

PART IV: SUSPENSION & TERMINATION OF COLLECTION ACTION

TABLE OF CONTENTS

<u>A. INTRODUCTION.....</u>	<u>2</u>
<u>B. TERMINOLOGY.....</u>	<u>3</u>
I. Suspension of Debt Collection Action.....	3
II. Termination of Debt Collection Action	3
III. Active Collection	3
IV. Distinction from Write-off.....	3
V. Distinction from Waiver	4
<u>C. GENERAL PRINCIPLES APPLICABLE TO SUSPENSION & TERMINATION</u>	<u>5</u>
I. General Authority to Suspend or Terminate Debt Collection Action.....	5
II. Agency-Specific Authorities.....	5
III. Authorities Regarding Fraud and Antitrust Claims	6
IV. Effect on Claims with Joint and Several Liability	6
V. Discretionary Action.....	6
<u>D. STANDARDS FOR SUSPENSION OF DEBT COLLECTION ACTION.....</u>	<u>8</u>
I. Inability to Locate the Debtor	8
II. Debtor's Ability to Pay	9
III. Requests for Waiver or Administrative Review	10
IV. Automatic Stay.....	11
<u>E. STANDARDS FOR TERMINATION OF DEBT COLLECTION ACTION.....</u>	<u>12</u>
I. Inability to Collect and Inability to Locate the Debtor	13
II. Cost-Benefit Analysis	13
III. Debt is Legally Without Merit.....	14
IV. Debt Cannot be Substantiated.....	15
V. Debt Discharged in Bankruptcy.....	15
VI. Exception to Termination for Enforcement Policy	15
<u>F. WRITE-OFF AND REPORTING DISCHARGE OF INDEBTEDNESS</u>	<u>16</u>
I. Termination of Debt Collection Action, Discharge, and Close Out.....	16
II. Requirement to Report Discharge of Indebtedness to the Internal Revenue Service	16

A. INTRODUCTION

Federal agencies must collect claims owed to them. Agencies may, however, suspend collection action or terminate it entirely for debts that meet certain criteria. “Suspension” and “termination” refer generally to ceasing active collection efforts, such as sending demand letters, placing collection calls, issuing wage garnishment orders, and initiating litigation, but can also include ceasing passive collection efforts such as administrative offset and credit bureau reporting. The concepts of suspension and termination of debt collection action are legally distinct from the concepts of compromise and waiver. This chapter discusses the rules generally applicable to the suspension and termination of collection activity and explains the distinctions between the two terms and other, related terms.

Before the enactment of the Federal Claims Collection Act of 1966, Pub. L. 89-508, 80 Stat. 308 (“FCCA”), most federal agencies had no authority to stop collecting claims owed to the United States.¹ As stated in a 1966 Senate Committee on the Judiciary Report, agencies could not “terminate or suspend efforts to collect a claim even when the very futility of these efforts serve to add to the cost of Government and therefore compound the loss to the United States.” S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533. This odd result was caused by the “inflexibility in the law” that restricted agencies’ authority to compromise debts and to terminate or suspend collection action on such debts. *Id.* To address this problem, Congress enacted the FCCA, which granted agency heads the power to suspend or terminate collection action on non-fraud claims of not more than \$20,000 “pursuant to regulations prescribed by [the agency] and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General.” FCCA at § 3, 80 Stat. at 309; *see also* S. Rep. No. 89-1331, at 2-4. The FCCA explicitly stated that none of its provisions should be interpreted to “increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.” Pub. L. No. 89-508, 80 Stat. 308, 351 (1966). Thus, the FCCA did not diminish any existing authorities for the few agencies that could already compromise debts and suspend or terminate debt collection action on their own. S. Rep. No. 89-1331, at 3; Letter from Attorney General, to the Vice President, U.S. Senate, 2 (Mar. 10, 1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2539. Rather, the FCCA provided agencies with the needed flexibility to appropriately deal with their claims. *Id.*

Since then, the monetary cap on federal agencies’ authority to suspend or terminate collection of claims has been increased to \$100,000. Pub. L. No. 101-552, § 8(b), 104 Stat. 2736, 2746-47 (1990) (amending 31 U.S.C. § 3711(a)(2)). Agencies’ general statutory suspension and termination authority is codified at 31 U.S.C. § 3711(a)(3), and the corresponding regulations, now jointly promulgated by the Attorney General and the Secretary of the Treasury, are codified at 31 CFR Part 903. 31 U.S.C. § 3711(a)(3), (d)(2); 31 CFR Part 903.

¹ The Federal Claims Collection Standards (FCCS), 65 Fed. Reg. 70,390 (Nov. 22, 2000), were promulgated to implement the FCCA. The FCCS are codified in 31 CFR Parts 900-904.

B. TERMINOLOGY

I. Suspension of Debt Collection Action

An agency suspends collection action when it determines to cease active (or active and passive) collection efforts temporarily, because the agency cannot locate the debtor, the debtor's financial condition is expected to improve, or the debtor has requested a waiver of the debt. 31 CFR § 903.2(a); *see also* 31 U.S.C. § 3711(a)(3).

