hardship. *See supra* Chapter E.IV.B.3.c. In addition, agencies may not garnish the debtor's disposable pay in excess of the amount by which a debtor's weekly disposable pay exceeds an amount equivalent to thirty times the minimum wage. 31 CFR § 285.11(i)(2)(B); *see also* 15 U.S.C. § 1673(a); 29 CFR § 870.10. The aggregate amount garnished under one or more garnishment orders is limited to the lesser of: (1) 25% of disposable pay or (2) the amount of weekly disposable pay that exceeds thirty times the federal minimum wage. 31 CFR § 285.11(i)(3)(ii); *see also* 15 U.S.C. § 1673(a).

## **VII. Priority of Garnishments**

When a debtor's pay is subject to multiple withholding orders, the employer should generally comply with the withholding orders on a "first come, first served" basis.<sup>97</sup>

## **VIII. Use of Private Collection Contractors**

Agencies may use private collection contractors to assist in the AWG process. For example, agencies may use contractors "to mail notices and garnishment orders authorized by the agency, receive documents from the debtor and the employer, and document agency-approved repayment agreements with the debtor" or anything else that is not an inherently governmental function.<sup>98</sup> However, federal employees must retain responsibility for making the ultimate decision regarding whether and when to issue a withholding order and for providing hearings.

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<sup>96</sup> 31 CFR § 285.11(i)(3)(ii); *Cf. Halperin v. Reg'l Adjustment Bureau, Inc.*, 206 F.3d 1063 (11th Cir. 2000) (holding that the 10% limit under 20 U.S.C. § 1095a applies to each individual creditor and multiple garnishments are governed by the 25% limit established by the Consumer Credit Protection Act, 15 U.S.C. § 1673).

<sup>97</sup> *But see* 31 CFR § 285.11(i)(3)(i) (noting that withholding orders for family support shall have priority over other withholding orders).

<sup>98</sup> 63 Fed. Reg. 25,136, 25,137 (May 6, 1998); *see also* 76 Fed. Reg. 56,227, 56,236 (Sept. 12, 2011) (defining an inherently governmental function as "a function that is so intimately related to the public interest as to require performance by Federal Government employees").

## IX. Employer Issues

### A. Compliance Required

The employer of a debtor is required to pay the agency as directed by the withholding order. 31 U.S.C. § 3720D(f)(1)(A). An employer is “a person or entity that employs the services of others and that pays their wages or salaries” and includes state and local governments, non-profit organizations, and small businesses.<sup>99</sup> 31 CFR § 285.11(c). An “employer” also generally includes Indian Tribes.<sup>100</sup> For the purposes of AWG, the definition of “employers” does not include federal agencies<sup>101</sup> or sole proprietorships in which the debtor is self-employed.<sup>102</sup> 31 CFR § 285.11(c).

An employer’s failure to comply with its obligations under 31 U.S.C. § 3720D may result in liability. The employer can be held liable for all wages that are not withheld as directed, attorney’s fees, and costs. 31 U.S.C. § 3720D(f)(1). In some circumstances, a court, in its discretion, may award punitive damages.<sup>103</sup> *Id.* If an agency seeks to hold the employer liable for its noncompliance, the agency must first terminate its collection actions against the debtor. 31 U.S.C. § 3720D(f)(2)(B); 31 CFR § 285.11(o). However, for purposes of this requirement, an agency will be deemed to have terminated collection if it has not received any payments from the debtor for a period of one year. 31 CFR § 285.11(o). Moreover, an agency could (and should) continue to collect from other debtors who were jointly and severally liable on the debt. 63 Fed. Reg. 25,136, 25,139 (May 6, 1998).

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<sup>99</sup> See also *United States v. S.C. Dep’t of Corrs.*, Civil Action No. 3-04-22066-MJP, 32 (D.S.C. June 14, 2006) (concluding that 31 CFR § 285.11(c), defining “employer” to include state governments, is a reasonable interpretation of the Debt Collection Improvement Act and therefore state government employers are required to honor AWG orders issued pursuant to 31 U.S.C. § 3720D); Tex. Atty. Gen. Op. DM-419; 63 Fed. Reg. 25,136, 25,138 (May 6, 1998) (rejecting a suggestion that small business should be excluded from the requirement to comply with AWG orders when compliance would constitute a major hardship).

<sup>100</sup> See 31 CFR § 285.11(c) (broadly defining the term “employer”); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989) (concluding that general statutes whose concerns are widely inclusive and do not affect traditional Tribal rights are typically applied to Tribes).

<sup>101</sup> See 31 U.S.C. § 3701(a)(4) for a definition of “executive, judicial, or legislative agency.”

<sup>102</sup> A corporation in which a sole shareholder was the sole employee, however, might qualify as an “employer” for purposes of AWG because, unlike a sole proprietorship, the employee and the employer are two separate legal entities. For the sole shareholder to qualify as an employee, the employee would have been paid by the company as an employee (i.e., with regular paychecks with statutory deductions for payroll taxes).

<sup>103</sup> See, e.g., *United Student Aid Funds, Inc. v. Gary’s Grading & Landscaping*, No. 6:07-cv-1140-Orl-19DAB, 2008 U.S. Dist. LEXIS 106866, at \*23-24 (M.D. Fla. Sept. 22, 2008) (declining to award punitive damages for failure of the employer to comply with a garnishment order under 20 U.S.C. § 1095a); *Educ. Credit Mgmt. Corp. v. Cent. Equip. Co.*, 477 F. Supp. 2d 788, 796 (E.D. Ky. 2007) (holding that an employer’s repeated failure to comply with a garnishment order under 20 U.S.C. § 1095a was not so reprehensible as to warrant punitive damages).

Confusion or ignorance regarding this requirement will not excuse the employer from liability.<sup>104</sup> Likewise, an employer's genuine concerns that the debt sought to be collected is not valid or legally enforceable will not be a defense to liability.<sup>105</sup>

Employers must continue to withhold pursuant to a withholding order until the employer receives notification from the agency to discontinue or suspend the wage withholding. 31 CFR § 285.11(i)(8).

