

PART III: THE FEDERAL NONTAX DEBT COLLECTION PROCESS

(October 2014)

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A. CONTACT WITH AND OBTAINING INFORMATION ABOUT THE DEBTOR

[forthcoming]

B. PAYMENT AND RESOLUTION OF DEBT

[forthcoming]

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

[forthcoming]

D. OFFSET

I. Introduction

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

II. “Offset” Defined

A. “Offset” and “Setoff”

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

B. Offset Distinguished from Garnishment, Attachment, and Levy

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

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

crediting of monetary amounts against competing claims.

C. Offset Distinguished from Withholding

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

D. Offset Distinguished from Recoupment

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

III. Types of Offset

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

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

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

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

- “Centralized administrative offset” means the collection of federal nontax debts from federal nontax payments through TOP pursuant to 31 U.S.C. §§ 3716 and implementing regulations at 31 CFR §§ 285.4 and 285.5. Centralized offsets are conducted by disbursing officials.
- “Common law” offset means any offset authorized under the common law. It generally means an internal offset or a direct agency-to-agency offset, rather than disbursing official or centralized offset.
- “Disbursing official offset” means the offset by the disbursing official (e.g., Treasury, Department of Defense, or Postal Service) pursuant to 31 U.S.C. §§ 3716 and 3720A and regulations promulgated at 31 CFR part 285, subpart A. The offset occurs after the paying agency has certified the amount of the payment. It includes all centralized administrative offset and tax refund offsets conducted by the disbursing official.
- “Internal offset” means an intra-agency offset under any legal authority.
- “Non-centralized offset” means any offset not conducted through TOP, regardless of the legal authority. It includes internal offsets and direct agency-to-agency offsets.
- “Salary offset” means the offset of current federal pay, including military retiree pay, through various means (i.e., TOP, internal offset, and direct agency-to-agency offsets), pursuant to 5 U.S.C. § 5514 and 5 CFR §§ 550.1101-550.1110. The term does not include offset of final lump sum payments of federal salaries (which is considered administrative offset).
- “State payment offset” means the offset of state payments to collect federal nontax debts pursuant to state laws and reciprocal agreements entered into between Treasury and the states as authorized by 31 U.S.C. § 3716(h) and 31 CFR § 285.6.
- “Tax refund offset” means the offset of federal tax refund payments to collect federal debts pursuant to 26 U.S.C. § 6402 and 31 U.S.C. § 3720A and implementing regulations at 31 CFR §§ 285.2, 285.3, 285.5, and 285.8.

IV. Federal Payments

A. All Federal Payments Generally Subject to Offset

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

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

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

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

B. Special Rules for Certain Federal Nontax Payments

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

(1) Secretary-Exempted Payments: Means Tested

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

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

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

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

(3) Loan Payments

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

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

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

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

(4) Tariff Payments

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

(5) Federal Salary Payments

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

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

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

a) Salary Payments Defined

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

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

b) Disposable Income Defined

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

(6) Benefit payments

a) Partial Exemption

Like other federal payments, most federal benefit payments⁵ may (and generally must) be offset for the collection of delinquent federal nontax debt. 31 U.S.C. § 3716(a), (c); 31 CFR § 285.4. Unlike most other federal payments, however, the amount which can be offset is limited. By statute, a debtor's benefit payments of up to \$9,000 per year—or \$750 per month—are exempt from offset. 31 U.S.C. § 3716(c)(3)(A)(ii); 31 CFR § 285.4(e)(1)(iii). That is, the aggregate amount of a debtor's monthly benefit payments must exceed \$750 to qualify for offset. *Id.*⁶

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

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

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

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

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

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

b) Veterans Benefits

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

c) Other Benefit Payments

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

Notwithstanding any other provision of law . . . , except as provided in clause (ii), all payments due to an individual under—

- (I) the Social Security Act
- (II) part B of the Black Lung Benefits Act, or
- (III) any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits),

shall be subject to offset under this section.

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

The provisions of sections 205(b)(1), 809(a)(1), and 1631(c)(1) of the Social Security Act⁷ shall not apply to any administrative offset executed pursuant to this section against benefits authorized by title II,⁸ VIII⁹, or title XVI¹⁰ of the Social Security Act, respectively.

