



BUREAU OF THE  
**Fiscal Service**  
U.S. DEPARTMENT OF THE TREASURY

# 2018 Annual Governmentwide Federal Receivables Management Symposium

*Back to Basics: Living the Legacy of the DCIA*

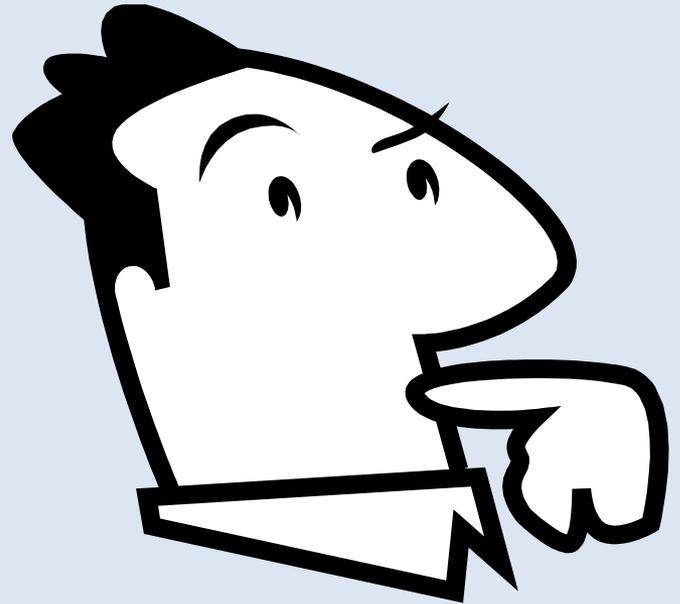
# Debt Collection Myths

May 24, 2018

# Establishing Debts: Fact or Myth?

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- An agency has discretion regarding whether to establish debts owed to the agency.



# Establishing Debts: Myth

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- Agencies must determine that a debt is owed when it becomes aware of facts sufficient to establish that the agency is owed a amounts arising out of activities of the agency.
  - A debt may exist even though the amount of funds, money, or property owed to the United States is unknown or unliquidated.
- However, a cost/benefit analysis may be used in some cases to avoid establishing a debt.
  - For example, if the costs of auditing records and determining whether a debt exists exceed the amounts that might be collected, an agency may be able to justify not establishing a debt (just as it would be able to justify terminating collection action).

# Establishing Debts: Fact or Myth?

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If my agency has a tort claim against someone who denies liability, I can start administrative debt collection action without reducing a debt to judgment (i.e., without going to court).



Hint: Example of a tort would be if a person accidentally hit and damaged a government vehicle because they weren't paying close enough attention while driving.

# Establishing Debts: Fact

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- Unless required by statute, an agency does not need to reduce a claim to judgment when making a determination that a debt is owed.
- However, an agency must follow agency procedures for establishing a debt.
- The relevant statutory authority for establishing debts merely requires that “an appropriate official of the Federal Government” determine that an “any amount of funds or property” is owed to the United States. 31 U.S.C. 3701(b).

# Wage Garnishment: Fact or Myth?

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- Federal administrative wage garnishment permits agencies to collect debts by garnishing a debtor's wages without a court order, even when state law prohibits wage garnishment.



# Wage Garnishment: Fact

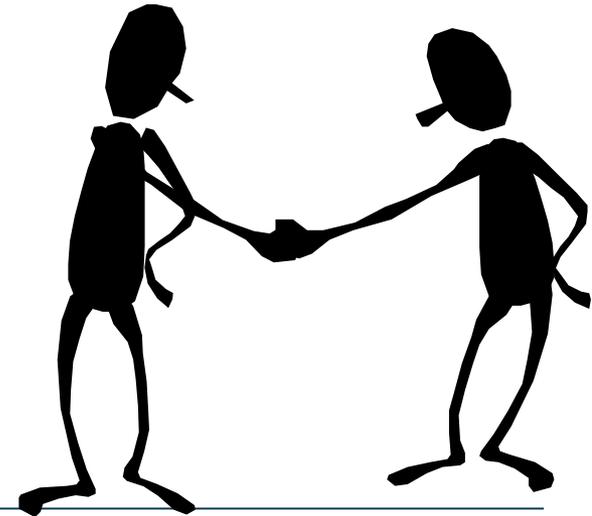
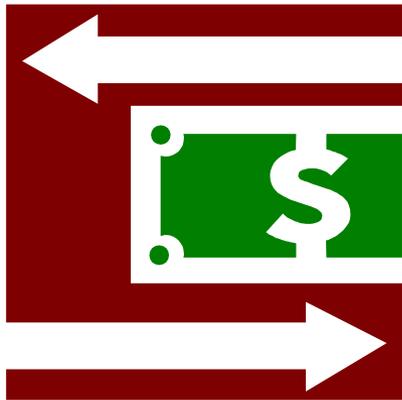
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- The applicable statute that permits administrative wage garnishment is a federal statute that, by its terms, applies “[n]otwithstanding state law.”
- Federal agencies can garnish wages regardless of what a state’s regulations, statutes, or constitution says. Federal agencies can even garnish the wages of state employees.