### B. Timing of Compliance

Employer must commence garnishments within a reasonable amount of time after receiving the withholding order. *Id.* § 285.11(i)(8). A reasonable amount of time generally requires that the employer commence withholding within two pay cycles following receipt of the withholding order, but may differ based on the employer's circumstances. 63 Fed. Reg. 25,136, 25,139 (May 6, 1998). However, employers are not required to vary normal pay cycles. 31 U.S.C. § 3720D(f)(3); 31 CFR § 285.11(i)(6). Once the employer commences withholding, it must promptly pay to the agency any amounts withheld in accordance with the withholding order. 31 CFR § 285.11(i)(5).

### C. Retaliation Prohibited

Employers may not take action against the debtor as a result of the withholding order, including discharging the debtor from employment, refusing to employ the debtor, or taking any other disciplinary action against the debtor. 31 U.S.C. § 3720D(e)(1); 31 CFR § 285.11(m). If the employer does retaliate against the debtor, the debtor has a right of action against the employer. 31 U.S.C. § 3720D(e)(1). The debtor would be entitled to an award of attorneys' fees and, in the court's discretion, reinstatement of the debtor to employment, punitive damages, back pay, or any other remedy that the court determines is reasonable. *Id.* § 3720D(e)(2).

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<sup>104</sup> *Educ. Credit Mgmt. Corp. v. Wilson*, No. 1:05-CV-41, 2005 U.S. Dist. LEXIS 45334, at \*8-9 (E.D. Tenn. May 27, 2005) (refusing to excuse employer's noncompliance with withholding orders issued under 20 U.S.C. § 1095a despite employer's contention that they believed the garnishment orders to be false or fabricated); *United Student Aid Funds, Inc. v. Gary's Grading & Landscaping*, No. 6:07-cv-1140-Orl-19DAB, 2008 U.S. Dist. LEXIS 106866, at \*2-4 (M.D. Fla. Sept. 22, 2008) (showing that ignorance of the validity of the withholding orders issued under 20 U.S.C. § 1095a did not excuse requirement to comply).

<sup>105</sup> *See, e.g., Educ. Credit Mgmt. Corp. v. Wilson*, No. 1:05-CV-41, 2005 U.S. Dist. LEXIS 45334, at \*6-8 (E.D. Tenn. May 27, 2005) (refusing to excuse employer's noncompliance with withholding orders issued under 20 U.S.C. § 1095a despite employer's belief that employee did not owe the loans).

## F. USE OF PRIVATE COLLECTION CONTRACTORS

### I. Agency Authority to Use Private Collection Contractors

Agencies have statutory authority to procure the services of private collection contractors (PCCs) to recover federal nontax debts.<sup>106</sup> Before Congress explicitly granted this authority to federal agencies through the Debt Collection Act of 1982 (DCA),<sup>107</sup> there was some uncertainty about whether agencies were permitted to procure such services.<sup>108</sup> Congress provided agencies with explicit authority to procure services of PCCs in the DCA to encourage agencies to make use of PCCs.<sup>109</sup>

### II. Limitations on What Authority May Be Delegated to Private Collection Contractors

Although agencies may use PCCs to assist with their debt collection responsibilities, there are limits on the authority that agencies may delegate to PCCs.<sup>110</sup> Any actions of a PCC that exceed its statutory, regulatory, or contractual authority are invalid. *See supra* Chapter B.III.C.2.e of this Treatise. In addition, when referring a debt to a PCC, the agency retains ownership of and

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<sup>106</sup> 31 U.S.C. § 3718(a) (permitting agencies to enter into contracts “for collection service to recover indebtedness owed”); *see also id.* § 3701(f) (defining PCCs for 31 U.S.C. § 3711 as “private debt collectors under contract with an agency to collect a nontax debt or claim owed the United States” and noting that the term “includes private debt collectors, collections agencies, and commercial attorneys”).

<sup>107</sup> Pub. L. No. 97-365, § 13, 96 Stat. 1749, 1757 (1982).

<sup>108</sup> *See* 46 Fed. Reg. 22,353, 22,353 (Apr. 17, 1981) (“Agencies have been contracting for some services related to debt collection . . . . The scope of such contracts has been limited, however, because several years GAO [i.e., the Government Accountability Office, which was then known as the Government Accounting Office] took the position that [f]ederal agencies could not delegate to private contractors the agencies’ collection authority under the Federal Claims Collection Act [of 1966].”); *see also* 76 Fed. Reg. 56,227, 56,241 (Sept. 12, 2011) (defining the collection of “fees, royalties, duties, fines, taxes and other public funds” to be an inherently governmental work to be performed by federal government employees, unless authorized by statute, like 31 U.S.C. § 3718); *In re GSA Transp. Audit Contracts*, B-198137, 64 Comp. Gen. 366, 369 (1985) (stating that agencies may use PCCs to collect delinquent amounts if they retain inherently governmental functions); LETTER TO REP. CABELL, B-171524 (Jan. 4, 1971), *available at* <https://www.gao.gov/products/400061#mt=e-report> (“[I]t was not our intention to indicate that the head of an agency has authority to divest himself of the statutorily assigned function of collection claims of the United States . . . and delegate this responsibility to a private debt collection agency”). GAO based its original position that agencies could *not* delegate collection authority to PCCs on both legal and policy grounds. *See* 46 Fed. Reg. at 22,353 (noting that the policy objections related to the “dubious reputations and method of collection agencies,” which were addressed by the passage of the Fair Debt Collection Practices Act in 1978 and comparable State laws prohibiting “abusive, deceptive, and unfair practices by collection agencies”). After GAO’s policy concerns were resolved, it re-examined its legal position and determined that although “agencies must retain ultimate responsibility for, and control over, debt collection activities, including retention of discretion over the compromise of debts or other dispositions short of full recovery,” agencies could delegate “routine administrative actions such as locating debtors, arranging for repayment schedules and billing and posting payments, which could be provided by private sources.” *Id.* But, even after GAO reversed its position, agencies remained reluctant to use PCCs. *See* S. REP. NO. 97-378, at 18-20, *as reprinted in* U.S.C.C.A.N. 3377, 3394-96 (1982).

<sup>109</sup> *See* S. REP. NO. 97-378, at 19 (“The Committee has concluded that collection agencies should be used much more extensively by the Federal Government”).

<sup>110</sup> 31 U.S.C. § 3718; 31 CFR § 901.5.

certain responsibilities for the debt. *See id.*; *cf.* 31 U.S.C. § 3711(i) (providing for authority for agencies to sell debts).