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

⁷ 42 U.S.C. §§ 405(b)(1), 1009(a)(1), and 1383(c)(1).

⁸ Federal Old-Age, Survivors, and Disability Insurance Benefits

⁹ Special Benefits for Certain World War II Veterans

¹⁰ Supplemental Security Income for the Aged, Blind, and Disabled

- Federal Old-Age, Survivors, and Disability Insurance (OASDI)¹¹ benefit payments under the Social Security Act¹²
- Payments under part B of the Black Lung Benefits Act¹³
- Payments administered by the Railroad Retirement Board (other than tier 2 benefit payments)¹⁴

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

(7) Civil Service Retirement Payments

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

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

(8) Settlements and Judgments

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

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

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

¹³ 31 U.S.C. § 3716(c)(3)(A)(i)(II).

¹⁴ 31 U.S.C. § 3716(c)(3)(A)(i)(III).

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

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

C. Special Rules for Federal Tax Payments

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

(1) Joint Taxpayers

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

(2) Disclosure

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

D. Special Rules for State Payments

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

V. Federal Nontax Debts

A. All Federal Nontax Debts Are Subject to Offset.

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

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

B. Eligible Debts

(1) Debt Defined

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

(2) Agency Determination

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

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

(3) Due Process

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

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

(4) Excluded Debts/Debtors

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

a) Federal Agencies

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

b) Foreign Sovereigns

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

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

c) Tax and Tariff Debts

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

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

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

e) Hardship

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

C. No Statute of Limitations

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

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

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

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

VI. Centralized (Disbursing Official) Offset

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

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

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

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

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

A. Administrative Offset

(1) Creditor Agency Must Use Centralized Administrative Offset

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

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

(2) Creditor Agency Must Satisfy Prerequisites to Administrative Offset

a) Attempt to Collect

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

b) Notice

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

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

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

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

c) Opportunity to Review Records

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

d) Opportunity for Agency Review

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

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

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

e) Opportunity to Enter into Repayment Agreement

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

f) Additional Due Process Required for Salary Offset

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

i. Notice

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

ii. Opportunity to Dispute

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

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

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

iii. Exceptions

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

B. Tax Refund Offset¹⁷

(1) Creditor Agency Must Use Tax Refund Offset

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

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

a) Attempt to Collect

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

b) Notice

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

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

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

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

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

c) Opportunity for Agency Review

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

(3) Limited Judicial Review

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

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

C. Offset Process

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

(1) Payees

a) Generally

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

b) Joint Payees

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

c) Assigned Payments

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

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

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

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

31 CFR § 285.5(e)(6)(ii)(A)-(C).

d) Payments made to Representative Payees

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

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

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

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

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

(3) Role of the Creditor Agency

a) Submit Delinquent Debts to Fiscal Service

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

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

b) Creditor Agency Regulations

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

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

c) Certifying Debt

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

d) Responsibility for Collection

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

(4) Role of the Payment Agencies and Disbursing Agencies

a) Payment Agencies

i. Certifying Payments

Agencies make payments by certifying on a payment voucher to the disbursing official that a payment is due to be paid to a particular person. 31 U.S.C. §§ 3325, 3528. The payment voucher must be prepared and submitted in the manner prescribed by the disbursing official. *Id.*; 31 CFR § 285.5(e)(8)(i). Among other things, the payment voucher must include the name and the taxpayer identification number (TIN) of the person entitled to the payment. 31 U.S.C. § 3325(d); 31 CFR § 285.5(e)(8)(i); *see also* 31 U.S.C. § 7701; Fiscal Service, TIN Policy, *available at* <http://www.fms.treas.gov/tinpolicy/tin.pdf>. Because TOP works by matching the names and TINs of payees with the names and TINs of debtors, without a valid name and TIN, the payment will not be properly offset for debts owed by the payee. 31 CFR § 285.5(c)(2); *see also* 142 Cong. Rec. H4046-01 (daily ed. Apr. 25, 1996) (statement of Rep. Horn²⁰) (including TINs on payment vouchers “will facilitate offset and increase collections”).

