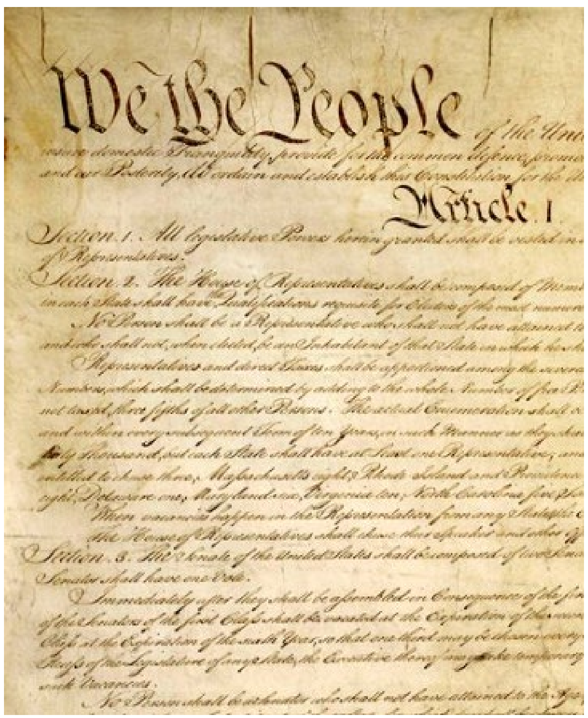
Bureau of the Fiscal Service

Due Process for Federal Nontax Debt Collection

Due Process Clause

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .



Fifth Amendment to the U.S. Constitution

Procedural Due Process

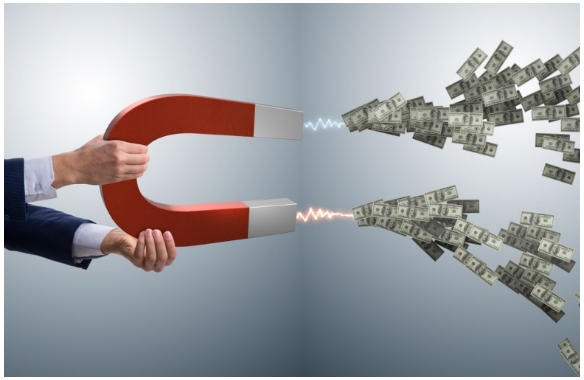
- Procedural due process mandates a **fair decision-making** process.

- Procedural due process seeks to put procedures in place to **minimize the risk of error**.

- A "***flexible*** concept."

Due Process for Debt Collection

- Agencies must provide the debtor with due process prior to using most debt collection tools.



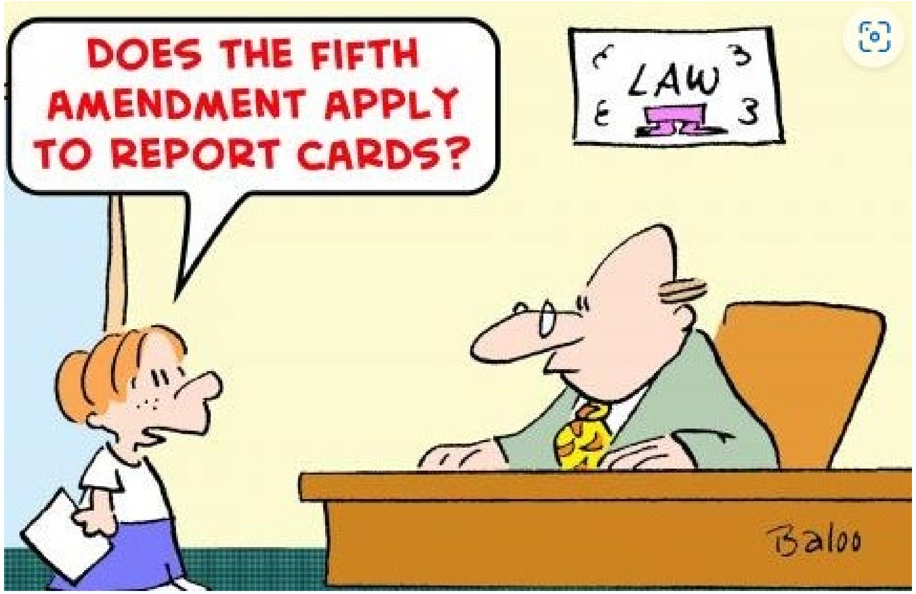
- Who? Both individual and non-individual debtors are entitled to due process.

When is Due Process Required?

- Due process is generally required **prior** to depriving someone of property (e.g., taking an adverse debt collection action).
- For example, due process is required for:
  - Administrative and tax refund offset
  - Salary offset and administrative wage garnishment
  - Credit bureau reporting

When is Due Process Required?