# Compromise: Fact or Myth?

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- Agencies have authority to waive all or a portion of a debt (with a principal balance of less than \$100k) only if they follow the Federal Claims Collection Standards.



# Compromise: Myth

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- Compromises result in forgiveness of indebtedness income (think, 1099C reporting) and are based on consideration.
  - The Federal Claims Collection Standards (FCCS) provide standards for *compromising* debts.
- Waiving a debt essentially makes it as if the debt never existed.
  - There is no general waiver authority. To waive debts, you need specific authority (e.g., employee debts; interest/penalties/costs).
  - When there is waiver authority, the standard is generally that collection of the debt is against equity and good conscience or is not in the best interest of the United States.
    - This standard is not satisfied solely because the debt was incurred through the fault of the creditor agency and not fault of the debtor (e.g., overpayment debts).
    - Agencies should consider whether the debtor:
      - knew of the circumstances giving rise to the debt
      - made efforts to resolve the debt.
      - relinquished a valuable right or changed positions to the debtor's detriment due to reasonable reliance upon the agency's actions

# Compromise: Fact or Myth?

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- Let's say that Debtor A and Debtor B are jointly and severally liable on a debt. Total debt is \$100.
- Agency and Debtor A agree to compromise the debt for \$10. Debtor A pays the \$10.
- Agency can no longer pursue either Debtor A or Debtor B for the debt.

# Compromise: Myth

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- The compromise agreement should make clear that the compromise was only between Debtor A and the agency.
- A compromise between one co-debtor and the agency generally has no affect on how the agency must treat another co-debtor.
- However, similarly situated debtors should be treated similarly.

# Partial Payments: Fact or Myth?

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- A delinquent debtor can choose to apply a partial payment to the principal only (rather than penalties, interest, etc.).



# Partial Payments: Myth

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- When a debt is paid in partial payments, amounts must be applied in the following order:
  - contingency fees
  - outstanding penalties
  - administrative costs other than contingency fees
  - interest
  - principal

# Termination: Fact or Myth?

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- If an agency terminates debt collection action, it may not collect through offset in the future.

# Termination: Myth

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- The Federal Claims Collection Standards expressly permit agencies to preserve records after terminating debt collection action for the purpose of offsetting future payments.

# Write-off: Fact or Myth?

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Agencies must seek DOJ concurrence before writing off debts with a principal balance of \$100,000 or greater?



# Write-off: Myth

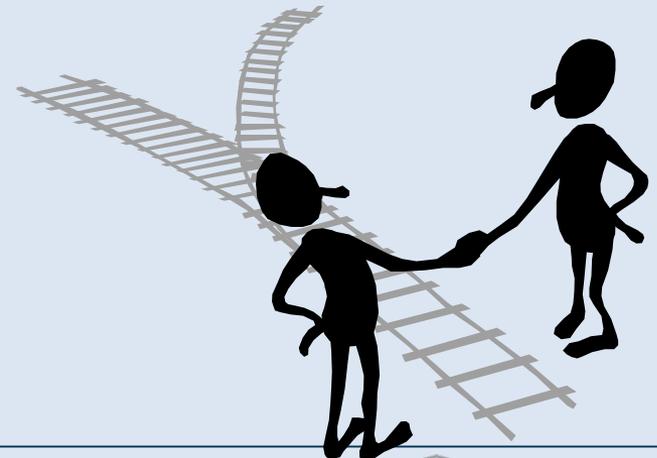
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- This statement is generally true when an agency is seeing to *compromise* or *terminate* collection upon a debt over \$100k.
- *Write off* and *termination* of collection action, however, are two different things.
  - Write-off is an accounting concept that allows agencies to accurately reflect the value of their receivables on their books and is governed by OMB Circular A-129.
  - Termination is a legal determination that the agency may cease its efforts to collect a debt and is governed by the Federal Claims Collection Standards.

# 1099-C Reporting: Fact or Myth?

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The Internal Revenue Code does not permit 1099-C reporting for amounts less than \$600.