For example, a federal agency using a PCC must “retain the authority to resolve disputes, compromise debts, suspend or terminate collection activity, and refer debts [to the Attorney General] for litigation.” 31 CFR § 901.5(a)(1); *see also* 31 U.S.C. § 3718(a)(1); 31 CFR § 901.5(a)(2) (“The [PCC] is not allowed to offer the debtor, as an incentive for payment, the opportunity to pay the debt less the [PCC’s] fee unless the agency has granted such authority prior to the offer”). In addition, even though agencies must retain authority to compromise debts, agencies may “set parameters within which [PCCs] could compromise debt.” Federal Claims Collection Standards, 65 Fed. Reg. 70,390, 70,393 (Nov. 22, 2000).

PCCs must also comply with applicable law, including the Privacy Act of 1974, the Fair Debt Collection Practices Act, the Federal Claims Collection Standards, and other federal and state laws applicable to debt collection practices.<sup>111</sup>

### III. Compensation of Contractors

A contract with a PCC is effective “only to the extent and in the amount provided in an appropriation law” or to the extent the contractor is compensated through a fee recovered under 31 U.S.C. § 3718(d). 31 U.S.C. § 3718(e); *see also* 31 U.S.C. § 3718(d) (permitting contracts with PCCs to permit compensation to be paid to PCCs from the amounts recovered); 31 CFR § 901.5(c).

### IV. Centralized Referral to PCCs

Through its Cross-Servicing program, Fiscal Service collects delinquent nontax debts on behalf of federal agencies. Agencies may use PCCs before referring debts to Fiscal Service but, in general, must refer uncollected debts to Fiscal Service before the debts are more than 120 days delinquent. 31 CFR § 901.5(b); *see also* 31 U.S.C. § 3711(g)(2)(A)(iii). In addition, Fiscal Service may refer debts in the Cross-Servicing program to PCCs. 31 U.S.C. § 3711(g)(4)(B); 31 CFR § 901.5(a)(4)(b).

In accordance with its statutory obligations, Fiscal Service maintains a schedule of those PCCs “eligible for referral of debts from Fiscal Service, other debt collection centers, and creditor agencies for collection action.” 31 U.S.C. § 3711(g)(5)(C).

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<sup>111</sup> 31 U.S.C. § 3718(a)(2)(B) (requiring that PCCs be subject to “laws and regulations of the United States Government and State governments related to debt collection practices”); 5 U.S.C. § 552a(m) (providing that agencies must require contractors to comply with Privacy Act requirements); 31 CFR § 901.5(a)(3) (requiring that PCCs contractually agree to comply with “applicable Federal and state laws and regulations pertaining to debt collection practices”). In general, PCCs will have to comply with all applicable law, including laws that federal agencies themselves do not have to comply with when there has been no waiver of sovereign immunity. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (“When a contractor violates both federal law and the Government’s explicit instructions. . . no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.”).

## **G. CREDIT BUREAU REPORTING**

### **I. Introduction**

Federal agencies are generally permitted to report debts to credit bureaus and, in many cases, are required to do so.<sup>112</sup> Reporting debts to credit bureaus is meant to incentivize debtors to satisfy their federal, nontax debts. S. REP. NO. 97-378, at 8 (1982), reprinted in 1982 U.S.C.C.A.N. 3377, 3384 (“The theory behind debt reporting by the Federal government is that the availability of delinquency information to private sector credit grantors will induce debtors to pay their obligations to the Federal government. Those who do not pay may find that other credit is unavailable”). Credit bureau reporting also equips agencies with effective debt collection tools used by private lenders. *Id.* (“In view of the fact that the Federal government operates the largest credit institution in the world, the Committee feels that it should have the same collection tools available to private lenders – this is especially true because the Federal government is assuming a higher risk than the private sector in lending in most of its programs”).

When reporting debts, agencies have an obligation to ensure information reported to credit bureaus is accurate, and to correct inaccurate information once they are aware of it. *See* 31 U.S.C. §§ 3711(e)(1)(B), (E)(ii).

### **II. Requirements to Report Debts**

#### **A. Delinquent Debts Owed by Individuals**

In most cases, agencies are required to report delinquent debts owed by individuals (not including tax and tariff debts) to consumer reporting agencies. *Id.* § 3711(e)(1) (“When trying to collect a claim of the Government . . . the head of an executive, judicial, or legislative agency *shall* disclose to a consumer reporting agency information from a system of records that a person is responsible for a claim . . . .”) (emphasis added); OMB CIRCULAR NO. A-129, at 15 (“Agencies shall refer . . . all delinquent non-tariff and non-tax consumer accounts”). There is no minimum dollar threshold for agencies to refer debts to credit bureaus. *Id.* (debts of \$5 may be reported); *but see* 38 U.S.C. § 5320 (requiring the Secretary of Veterans Affairs to establish a threshold for reporting certain debts to consumer reporting agencies).

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<sup>112</sup> For the purpose of this Treatise, “credit bureaus” include both consumer reporting agencies (defined in 31 U.S.C. § 3701(a)(3)) and commercial reporting agencies.

## B. Current Debts Owed by Individuals

Agencies are also encouraged to report current debts owed by individuals to credit bureaus. OMB CIRCULAR NO. A-129, at 15 (providing guidance on federal debts other than tax and tariff debts). “The reporting of current data . . . provides a truer picture of indebtedness while simultaneously reflecting accounts that the borrower has maintained in good standing.” *Id.* Reporting current debts also “allows Federal credit reporting to be more consistent with private sector practice.” 142 CONG. REC. H4087, 4089 (daily ed. Apr. 25, 1996) (statement of Rep. Horn).

## C. Delinquent and Current Debts Owed by Entities

Finally, agencies must report delinquent and current debts owed by entities to credit bureaus. OMB CIRCULAR NO. A-129, at 15 (providing guidance on federal debts other than tax and tariff debts).

# III. Exceptions to Required Reporting

## A. Termination of Debt Collection

Agencies are not required to report debts to credit bureaus on which they have terminated or suspended collection. *See* 31 CFR § 903.3(a) (allowing agencies to terminate debt collection because, for example, the costs of collection are anticipated to exceed the amount recoverable, the debt is legally without merit, or the debt cannot be substantiated); *id.* § 903.2(a) (permitting agencies to suspend debt collection when, among other things, the agency cannot locate the debtor, or the debtor has requested a waiver or review of the debt). Still, even after suspending or terminating active debt collection, agencies may continue credit bureau reporting if appropriate. *See id.* § 903.3(b) (permitting agencies to continue certain collection actions after termination).