- However, due process is generally not required for:
  - Sending demand letters
  - Placing collection calls



Why Provide Due Process?

- The Constitution requires due process.
- Provides for ***fairness*** in the process before an agency takes an adverse action.
- Statutes and regulations generally define what process is due.

How to Provide Due Process?

- Generally, a single due process **notice** can cover notice requirements for all collection actions.

- The precise due process **requirements** may differ by:
  - Type of debt to be collected
  - Collection action to be used

Which brings us to….

Procedural Due Process Components

Notice

and

Opportunity

to Dispute or Challenge

Most Debt Collection Tools Require Due Process

- Agencies are generally authorized to use certain tools to collect **delinquent** debt.
- Most statutes authorizing the use of a particular tool require that the agency provide the debtor with **prior written notice** of the nature and amount of the debt and a **description of how the debtor can dispute** the debt or the proposed collection action.

Most Debt Collection Tools Require Due Process

Generally, the statute or regulation for each collection tool specifies its own due process requirements.

- ✓ Credit bureau reporting
  - 31 U.S.C. § 3711(e); 31 CFR 901.4
- ✓ Administrative offset
  - 31 U.S.C. § 3716(a); 31 CFR 285.4, .5
- ✓ Tax refund offset
  - 31 U.S.C. § 3720A(b); 31 CFR 285.2
- ✓ Administrative wage garnishment
  - 31 U.S.C. § 3720D(b); 31 CFR 285.11
- ✓ Federal salary offset
  - 5 U.S.C. § 5514(a); 31 CFR 285.7; 5 CFR 550, Subpart K

Minimum Due Process Requirements

Debt Collection Tool	Notice	Opportunity to Dispute
Administrative offset (non-salary, non-tax)	Prior to offset, but no specific timeframe	Review with an agency official
Salary offset	30 days prior to offset	Hearing with hearing official *not under the control of the agency*
Tax refund offset	60 days prior to offset	Review with an agency official
Treasury Offset Program (TOP) (includes administrative, salary & tax refund offset)	60 days prior to debt submission to TOP	Review and/or hearing, as appropriate
Administrative wage garnishment	30 days prior to garnishment	Hearing with agency official or any qualified individual
Credit bureau reporting (consumer reporting only)	60 days prior to reporting	Review with an agency official

Contents of Notice

- Notice should provide information regarding:
  - Amount and type of debt.
  - Actions the agency might take to collect the debt.
  - Opportunity to review agency records.
  - Opportunity to dispute agency's determination.
  - Opportunity to enter into repayment plan.
- Notice should be clearly written.
- Agencies should periodically review the content of their notices.
  - You may have had lessons learned; rates of interest may have changed; etc.

Delivery of Notice

The notice must be sent to the debtor in a way that is "reasonably calculated" to reach the debtor.

- *"Notice 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."* - Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)

Generally, this means that the notice should be sent to debtor's last address known to the agency.

Delivery of Notice

- If agency knows that debtor did not receive notice (e.g., letter was returned undelivered), agency should consider whether to obtain a better address.
  - Depends on age of debt, debtor population, obligation of debtor to keep agency informed, possibility that agency failed to update its address records properly, etc.
- To find updated address information:
  - Review available agency records.
  - Access IRS address information – 26 U.S.C. § 6103(m).
  - Research in commercial databases.
- Actual receipt of notice is generally not required for due process requirements to be satisfied.

Opportunity to Dispute

A major purpose of the notice is to provide the debtor with the opportunity to dispute the proposed collection action(s)!

Debtor may dispute:

- Existence or amount of debt.
  - Includes correct identity of the debtor.
- Legality of a particular collection action.
- In some cases, the amount to be collected through a particular collection action.
  - Example: wage garnishment, benefit offset, etc.

Opportunity to Dispute

How to dispute?

- Debtor can review file.
- Debtor can request proof of debt.
- Debtor can request agency review (administrative review).
- Debtor can request a hearing for:
  - Federal salary offset.
  - Administrative wage garnishment (AWG).

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Opportunity to Dispute

- Agencies are required to have procedures to:

  - Process requests for reviews and/or hearings.

  - Communicate results of requested reviews and/or hearings.

Other Opportunities

Before using certain collection tools, agencies may be required to offer the debtor other opportunities.

PAYMENT AGREEMENT

I understand and agree that I am financially responsible for payment of all services received in the amount stated below. I agree to pay the amount in the time period stated below.

I understand that any remaining balance not paid in full will accrue a monthly service charge at [SPECIFY] % (minimum monthly service charge of [SPECIFY] $).

For professional services rendered or [SPECIFY], I agree to pay [YOUR COMPANY NAME] the total sum of [SPECIFY] $.