# 1099-C Reporting: Myth

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- Generally, agencies are required to report cancellation of indebtedness income if they compromised more than \$600.
- But, they are still permitted to file 1099Cs for the smaller amounts.

# Legal Compliance: Fact or Myth?

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- If my computer system does it, then it must be legal.

# Legal Compliance: Myth

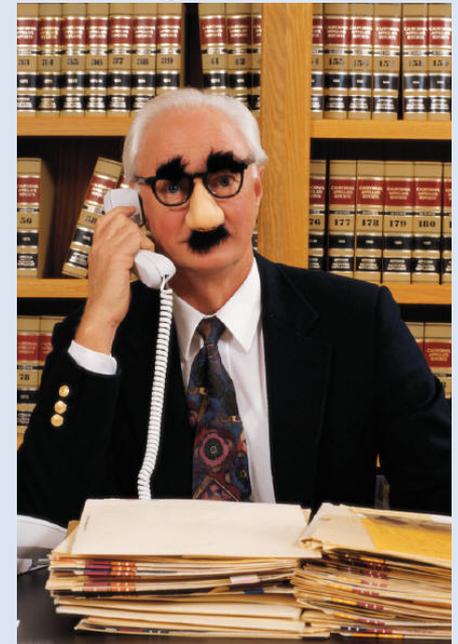
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- Hopefully, our computer systems are programmed to comply with the law.
- But, sometimes there are oversights and sometimes the law changes faster than we can update our systems.
- It is important to keep in mind that, just because the computer lets you do it (or doesn't let you do it), doesn't mean its consistent with legal standards.

# Referral Requirement: Fact or Myth?

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- If your agency's legal counsel is looking the file over, then the debt is exempt from mandatory referral to the Treasury Offset Program and the Cross-Servicing Program.



# Referral Requirement: Myth

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- Debts are required to be referred by 120 or 180 days.
- If legal is looking over the file, it does not meet the “in litigation” exception.
  - *Possible* exception if agency has independent litigating authority and the commencement of litigation is imminent.
- Note that there are certain other reasons that a debt may be exempt or ineligible for referral.

# Preparing for Litigation: Fact or Myth?

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- I only need to determine the statute of limitations for litigation once I have decided to review the file to determine whether to litigate.



# Preparing for Litigation: Myth

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- While an agency must look at the statute of limitation before determining whether it can litigate, the agency should not necessarily wait until it is considering litigation to determine the statute of limitation -- by then, it may be too late.

# Due Process: Fact or Myth?

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I don't have to repeat due process notification just because I am adding amounts to the principal debt balance.



# Due Process: Myth

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- Additional due process is likely required.
  - Adding amounts to the principal debt balance is an adverse action.
  - The debtor is entitled to notification and an opportunity to dispute.
- Note, additional due process likely not required when adding interest, penalties and costs to the debt balance,
  - This assumes the debtor was properly notified of how the agency would accrue and assess these amounts.

# Due Process: Fact or Myth?

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- Due process notification is insufficient unless it was actually received by the debtor.

# Due Process: Myth

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- Generally, due process notification is sufficient if it was sent to the last known address, even if the debtor does not receive actual notice.
- Nevertheless, agencies should ensure they have appropriate procedures in place to update address information.

# Interest: Fact or Myth?

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- If a debtor receives an overpayment, interest begins to accrue from the date of the overpayment.

# Interest: Myth

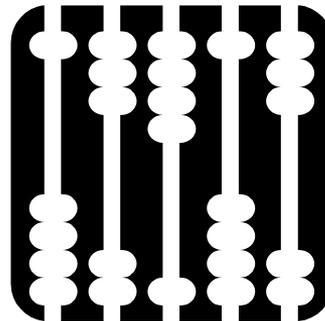
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- Interest generally starts accruing at the date of delinquency (date of notice of overpayment and demand for payment).

# Interest/Penalties/Costs: Fact or Myth?

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- Debtor did not pay a debt per the terms of a contract, which specifies that she must pay a 2% interest rate. Per 31 U.S.C. 3717, she must also pay penalties and costs of collection.



# Interest/Penalties/Costs: Myth

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- In general, the terms of 31 U.S.C. 3717 don't apply if a contract fixes the interest rate.
- If the agency's contract fixes the interest rate, the agency's contract should also specify costs and penalties, if the agency intends for those amounts to apply.

# DMS Fees: Fact or Myth?

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- When DMS takes an offset through TOP, it charges the debtor a fee and sends my agency the offset amount net of the fees.