II. Termination of Debt Collection Action

An agency terminates collection action when it ceases active (or active and passive) collection efforts for the foreseeable future. An agency may terminate collection action if it has determined that the costs of collection are likely to exceed the amount that can be collected or because further collection efforts are legally inappropriate. 31 CFR § 903.3(b); *see also* 31 U.S.C. § 3711(a)(3). Termination of active collection does not preclude passive collection efforts. 31 CFR § 903.3(b). Nor does termination prevent an agency from pursuing future collection if there is a change in the debtor's status or if a new collection tool becomes available. *Id.* § 903.3(b)(2).

III. Active Collection

Active collection refers to the agency's attempts to collect the debt through activities such as sending demand letters, placing collection calls, issuing administrative wage garnishment orders, or initiating litigation. It does not include passive collection actions, such as centralized offset through the Treasury Offset Program or reporting a debt to a credit bureau. Agencies must determine that a debt has met the criteria for suspension or termination if it intends to collect the debt solely through passive means.

IV. Distinction from Write-off

The legal concepts of "suspension" and "termination" are separate and distinct from the accounting concepts of "write-off." Write-off, including the classifications of "currently not collectible" and "close-out," is an accounting action governed by the Office of Management and Budget (OMB) Circular A-129. 31 CFR § 900.1(d); OMB Circ. A-129,² Sec. V.E; Managing Federal Receivables.³ The write-off of a debt is simply the "removal of the debt from the agency's accounting records." FCCS, 65 Fed. Reg. at 70,391. Generally, write-off is mandatory for debts delinquent more than two years. OMB Circ. A-129, Sec. V.E. An agency must continue cost-effective collection efforts after the agency writes off a debt unless it determines that suspension or termination of debt collection action is appropriate. *Id.*

² Office of Mgmt. & Budget, Circular A-129 (revised), Policies for Federal Credit Programs and Non-Tax Receivables (Jan. 2013) [hereinafter OMB Circular A-129].

³ U.S. Dep't of the Treasury, Managing Federal Receivables, Chap. 7 (rev. 2015), *available at* <https://www.fiscal.treasury.gov/files/dms/managing-federal-receivables.pdf>.

To illustrate this concept, an agency may write off a debt at the two-year delinquency date, as required by OMB Circular A-129, yet continue collection because it has not exhausted all appropriate debt collection tools. Similarly, an agency may determine to suspend or terminate active collection on a debt without writing off the claim; an agency might do this if it is realizing significant collections through a passive tool such as the Treasury Offset Program, but the agency has determined that active collection is not appropriate under the standards set forth in the FCCS. 31 CFR § 903.3(b)(3).

V. Distinction from Waiver

“Waiver” has been defined as “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.” *See* Black’s Law Dictionary (11th ed. 2019). Agencies may only waive collection of claims if they have specific statutory authority to do so. Suspension and termination, by contrast, do not relinquish the Government’s rights with respect to the debt or debtor. *See* 31 CFR §§ 900.8 and 903.5(a). They merely reflect a decision that further collection action is not warranted, and agencies are not legally precluded from revisiting that decision and resuming collection at a later time. *Id.*

C. GENERAL PRINCIPLES APPLICABLE TO SUSPENSION & TERMINATION

I. General Authority to Suspend or Terminate Debt Collection Action

Agencies have an affirmative obligation to attempt to collect amounts owed to them. 31 U.S.C. § 3711(a)(1). Specifically, agencies must “collect all debts arising out of activities of, or referred or transferred for collection services to, that agency.” 31 CFR § 901.1. Agencies must therefore identify statutory authority to cease collection action, whether temporarily or permanently.

While agencies have an affirmative duty to collect, Congress specifically authorized agencies to suspend or terminate debt collection action for debts with a principal balance of \$100,000 or less, “when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.” 31 U.S.C. § 3711(a)(2)-(3); 31 CFR § 903.1. The \$100,000 cap is calculated “after deducting the amount of any partial payments or collections” that the agency has received, and before the application of any interest, penalties, or costs. 31 CFR § 903.1(b). If an agency determines that suspension or termination of collection of a claim exceeding \$100,000 is appropriate, the agency must refer the debt to the Civil Division or other appropriate litigating division in the Department of Justice (DOJ), using the Claims Collection Litigation Report (CCLR). *Id.* § 903.1(b); *see also id.* § 904.2(c). This “referral should specify the reasons for the agency’s recommendation.” *Id.* § 903.1(b).