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

ii. Determination of Whether Payment is Eligible for Offset

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

iii. Restriction on Making Payments via Credit Card

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

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

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

iv. No Liability for Erroneous Offsets

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

b) Disbursing Officials

i. Conducting Offsets

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

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

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

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

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

ii. Warning Notice to Debtor

Before offsetting a recurring payment²² or periodic benefit payment, a disbursing official must send a warning notice to the payee. 31 U.S.C. § 3716(c)(7)(B); 31 CFR § 285.5(g)(1); 31 CFR 285.4(f).²³ The warning notice must state in writing when offsets will begin and the anticipated amount of the offset, which can be stated as a percentage of the payment. 31 CFR § 285.5(g)(1). This warning notice need only be sent once. If Fiscal Service suspends the offset of a periodic payment to satisfy a tax levy, Fiscal Service is not required to re-notify the debtor prior to re-commencing offset. 31 U.S.C. § 285.5(g)(2).

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

iii. Post-Offset Notice to Debtor

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

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

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

iv. Offset and Warning Notice Distinguished from Due Process Notice

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

v. Disbursing Official: Notice to Paying and Creditor Agencies

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

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

(5) Fees

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

(6) Order of Priority

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

- *First.* Federal tax debts have first priority. 26 U.S.C. § 6402(a) (governing offset of tax payments); 31 CFR § 285.5(f)(3)(i) (governing nontax payments); 5 U.S.C. § 5514(d) (governing salary payments); 31 CFR § 285.7(h) (governing salary payments); 26 CFR § 301.6402-1 (governing tax payments).
- *Second.* Any remaining amount is then applied to past-due child support. 26 U.S.C. § 6402(c) (governing tax payments); 31 CFR § 285.5(f)(3)(ii)(A) (governing nontax payments); 31 CFR § 285.7(h) (governing salary payments).
- *Third.* Federal nontax debts have next priority. 26 U.S.C. § 6402(d)(2) (governing tax payments); 31 CFR § 285.5(f)(3)(ii)(B) (governing nontax payments).
- *Fourth.* State tax debts, followed by other state debts, have last priority. 31 CFR § 285.5(f)(3)(ii)(C) (governing nontax payments); *see also* 26 U.S.C. § 6402(e)(3) (governing tax payments to collect state income tax debts); 26 U.S.C. § 6402(f)(2) (governing tax payments to collect state unemployment insurance compensation debts).
- *Fifth.* If any amount of the payment is left over after satisfying the above-listed categories of debts, the remaining balance is paid to the payee.

(7) Computer Matching and Privacy Protection Act of 1988

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

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

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

(8) Salary Offset Match Consortium

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

VII. Non-Centralized Offset

A. Generally

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

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

B. Statutory Authority to Conduct Non-Centralized Offsets

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

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

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

C. Common Law

(1) Historical Right of Common Law Offset

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

(2) Elements of Offset

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

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

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

Gratiot, 40 U.S. at 370.

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

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

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

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

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

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

(3) Due Process Requirements

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

a) Constitutionally Sufficient Notice

i. Contents of Notice

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

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

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

ii. Method of Notification

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

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

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

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

iii. Timing of Notice

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

iv. Right to Review Records

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

b) Constitutionally Sufficient Opportunity to be Heard

i. Agency Review of its Records

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

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

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

ii. Timely Reviews

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

iii. Inform Debtor of the Results

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

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

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

iv. Debtor Must Exercise Right to Review

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

(4) Common Law Exists Independently of Statutory Authority

Common law setoff rights generally exist independently of, and in addition to, statutory offset rights. *See, e.g.*, 31 U.S.C. 3716(d) ("Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law"); 142 Cong. Rec. H4046-01 (daily ed. Apr. 25, 1996) (statement of Rep. Horn²⁵) (stating that "the Debt Collection Improvement Act is not intended to prohibit the use of any existing authority to perform administrative offset under statute or common law"). Generally, common law setoff and recoupment rights will only be unavailable where Congress has explicitly overridden common law. *See, e.g.*, 38 U.S.C. § 5301(a)(1) (protecting Veterans benefits from offset); 5 U.S.C. § 5514(a)(1) (imposing limits on the percent of current pay that may be offset).

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

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

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

E. ADMINISTRATIVE WAGE GARNISHMENT

[forthcoming]

F. USE OF PRIVATE COLLECTION CONTRACTORS

[forthcoming]

G. CREDIT BUREAU REPORTING

[forthcoming]

H. BARRING DELINQUENT DEBTORS

[forthcoming]