## B. Bankruptcy

If an agency discovers that a debtor has filed for bankruptcy protection and an automatic stay is in effect, the agency should consider whether it should suspend credit bureau reporting. *See* 11 U.S.C. § 362(a); 31 CFR § 903.2(d). While reporting debts to credit bureaus likely is not a per se violation of the automatic stay,<sup>113</sup> in some cases courts have held that such reporting is a violation of the stay when combined with another factor, such as when the reported information was inaccurate.<sup>114</sup>

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<sup>113</sup> *In re Porcoro*, 565 B.R. 314, 327 (Bankr. D.N.J. 2017) (“[T]he Court holds that the mere act of reporting a debtor's truthful credit information post-petition—but pre-discharge—without further evidence that the creditor is attempting to collect the debt, is not a violation of the automatic stay”).

<sup>114</sup> *In re Drake*, 2015 Bankr. LEXIS 326, at \*11 (Bankr. M.D.N.C. Jan. 6, 2015) (finding that a creditor’s “failure to correct a false report for over a month after it received notice of its stay violation evidences a pattern of sluggishness and disorganization, and further supports this Court's finding of a willful violation [of an automatic stay].”); *In re Weinhoeft*, 2000 Bankr. LEXIS 2246, at \*4 (Bankr. C.D. Ill. Aug. 1, 2000) (finding that reporting a pre-petition debt

In addition, agencies are generally required to terminate debt collection action when the debt has been discharged in bankruptcy. 31 CFR § 903.3(a)(6), (c). Agencies generally may report a debt that has been discharged to credit bureaus so long as the reported information accurately reflects that the debt was discharged in bankruptcy and that nothing is being collected from the debtor.<sup>115</sup> But, a creditor can violate the discharge injunction if the reporting was done with the intent to collect a discharged debt.<sup>116</sup>

#### IV. Prerequisites for Referring Debts to Credit Bureaus

First, the head of an agency must determine that claims are valid and overdue before the agency reports the debts to consumer credit bureaus. 31 U.S.C. § 3711(e)(1)(B).

##### A. Privacy Protections

The Privacy Act of 1974, which applies to individuals, permits federal agencies to disclose debts to credit bureaus. 5 U.S.C. § 552a(b)(12); *see also* 31 U.S.C. § 3711(e)(1)(A), (5). But, these disclosures are only permissible if agencies provide applicable protections for debtors. 31 U.S.C. § 3711(e)(1)-(2). To do so, agencies must publish a system of records notice in the Federal Register, as per 5 U.S.C. § 552a(e)(4), that indicates which information they may disclose to credit bureaus. 31 U.S.C. § 3711(e)(1)(A), (5).

When reporting a debt, agencies may only disclose information necessary to establish the debtor's identity, the amount, status, and history of the debt, and the agency or program under which the debt arose. *Id.* § 3711(e)(1)(F).

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to credit bureaus with intent to harass or coerce the debtor into paying the debt could constitute a violation of the stay).

<sup>115</sup> Such a report shows historically accurate information and would be treated differently by prospective creditors in evaluating credit applications compared with an amount that is past due and for which the debtor continues to be personally liable. *Delane v. Carrington Mortg. Servs., LLC*, 2016 U.S. Dist. LEXIS 196761, at \*35 (N.D. Ga. May 18, 2016) (holding that the reporting did not violate the discharge injunction because the report was accurate, showed a zero balance due and historical delinquency, and stated that the debts at issue were discharged in the bankruptcy); *In re Helmes*, 336 B.R. 105, 107 (Bankr. E.D. Va. 2005) (holding that furnishers of credit information may be in violation of a bankruptcy discharge injunction unless "a debt discharged in bankruptcy [is] reported to a credit reporting agency with the notation 'Discharged in bankruptcy' and with a zero balance due").

<sup>116</sup> *See e.g. Mahoney v. Wash. Mut., Inc. (In re Mahoney)*, 368 B.R. 579, 584 (Bankr. W.D. Tex. 2007) (the mere reporting of a discharged debt is not an "act" to collect unless there is a link between the reporting and the recovery of the discharged debt); *In re Puller*, 2007 Bankr. LEXIS 2017, at \*25 (Bankr. N.D.W. Va. June 20, 2007) (holding that to prove a violation of the discharge injunction, the debtor would need to demonstrate not only that the creditor continued to report inaccurate information, but also that it did so in knowing disregard of the discharge injunction); *Irby v. Fashion Bug (In re Irby)*, 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005) (discharge does not extinguish debt, so the sole act of reporting a debt does not violate discharge the injunction); *Smith v. Am. Gen. Fin., Inc., (In re Smith)*, 2005 Bankr. LEXIS 2481, at \*2 (Bankr. N.D. Iowa Dec. 12, 2005) (finding creditors' reporting of debts post-discharge as "charged off," "past due," and "written off" with an intent to collect could be a violation of a discharge injunction); *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 71 (Bankr. D. Colo. 2000) (inaccurate reporting of a discharged debt does not violate the discharge injunction unless the reporting was "done to extract payment of the debt").



## B. Due Process Protections

Agencies must also provide individuals with due process protections before their debts are referred to credit bureaus. Before reporting a delinquent debt to consumer reporting agencies, the head of the agency must provide written notice to debtors: (1) that payment of the claim is overdue, (2) that the agency head will disclose the claim to a credit bureau 60 days after the agency has sent notice to the debtor or later, (3) the specific information that the agency will report, and (4) “of the rights the person has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative repeal or review of the claim . . . .” *Id.* § 3711(e)(1)(C). The agency head must send this notice to the most current address on file, and if no current address is available, must take reasonable action to locate the debtor. *Id.* § 3711(e)(3). Such reasonable efforts may include, among other things, obtaining an address from the Internal Revenue Service pursuant to 26 U.S.C. § 6103(m)(2) or from a consumer reporting agency. S. REP. NO. 97-378, at 21 (1982).