# DMS Fees: Myth

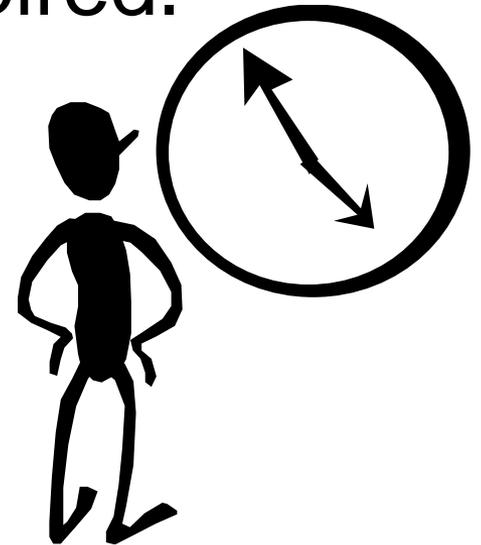
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- TOP has no authority to charge debtors. It operates under a number of fee-charging statutes. Each of these statutes authorizes TOP to charge agencies fees.
- Federal agencies are, with some exceptions, generally required to pass these fees as costs of debt collection to the debtor. See 31 U.S.C. § 3717.

# Time-Barred Debt: Fact or Myth?

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Agencies should aggressively pursue collection of debts as soon as possible. This is, in part, because they must eventually terminate administrative debt collection action on delinquent debts so that they do not collect on a debt that has expired.



# Time-Barred Debt: Myth

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- Generally, agencies should attempt to pursue collection of a debt as soon as possible.
- But, the reason is because younger debts are generally more collectable, not because the debt may expire.
- While certain debt collection tools may no longer be available after a certain period of time (e.g., judicial remedies), administrative debt collection remedies generally remain available.
- In general, federal debts do not expire.

# Servicemembers Civil Relief Act: Fact and Myth

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- SCRA provides certain protections for military members as they enter active duty, including protections from high interest rates.
- For the most part, federal agencies don't have to worry about the protection against high interest rates, because the interest rates charged by federal agencies are generally very low (currently, 1%).

# Servicemembers Civil Relief Act: Myth

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- SCRA limits the amount of interest to 6% per year during the period of military service.
- Interest rate is broadly defined to include not only interest, but also penalties and administrative costs.
- For example, if any agency referred a debt to DMS and was charging all amounts required under 31 U.S.C. § 3717, including interest (1%), penalties (6%), and administrative costs (32% based on fees charged by DMS), it would be charging far more than the permissible 6%.

# Bankrupt Debtor: Fact or Myth?

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- If a debtor files for bankruptcy, the agency may have to refund not only post-petition collections, but also certain collections made prior to the petition date.

# Bankrupt Debtor: Fact

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- Whether the agency must make a refund of pre- or post-petition collections depends on the type of collection.
  - Generally, offset collections taken prior to the petition date do not need to be refunded.
  - Wages garnished during the 90 days prior to the petition date may need to be refunded.
  - Wages garnished after the petition date generally must be refunded.
  - The agency may have setoff rights to keep certain offsets taken after the petition date.
- Consult agency counsel.

# Bankrupt Debtor: Fact or Myth?

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- Debtor files for chapter 7 bankruptcy. The agency must immediately recall the debt from Cross-Servicing and TOP and cease all collection action.

# Bankrupt Debtor: Part Truth, Part Myth

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- While the fact that the debtor has filed bankruptcy may impact *how* an agency may pursue its claim, it does not preclude the agency from exercising its right to collect.
- It is true that the agency must recall the debt from Cross-Servicing and TOP while the debt is subject to the automatic stay.
- However, the agency still conduct some collection activities. It may:
  - file a proof of claim
  - work with DOJ to file a motion for relief from the stay in the event it wants to protect its collateral or setoff rights, etc.

# Deceased Debtor: Fact or Myth?

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- Debtor receives an overpayment and later dies. Agency must now terminate collection action.

# Deceased Debtor: Myth

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- Death generally does not extinguish debts. An agency's obligation to affirmatively and aggressively collect a debt generally continues after the debtor's death.
- While some debt collection tools may no longer be available or appropriate once a debtor dies (e.g., administrative wage garnishment), agencies have several other means through which to pursue debts owed by decedents.
- Among other things, an agency can:
  - pursue its claims through probate
  - pursue its claims through offset
  - pursue co-debtors

# Entity out of Business: Fact or Myth?

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- When an entity goes out of business, an agency may still be able to continue collection action.