Customer name: ____________________
Customer address: ____________________
Account No: ____________________
Payment amount: $__________ Weekly / Bi-weekly / Monthly
First payment date __________
Last payment date __________

Payments shall be deemed delinquent if not received at the payment date. If any scheduled payment related to this agreement is deemed delinquent during the term of this agreement, the agreement shall be considered to be in default, and the entire amount, penalty, and interest owed shall be due and payable immediately.

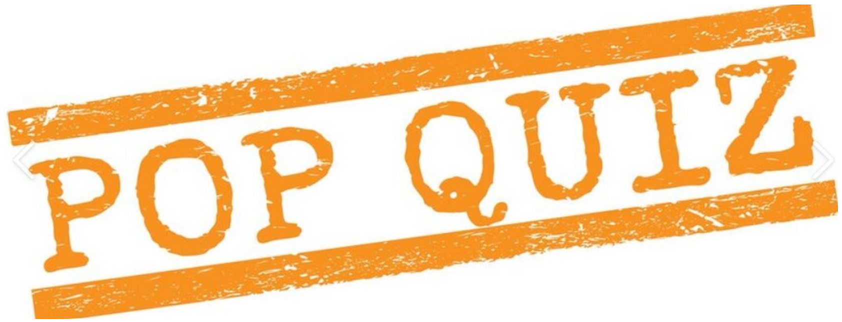
Client signature — Date

Staff Witness signature — Date

For example, the opportunity to enter into a reasonable **payment agreement.**

No Duplication of Due Process

Generally, an agency need not duplicate due process.



Examples:

- Agency provided AWG hearing on identity of the debtor. Agency issued hearing decision determining that it had identified the correct individual as the debtor. Several months later, after receiving the due process notice required for administrative offset, the debtor requests an agency review on the same issue. Need the agency conduct the review?
  - NO. The issue of the debtor's identity has already been determined by a more formal level of agency review.

No Duplication of Due Process

- Examples:
  - Agency realized that it made a calculation error on the debt, and the debt is actually $100 more than what the debtor was told in the due process notice. Must the agency re-do due process?
    - YES. But, only with regard to the additional $100.
  - Agency obtained a judgment against the debtor. Does the agency need to send a due process notice to the debtor before offsetting the debtor's payments?
    - YES. The debtor may have already received some of the required due process notification through the court proceeding. But, did the agency warn the debtor about each possible collection action and provide the debtor with all the required opportunities (e.g., opportunity for a repayment agreement)?

Tips & Best Practice

Periodically revisit your agency's form demand and due process letter(s) to ensure that they are well-written and include all required notifications.

- Some situations may require an individualized due process notice (e.g., if the debtor is subject to bankruptcy; if the agency knows the debtor's situation to be atypical).

Does your agency combine its due process and demand letters?

- Combining these letters is generally the recommended approach but, there may be circumstances where it is preferable to separate the two letters.

Do you send your due process notice at an appropriate time in the collection cycle?

- The earlier the due process letter is sent, the sooner collection action can begin.

Tips & Best Practice

Have a process for promptly responding to requests for payment agreements, including how to evaluate such requests.

Have a process for responding to disputes, proof of debt requests, requests for repayment agreements and hearing requests.

Have a process for determining when a communication qualifies as a request for agency review or for a hearing request.

Retain appropriate records regarding due process.

Engage with your agency's legal counsel.

Checklist

- Below is a non-exhaustive list of the information that generally should be included in an agency's due process letter:
  - Inform debtor of the nature and amount of the debt.
  - Explain how interest, penalties, and administrative costs will be added to the debt balance.
    - Note that interest rates and BFS fee rates periodically change.
  - List the date by which payment should be made to avoid enforced collection.
  - Explain how the debtor can pay the debt.

Checklist (continued)

- List all collection tools that the agency may use to collect the debt.
- Explain how the debtor can exercise the opportunity to: inspect and copy agency records, request a review of the agency's determination regarding the debt, or enter into a reasonable repayment agreement.
- If the agency intends to collect the debt through salary offset or AWG, explain how the debtor can request a hearing.

Checklist (continued)

- Provide contact information for the agency.
- Advise the debtor:
  - To notify the agency if a bankruptcy is filed.
  - Of the penalties for making false statements.
  - That excess collections will be refunded to the debtor, unless prohibited by law.
  - If collecting through tax refund offset, that the non-debtor spouse should file a Form 8379 with the IRS to obtain his/her share of the tax refund.
- Provide the debtor with any notice required by any law applicable to your agency or program.

Remember….

Due Process is a flexible concept for *fairness* in the process before an agency takes an adverse action.

It generally consists of notice and an opportunity to dispute.

Statutes and regulations define what process is due for each debt collection tool. Consult your agency counsel for advice.

Thank you!