Agencies may choose not to refer a debt to a credit bureau for a person who has repaid the debt, entered into a written repayment plan with the agency, or requested a review of the debt. 31 U.S.C. § 3711(e)(1)(D). Furthermore, the agency head must provide for “a review of the obligation of the person, including an opportunity for reconsideration of the initial decision on the claim.” *Id.* § 3711(e)(2). Agencies generally should act promptly on such requests for review. S. REP. NO. 97-378, at 21 (1982) (advising that the opportunity for review should not be construed to allow the debtor to delay referrals to credit bureaus unreasonably or unjustifiably and that agencies should reach final decisions on debtor appeals within 30 days, if possible). Agencies, however, generally need not duplicate due process opportunities. 31 CFR § 901.4(a)(2). After agencies have reported debts to a credit bureau, the head of an agency must create procedures: (1) to report any substantial change in the condition or amount of the claim, (2) quickly verify and correct information requested by credit bureaus, and (3) get assurances from credit bureaus that they are complying with all relevant laws. 31 U.S.C. § 3711(e)(1)(E). The verification and correction are limited to the information the agency originally disclosed. *Id.*

While applicable statutes do not address due process requirements for reporting debts owed by entities, constitutional due process protections apply to entities,<sup>117</sup> and agencies should consult their counsel on what if any due process protections to provide non-individual debtors before reporting to credit bureaus.

## C. Agencies Must Develop Standards

Agencies must develop standards for reporting delinquent debts to credit bureaus that comply with the Privacy Act and Bankruptcy Code and may similarly develop standards for reporting current debts to credit bureaus. 31 CFR § 901.4(a).

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<sup>117</sup> *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (“[A] corporation is a ‘person’ within the meaning of the equal protection and due process of law clauses”).

## V. Application of Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA), codified at 15 U.S.C. § 1681 *et seq.*, is a consumer protection statute that imposes duties on persons that provide information to credit bureaus to ensure that credit reports are accurate. *See e.g.*, 15 U.S.C. § 1681s-2.

The law on whether FCRA applies to federal agencies' credit bureau reporting activities is unsettled. Some courts have held that federal agencies may not be sued for violations of FCRA because FCRA does not waive the federal government's sovereign immunity.<sup>118</sup> Other courts to address the issue, however, have found that FCRA waived sovereign immunity.<sup>119</sup> Agencies should consult with agency counsel about whether and how to comply with FCRA when reporting debts to credit bureaus.

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<sup>118</sup> *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 806 (4th Cir. 2019) (concluding that the United States had not waived its sovereign immunity under the enforcement provisions of FCRA, such as the provision requiring agencies to fully investigate disputed information reported to credit bureaus); *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018) (opining that the federal government could not be sued for violating FCRA by failing to redact the plaintiff's debit card expiration date from a receipt because the federal government had not unequivocally waive its sovereign immunity).

<sup>119</sup> *See, e.g., Kirtz v. Trans Union LLC*, 46 F.4th 159 (3d Cir. 2022), *petition for cert. filed*, (U.S. Mar. 3, 2023) (No. 22–846) (finding that federal agencies may be liable under FCRA for incorrectly reporting debts to a credit bureau as “past due,” and failing to investigate or correct the report after the debtor disputed the information); *Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723, 729 (D.C. Cir. 2021) (holding that federal agencies generally may be liable for damages under FCRA, but that the federal agencies at issue were not acting as “consumer reporting agencies,” and so were not subject to FCRA); *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014) (regarding the alleged failure to redact credit card information from a receipt and holding that FCRA waived the United States' sovereign immunity).

## H. BARRING DELINQUENT DEBTORS

### I. Introduction

Barring delinquent debtors from receiving federal financial assistance is yet another tool for the collection of delinquent nontax debt.<sup>120</sup> Although barring delinquent debtors from receiving loans, loan insurance, and loan guarantees does not result directly in the collection of delinquent amounts, it can be an effective collection method because denial of assistance may incentivize a debtor to resolve a delinquency.<sup>121</sup> This collection tool also serves the additional purpose of “reduc[ing] losses arising from debt management activities by requiring proper screening of potential borrowers.”<sup>122</sup> In general, the Government should not provide financial assistance to those who have failed to repay other debts owed to the United States. To facilitate this objective, 31 U.S.C. § 3720B requires federal agencies to deny certain types of federal financial assistance to delinquent debtors, even if creditworthiness is not a factor for eligibility.<sup>123</sup>

Credit granting agencies<sup>124</sup> may also be required to screen for creditworthiness, which can facilitate the identification of applicants owing delinquent federal nontax debts.<sup>125</sup> Credit granting agencies can obtain information regarding whether a person owes a delinquent debt from a variety of sources, including from Do Not Pay (DNP), which operates a resource dedicated to detecting and preventing improper payments.<sup>126</sup> Operated by Treasury, DNP is authorized and governed by the Payment Integrity Information Act of 2019 (PIIA) and Office of Management and Budget (OMB) memoranda and circulars. In addition to DNP, credit granting agencies can also obtain delinquent debt information from credit reports or borrower self-certification.<sup>127</sup> Several laws and regulations also mandate that credit granting agencies properly screen potential borrowers to avoid making improper payments to ineligible recipients.<sup>128</sup>

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<sup>120</sup> See 31 U.S.C. § 3720B. In this context, the term “barring” refers to the denial of federal financial assistance under 31 U.S.C. § 3720B and is distinct from the legal concept of debarment applicable in government contracting. Cf. 48 CFR §§ 9.406-1 to 9.406-5 (reflecting the debarment provisions of the Federal Acquisition Regulations).

<sup>121</sup> Cf. 142 Cong. Rec. H4088 (daily ed. Apr. 25, 1996) (statement of Rep. Horn) (“The intent of this section is to provide authority to Federal agencies which administer credit programs to refuse to approve credit to parties who are delinquent on Federal claims to resolve their debts with the appropriate agency”).

<sup>122</sup> Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, § 31001(b)(3), 100 Stat. 1321-358 (1996).

<sup>123</sup> See 31 U.S.C. § 3720B; 31 CFR § 285.13(c)(1).

<sup>124</sup> Throughout this Chapter, the agency from which financial assistance is sought is referred to as the “credit granting agency, and the agency to which a delinquent debt is owed is referred to as the “creditor agency.” In some cases, the credit granting agency and the creditor agency may be the same.

<sup>125</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRC. NO. A-129, POLICIES FOR FEDERAL CREDIT PROGRAMS AND NON-TAX RECEIVABLES (revised Jan. 2013) [hereinafter OMB CIRCULAR A-129].