# Entity out of Business: Fact

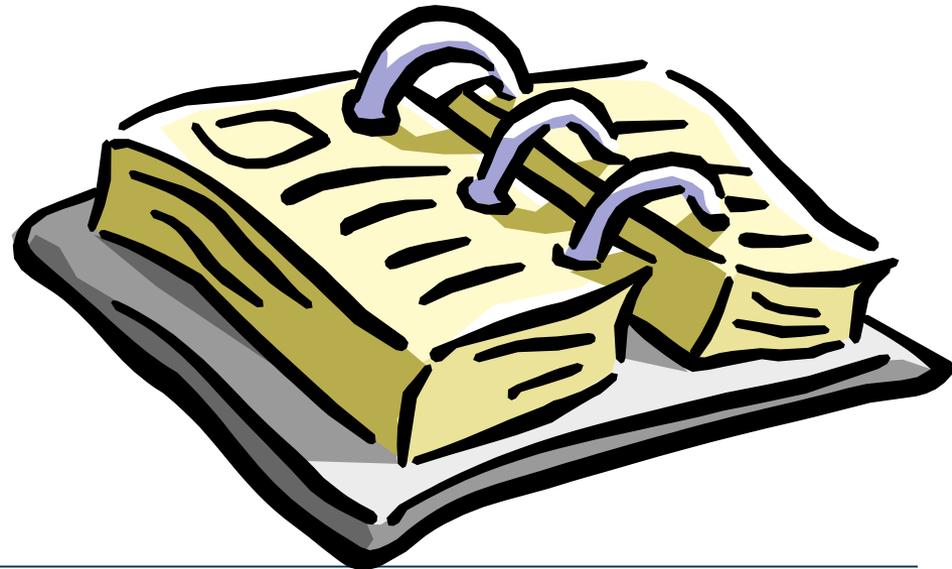
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- Individuals can form certain legal entities under state law.
  - Generally, these legal entities are separate and legally distinct from the individuals who created or control them.
- Because the entities are *created* under state law, they can also be *dissolved* under state law.
  - The dissolution of an entity must comply with state law.
  - Even if a business has shut its doors and is no longer actively engaging in business, it is not dissolved until it follows the proper state procedures.
  - If the entity did not properly dissolve, the agency should consider whether it has a claim against the former officers of the entity or against the transferees of the entity's assets.

# Furnishing and Using Credit Info: Fact or Myth?

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- Federal agencies must comply with the Fair Credit Reporting Act.



# Furnishing and Using Credit Info : Unclear

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- It is not clear that there has been a waiver of sovereign immunity under FCRA.
- Also, other laws (such as the DCIA and the Privacy Act) may be more specific and may apply, rather than provisions of FCRA.
- Consult agency counsel and carefully consider boilerplate language in contracts before signing.

# Federal agencies: Fact or Myth?

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- If a federal agency or state is owed a debt by a federal agency, that debt may be referred to TOP.

# Federal agencies: Myth

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- Federal agencies cannot be debtors for purposes of the DCIA.
- Neither a state or another federal agency may refer a debt owed by a federal agency to Fiscal Service for collection.

# Refunds: Fact or Myth?

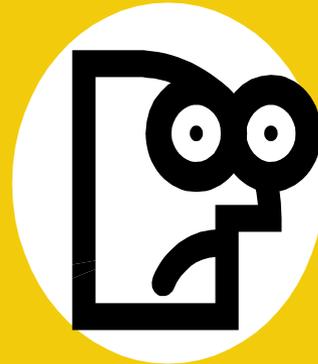
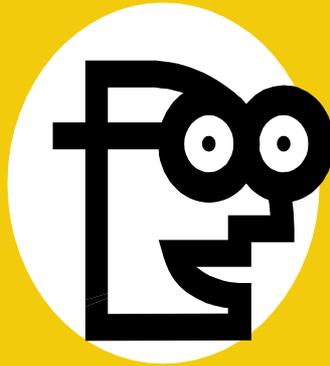
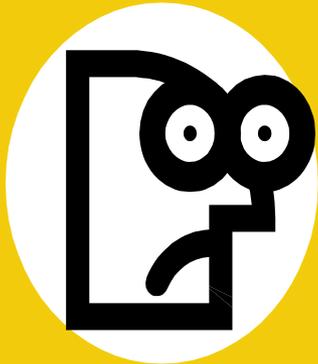
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- If my agency determines that a collection taken by Fiscal Service occurred in error (e.g., the debt was not actually valid; the debtor filed for bankruptcy, etc.), my agency is responsible for issuing any and all appropriate refunds, including the costs that were added to the debt as a result of Fiscal Service's fees.

# Refunds: Fact

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- Agencies are responsible for issuing refunds.
- Agencies must refund any costs that were erroneously charged to the debtor, regardless of whether Fiscal Service refunded its fees to the agency.



**It's QUESTION TIME !!**