PART I: FOUNDATIONAL CONCEPTS
APPLICABLE TO FEDERAL NONTAX DEBT COLLECTION

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TABLE OF CONTENTS

A. APPROPRIATIONS LAW AND THE AFFIRMATIVE DUTY TO COLLECT

I. INTRODUCTION

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

II. THE RIGHTS AND RESPONSIBILITIES OF AGENCIES COLLECTING DEBTS

A. Appropriations Principles

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

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

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

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

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

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

III. THE COMMON LAW RIGHT TO COLLECT DEBTS

A. The Federal Government's Right to Collect

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

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

(1) Evolution of Case Law

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

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

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

(2) Right to Charge Interest

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

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

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

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

B. Federal vs. State Common Law

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

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

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

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

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

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

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

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

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

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

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

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

IV. HISTORY OF FEDERAL DEBT COLLECTION LAW

A. Debt Collection Law Prior to 1966

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

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

B. Federal Claims Collection Act of 1966

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

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

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

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

C. Debt Collection Act of 1982

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

D. Deficit Reduction Act of 1984

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

E. Debt Collection Improvement Act of 1996

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

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

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

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

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

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

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

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

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

F. Post-DCIA

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

B. DUE PROCESS

I. INTRODUCTION

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

A. Overview of Procedural Due Process

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

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

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

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

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

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

B. Constitutional v. Statutory Due Process

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

C. When Due Process Rights are Implicated

(1) Governmental Action

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

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

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

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

(2) Deprivation of Property

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

a) Property Interests

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

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

b) Deprivation

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

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

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

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

(3) Rulemaking

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

(4) Statutes of Limitation and Laches

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

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

II. PROCEDURAL DUE PROCESS REQUIREMENTS

A. Overview

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

B. Notice

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

(1) Content

a) Information

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

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

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

Id. (internal citation omitted).

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

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

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

b) Mass Notice

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

c) Language

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

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

(2) Delivery

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

a) Last Known Address

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

b) Electronic Mail

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

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

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

c) Publication

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

d) Unique Circumstances

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

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

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

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

(3) Waiver of Right to Notice

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

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

(4) Timing of Notification

a) Pre-Deprivation

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

b) Post-Deprivation

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

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

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

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

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

c) Stale Notice

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

C. Opportunity to be Heard

(1) General Standard

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

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

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

(2) Material Facts

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

(3) Decisionmaker

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

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

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

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

(4) Document Production

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

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

(5) Maintaining Records

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

(6) Type of Opportunity to be Heard

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

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

a) Administrative Reviews and Hearings

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

i. Paper Hearings and Reviews

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

ii. Oral Hearings

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

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

b) Full Evidentiary Hearings

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

c) Post-Deprivation Review

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

d) Judicial Review

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

(7) Waiver of Opportunity to be Heard

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

III. CONSEQUENCES OF VIOLATING DUE PROCESS

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

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

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

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