<sup>126</sup> The Do Not Pay portal includes, among other databases, the Department of Housing and Urban Development’s Credit Alert Verification Reporting System (CAIVRS), Treasury’s Debt Check Database, the Social Security Administration’s Death Master File, and the General Services Administration’s System for Award Management (SAM). See DNP: “What Can I Search?”, available at <https://fiscal.treasury.gov/dnp/search.html>.

<sup>127</sup> See 31 CFR § 285.13(c)(3).

<sup>128</sup> See *id.* § 3354(a)(1); see also *id.* §§ 3351-3358.

## II. Barring Delinquent Debtors Under 31 U.S.C. § 3720B

### A. Overview

#### (1) *General Rule*

A person may not obtain any federal loan, loan insurance, or loan guarantee if that person has an outstanding nontax debt with any federal agency that is “in a delinquent status.” 31 U.S.C. § 3720B(a). If a person is barred from receiving federal loans, loan insurance, or loan guarantees under this statute, the bar remains effective until the delinquency is resolved. *Id.*; 31 CFR § 901.6; *see also id.* § 285.13(b), (e) (describing the circumstances in which a delinquency is resolved). Even if a debt is resolved, a prior delinquency can still impact a debtor’s ability to obtain federal financial assistance if creditworthiness is a factor for eligibility.<sup>129</sup>

#### (2) *Definition of “Person” and Applicability of the Bar to Affiliates*

The bar applies to persons who owe delinquent debts. The term “person” refers not only to individuals, but to any entity other than a federal agency, including corporations, partnerships, associations, organizations, and state and local governments. *Id.* § 285.13(a). Because the bar applies regardless of how the debt arises, it can operate to preclude borrowers, guarantors, or persons owing administrative debts from receiving federal financial assistance. 31 U.S.C. § 3701(b); 31 CFR § 285.13(a), (c)(1).

The bar also applies to persons who control or are controlled by a delinquent debtor. 31 CFR § 285.13(c)(2). For example, if the delinquent debtor is a corporation, the bar on federal financial assistance could extend to its subsidiaries (who are controlled by the delinquent debtor) and its officers, directors, and controlling shareholders (who control the delinquent debtor). Whether a control relationship is sufficient to subject a person to the restrictions of 31 U.S.C. § 3720B is determined under standards issued by the applicable credit granting agency. *Id.*; *see also* Barring Delinquent Debtors, 63 Fed. Reg. at 67,755. Because the standards for control may vary from agency to agency, a person that is ineligible for one type of federal financial assistance may nevertheless remain eligible for another.

### B. Debts Subject to the Bar on Federal Financial Assistance

#### (1) *Delinquent Status and the 90-Day Rule*

The bar applies to any person who owes a federal nontax debt “in a delinquent status, as determined under standards prescribed by the Secretary of the Treasury.” 31 U.S.C. § 3720B(a). A debt is delinquent for purposes of 31 U.S.C. § 3720B if it has not been paid within 90 days of the payment due date. 31 CFR § 285.13(d)(1). This definition of

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<sup>129</sup> *See* OMB CIRCULAR A-129, at 9 (“Where creditworthiness is a criterion for loan approval, agencies and private lenders shall determine if applicants have the ability to repay the loan, *taking into consideration the applicant’s history of repaying debt.*” (emphasis added)).

delinquency applies exclusively to 31 U.S.C. § 3720B and does not extend to other debt collection tools.<sup>130</sup>

The 90-day rule ensures the debtor will not be subject to the bar if the debtor is merely late with a payment or a creditor agency fails to timely post a payment.<sup>131</sup> The rule is also “[c]onsistent with standard lending practices which classify a loan as non-performing when the loan is 90 days past-due.”<sup>132</sup> In addition, credit granting agencies generally rely on credit reports to determine whether an applicant is delinquent on federal nontax debts, and creditor agencies are required to provide debtors with 60 days’ notice before reporting delinquent debts to credit bureaus.<sup>133</sup> Similarly, the Do Not Pay portal that credit granting agencies can check to confirm recipient eligibility before issuing payments includes a data extract from the delinquent debtor database maintained by the TOP, and creditor agencies must also provide debtors with 60 days’ notice before referring debts to TOP for collection.<sup>134</sup> Therefore, as a practical matter, the 90-day rule allows sufficient time for debts to be reported to credit bureaus and referred to TOP before applying the bar on federal financial assistance.<sup>135</sup>

## (2) Debts Not In Delinquent Status

There are three circumstances in which a debt will not be in “delinquent status” for purposes of 31 U.S.C. § 3720B, even if it is more than 90 days past due. *See* 31 CFR § 285.13(d)(2).

### a) Obligation to Pay No Longer Exists

First, if a creditor agency releases a debtor from any obligation to pay a debt, or if there is a determination that the debtor either does not owe the debt or does not have to pay the debt, then the debt is not in delinquent status for purposes of 31 U.S.C. § 3720B. *See* 31 CFR § 285.13(d)(2)(i).

### b) Debt Subject to Bankruptcy Protection

Second, a debt is also not in delinquent status: (i) if the debt is the subject of, or has been discharged in, a bankruptcy proceeding; and (ii) if applicable, the person seeking federal financial assistance is current on any court-authorized repayment plan. *Id.* § 285.13(d)(2)(ii).

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<sup>130</sup> Compare 31 CFR § 285.13(d)(4) (defining “delinquent status” in relation to the bar on federal financial assistance), with 31 CFR § 900.2 (defining “delinquent” for purposes of the Federal Claims Collections Standards).

<sup>131</sup> Barring Delinquent Debtors From Obtaining Federal Loans or Loan Insurance or Guarantees, 63 Fed. Reg. 67,754, 67,755 (Dec. 8, 1998) [hereinafter Barring Delinquent Debtors], 63 Fed. Reg. at 67,756.

<sup>132</sup> *Id.*

<sup>133</sup> *See* 31 U.S.C. § 3711(e); Barring Delinquent Debtors, 63 Fed. Reg. at 67,755.

<sup>134</sup> *See* 31 U.S.C. § 3720A(b)(2); 31 CFR § 285.5(d)(6)(ii)(A); DO NOT PAY—DATA SOURCES, <https://fiscal.treasury.gov/dnp/search.html> (identifying TOP’s Debt Check database as one of the data sources for the Do Not Pay portal).

<sup>135</sup> Barring Delinquent Debtors, 63 Fed. Reg. at 67,755-56.

c) Debt Subject to a Pending Appeal

Finally, debts are not delinquent if the existence of the debt or its status (i.e., whether or not delinquent) is subject to a pending administrative appeal or a contested judicial proceeding filed by the debtor in a timely manner.<sup>136</sup>

(3) Exemptions by the Secretary of the Treasury

The Secretary of the Treasury (Secretary) may also exempt certain classes of debts from restricting debtors' eligibility for federal financial assistance. 31 U.S.C. § 3720B(a); 31 CFR § 285.13(f). These exemptions can be based either on the Secretary's determination that an exemption is "in the best interests of the Federal Government," or upon review at the request of a creditor agency. 31 CFR § 285.13(f)(1), (f)(3).

While there are no specific requirements on what the Secretary must consider when determining that an exemption is in the best interests of the United States, this review may involve: (a) balancing the purpose of the financial assistance program against the interests of the Government in reducing losses associated with debt management activities, and (b) assessing whether the assistance program's goals are frustrated by including the relevant class of debts within the scope of the bar.<sup>137</sup> By contrast, when a creditor agency requests an exemption for a particular class of debts, the agency must provide the Secretary with the following: (i) information about the nature of the program; (ii) the number, dollar amount, and age of the debts in the program; (iii) reasons justifying an exemption; and (iv) other information the Secretary deems necessary to review the exemption request.<sup>138</sup>

C. Resolution of Delinquent Debts

Once a delinquent debt is resolved, it will no longer prevent the debtor from receiving federal financial assistance under 31 U.S.C. § 3720B. *See* 31 CFR § 285.13(c)(1). There are four ways to resolve a delinquent debt: (1) full satisfaction; (2) compromise; (3) entry into a written repayment agreement; and (4) cure of the delinquency.<sup>139</sup>

<sup>136</sup> 31 CFR § 285.13(d)(2)(iii). Only challenges to the existence and/or status of the debt trigger this exception; appeals on other matters do not prevent the debt from being in delinquent status. *See id.*

<sup>137</sup> *Compare Id.* § 285.13(g)(2) (directing credit granting agencies to perform a balancing test based on these factors when considering a waiver of the eligibility requirement), *with Id.* § 285.13(f)(3) (indicating that the Secretary can "exempt a class of debts [from the bar] if exemption is in the best interests of the Federal Government," but declining to opine on what would fulfill that requirement).

<sup>138</sup> *Id.* § 285.13(f)(2).

<sup>139</sup> A creditor agency's suspension or termination of collection action on a delinquent debt does not, on its own, constitute a resolution. 31 CFR § 285.13(e)(2); *see also Id.* § 900.8 ("The standards [including the provisions of 31 CFR part 903 regarding suspension and termination] do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States"). Likewise, a delinquent debt is not resolved merely because an agency has closed-out or written off the debt, or reported a discharge of indebtedness to the IRS on a Form 1099-C. *Id.*; *see also* Issuance of Transmittal Memorandum Amending OMB Circular No. A-129, "Policies for Federal Credit Programs and Non-Tax Receivables," 65 Fed. Reg. 71,212, 71,222 (Nov. 29, 2000). For a more detailed discussion of suspension and termination of debt collection action, and the ways in which these actions differ from accounting actions like "close-out" and "write-off," see Part IV.B (Terminology).

(1) *Full Satisfaction*

Once a debtor pays or otherwise satisfies a delinquent debt in full, the debt is resolved. *Id.* § 285.13(e)(1)(i).

(2) *Compromise*

If a creditor agency accepts partial payment from the debtor “as a compromise in lieu of payment in full,” then debt is resolved. *Id.* § 285.13(e)(1)(ii).

(3) *Written Repayment Agreement*

A delinquency is also resolved if a debtor enters into a written agreement to repay the debt, in whole or in part, on terms acceptable to the creditor agency. *Id.* § 285.13(e)(1)(iv).

(4) *Cure of the Delinquency*

A debtor can also cure a delinquency by making all overdue payments and paying all assessed interest, penalties, and administrative costs, on terms acceptable to the agency. *Id.* § 285.13(e)(1)(iii). Cure differs from the other methods of resolution because even though the delinquency is cured, the obligation to pay the entire balance of the debt survives resolution.

D. Federal Financial Assistance barred by 31 U.S.C. § 3720B

(1) *Federal Loans, Loan Insurance, and Loan Guarantees*

Subject to the exceptions below, the bar applies to all loans, loan insurance, and loan guarantees provided by federal agencies, regardless of whether the funds are issued by a financial institution or directly by the agency.<sup>140</sup> Therefore, credit granting agencies should take care to ensure that they incorporate this eligibility requirement into the regulations, policies, and procedures for all loan, loan insurance, and loan guarantee programs they operate.

(2) *Exceptions*

The general bar against federal financial assistance does not apply to disaster loans or marketing assistance loans and loan deficiency payments under Subtitle C of the Agricultural

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<sup>140</sup> 31 U.S.C. § 3720B(a); 31 CFR § 285.13(a); Barring Delinquent Debtors, 63 Fed. Reg. at 67,754. There is no distinction for different types of federal loans. *See* Barring Delinquent Debtors, 63 Fed. Reg. at 67,755 (declining to include specific language in the rule on price support loans with non-recourse provisions because, as a type of loan, they were already within the rule’s scope). Federal grants and other types of financial assistance are outside the scope of 31 U.S.C. § 3720B but may be restricted under other legal authority.

Market Transition Act (7 U.S.C. § 7231 *et seq.*).<sup>141</sup> This does not, however, preclude credit granting agencies from denying these forms of federal financial assistance on other grounds, such as when creditworthiness is a separate factor for eligibility or when another statute or regulation authorizes denial.<sup>142</sup>

### E. Due Process

Unlike other debt collection tools, the bar on receiving federal financial assistance does not give rise to any specific due process or procedural requirements. *See* 31 U.S.C. § 3720B. However, credit granting agencies must comply with any procedural requirements that apply to their specific assistance programs when denying federal financial assistance due to ineligibility. Although there is no requirement to do so, creditor agencies may include language in their demand letters and/or due process notices explaining that an extended delinquency may cause the debtor to become ineligible for federal loans, loan guarantees, and loan insurance programs.

### F. Waiver

The head of a credit granting agency may waive the provisions of 31 U.S.C. § 3720B for an applicant seeking federal financial assistance. 31 U.S.C. § 3720B(a); 31 CFR § 285.13(g)(1). These waivers may be granted only on “person by person basis” and, therefore, cannot be applied to an entire class of applicants.<sup>143</sup> By contrast, the Secretary can exempt an entire class of debts from application of the bar at the request of an agency or if doing so is in the best interests of the United States.<sup>144</sup>

#### (1) *Delegation of Waiver Authority*

The head of a credit granting agency may delegate the authority to grant waivers to the agency’s Chief Financial Officer, who may in turn re-delegate the authority to the Deputy Chief Financial Officer.<sup>145</sup> No further delegations are permitted.

#### (2) *Factors to Consider When Reviewing a Waiver Request*

The agency official who reviews a waiver request must balance two competing considerations: whether denial would interfere with the underlying purpose of the financial assistance program, and the extent to which granting a waiver is contrary to the goal of reducing federal losses through proper screening of potential borrowers. 31 CFR § 285.13(g)(2). In assessing these factors, the agency official should also consider the age, amount, and cause of the delinquency; the likelihood of resolution; the aggregate amount of

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<sup>141</sup> 31 U.S.C. § 3720B(a). The loans and deficiency payments provided under the Agricultural Market Transition Act provide interim financing to commodities producers and distributors. *See* 7 CFR § 1434.

<sup>142</sup> *See* 31 CFR § 285.13(b)(3).

<sup>143</sup> 31 CFR § 285.13(g). A waiver of the provisions of 31 U.S.C. § 3720B, however, does not constitute a waiver of the debt. For a more detail discussion on waiver of debts, see *infra* at Part IV.B (distinguishing between suspension and termination of collection action, on the one hand, and waiver, on the other hand).

<sup>144</sup> 31 U.S.C. § 3720B(a).

<sup>145</sup> *Id.* § 3720B(b); 31 CFR § 285.13(g)(1).



debt (delinquent or otherwise) owed by the person; and the person's credit history with respect to repayment of debt. *Id.* § 285.13(g)(3).

### (3) Recordkeeping Requirement

Each agency that waives the provisions of 31 U.S.C. § 3720B for an applicant must also maintain a centralized record indicating the number and types of waivers granted.<sup>146</sup>

## III. Suspension or Revocation of Eligibility for Loans, Licenses, Permits, and Privileges

Agencies should also consider whether to suspend or revoke licenses, permits, or other privileges for “any inexcusable or willful failure” of a debtor to pay delinquent debts, but agencies must act pursuant to their own authority, rather than 31 U.S.C. § 3720B, in taking such actions. 31 CFR § 901.6(b). Any agency considering suspension or revocation of these opportunities in relation to delinquent debts subject to bankruptcy proceedings should consult the Bankruptcy Code, including 11 U.S.C. §§ 362 and 525, and other applicable laws to understand what restrictions may apply. *Id.* § 901.6(d).

## IV. Other Delinquency-Related Restrictions

In addition to 31 U.S.C. § 3720B, several other laws restrict the eligibility of debtors for federal financial assistance or may prevent debtors from receiving other federal opportunities. A few examples of these delinquency-related restrictions are discussed below.<sup>147</sup>

### A. Judgment Liens for Federal Debts

A debtor whose property is subject to a judgment lien for any federal debt (tax or nontax) is ineligible to receive any grant or loan that is made, insured, guaranteed, or financed directly or indirectly by the United States. *See* 28 U.S.C. § 3201(e). Debtors in these circumstances are also ineligible to receive funds directly from the Government in any program, except funds to which the debtor is entitled as a beneficiary, until the judgment is paid in full. *Id.* The range of federal financial assistance that may be denied under 28 U.S.C. § 3201(e) is broader than that denied under the 31 U.S.C. § 3720B, and includes federal grants, loans, and other program funds.<sup>148</sup>

Credit granting agencies may issue regulations permitting waiver of the eligibility restrictions of 28 U.S.C. § 3201(e) but, in contrast to 31 U.S.C. § 3720B, may do so for an entire category of applicants or an entire class of financial assistance.<sup>149</sup>

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<sup>146</sup> *Id.* § 285.13(g)(4).

<sup>147</sup> This Treatise includes only a brief overview of eligibility restrictions outside the context of the DCIA and does not attempt to provide a detailed analysis of all other contexts in which federal financial assistance may be denied.

<sup>148</sup> Compare 28 U.S.C. § 3201(e) with 31 U.S.C. § 3720B(a) (covering only federal loans, loan insurance, and loan guarantees).

<sup>149</sup> Compare 28 U.S.C. § 3201(e), with 31 CFR § 285.13(g)(1) (requiring that waivers of 31 U.S.C. § 3720B be granted on a person-by-person basis).

## B. Delinquent Child Support obligations

Several laws also restrict the availability of federal assistance to debtors owing delinquent child support.<sup>150</sup> For example, Executive Order 13019 requires that all federal agencies implement procedures to deny federal financial assistance to individuals whose nontax payments are subject to administrative offset to collect delinquent child support.<sup>151</sup> For this purpose, federal financial assistance means any federal loan (other than a disaster loan), loan insurance, or loan guarantee.

## C. Delinquent Tax Debts

Delinquent tax debt may also prevent debtors from receiving certain federal opportunities. For example, the Federal Acquisition Regulations permit agencies to prevent bidders from being awarded government contracts if the bidders have delinquent federal taxes of more than \$10,000. *See* 48 CFR § 9.406-2(b)(1)(v).

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<sup>150</sup> *See e.g.*, 42 U.S.C. § 652(k) (denying issuance of passports for nonpayment of child support); 7 CFR § 273.11(q)(1) (allowing States to prevent individuals who are delinquent on child support from participating in the Supplemental Nutrition Assistance Program); 13 CFR § 109.400(b)(21) (denying certain small business loans to businesses owned or controlled by an applicant who is more than 60 days delinquent on child support); 49 CFR § 22.17 (requiring controlling owners of certain Department of Transportation loan recipients to certify that they are not more than 60 days delinquent on child support obligations).

<sup>151</sup> Supporting Families: Collecting Delinquent Child Support Obligations, Exec. Order No. 13,019, 61 Fed. Reg. 51,763 (Oct. 3, 1996).