Some agencies with independent litigating authority may also have the authority to terminate or suspend collection action for debts more than \$100,000. Each agency must review its statutes to determine what authority Congress granted. If the agency’s statute does not provide authority to terminate, then the authority still rests with the Attorney General.⁴

II. Agency-Specific Authorities

Unless a more specific statute or regulation governs, an agency’s determination of whether to suspend or terminate active collection action on a claim is governed by 31 U.S.C. § 3711(a)(3) and the FCCS. 31 U.S.C. § 3711(a)(3) (providing agencies with limited authority to suspend and terminate debt collection action); 31 U.S.C. § 3711(d) (stating that agencies act under the FCCS and agency-specific regulations); 31 CFR § 900.1(a) (stating that the FCCS apply unless agency-specific statute or regulation applies); 31 CFR § 900.4 (same); 31 CFR Part 903 (describing

⁴ S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533 (noting that, aside from DOJ, few agencies have the authority to suspend and or terminate debt collection action); *see also* 28 U.S.C. § 516 (except as otherwise authorized, DOJ has sole litigating authority for the United States); 31 U.S.C. § 3711(a) (providing the Attorney General with the authority to set the maximum amount of a claim that can be compromised); *United States v. LaCroix*, 166 F.3d 921, 923 (7th Cir. 1999) (DOJ, not the U.S. Department of Housing and Urban Development, had authority to settle the litigation); Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *The Attorney General’s Role as Chief Litigator for the United States*, 1982 OLC LEXIS 34 (1982) (describing the plenary and exclusive authority of DOJ to litigate and settle claims, including exceptions to that authority, and stating that “[i]ncluded within [DOJ’s] broad grant of plenary power over government litigation is the power to compromise and settle litigation”).

governmentwide standards for suspension and termination of debt collection action). Each agency should be familiar with its own statutes and implementing regulations, including whether these laws provide greater or lesser authority than the FCCS to suspend or terminate active collection on claims. For example, some agencies have the authority to suspend or terminate active collection of a claim owed by a person who died while on active duty, without regard to the \$100,000 cap or the FCCS. 31 U.S.C. § 3711(f). Similarly, by authority granted by the Attorney General, the U.S. Department of the Treasury (Treasury), Bureau of the Fiscal Service (Fiscal Service)⁵ may terminate (and, by extension, suspend) collection action on claims that have been referred to Fiscal Service under 31 U.S.C. § 3711(g) and which have a principal balance under \$500,000. Letter from Christopher Kohn, Director, DOJ's Commercial Litigation Branch, to Richard L. Gregg, Commissioner, Fiscal Service (Sep. 3, 2003) (on file with recipient).

III. Authorities Regarding Fraud and Antitrust Claims

Absent independent statutory authority, only DOJ has the authority to determine how to proceed to collect any claim “that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws.” 31 U.S.C. § 3711(b)(1). Accordingly, only DOJ has the authority to terminate or suspend collection action on fraudulent claims, regardless of the amount. 31 CFR § 900.3. As such, if an agency believes that a claim involves fraud or misrepresentation or is based on conduct in violation of the antitrust laws, it must “promptly refer the case to the Department of Justice for action” using a CCLR. 31 CFR § 900.3. Some agencies may have explicit statutory authority to suspend or terminate active collection action on certain subsets of such claims. Otherwise, only DOJ has the authority to act on these claims.

IV. Effect on Claims with Joint and Several Liability

When two or more debtors are jointly and severally liable for a debt, the agency “should pursue collection activity against all debtors, as appropriate.” *Id.* § 902.4. If an agency accepts a compromise offer from one debtor, for example, it should ensure that this compromise “does not release the agency’s claim against the remaining debtors.” *Id.* Similarly, when deciding whether to suspend or terminate collection on a claim owed by multiple debtors, agencies should analyze the factors for each debtor independently. *See id.* If suspension or termination of collection action is appropriate with regard to only one debtor, collection action against the co-debtors should continue. *See id.*

V. Discretionary Action

The suspension or termination of debt collection action does not affect the Government’s right to collect, or the debtor’s obligation to pay, a debt. Suspending or terminating collection action, or re-initiating collection after an agency has made such a determination, thus, does not create a

⁵ Fiscal Service was created by the consolidation of the Financial Management Service and the Bureau of the Public Debt on October 7, 2012.

private right of action on the part of the debtor or any other party. *Id.* § 900.8 (stating that the FCCS do not create any private rights of action). Similarly, the failure of an agency to comply with the FCCS is not “available to any debtor as a defense” to non-payment. *Id.*; *see also Dept’t of the Army v. Blue Fox*, 525 U.S. 255 (1998) (noting that absent explicit waiver of sovereign immunity, the federal government is shielded from suit); *Heckler v. Chaney*, 470 U.S. 821 (1985) (explaining that an agency’s decision regarding enforcement of civil or criminal matters is generally not reviewable by a court); *Jordan v. United States*, 158 Fed. Cl. 440, 453 (2022) (the FCCS “expressly preclude a money-mandating characterization”); *In re Zandford*, No. 05-13305, 2012 U.S. Dist. LEXIS 24201, at *11 (D. Del. Feb. 27, 2012) (stating that the FCCS “prohibit the Debtor from using these agency operating procedures as either a sword or a shield”) (citation omitted); *Berdeaux v. U.S. Dep’t of Educ.*, No. CV 10-1737, 2011 U.S. Dist. LEXIS 99573, at *25-26 (D. Ariz. Sep. 2, 2011) (finding that plaintiff failed to allege how an agency’s discretionary denial of a compromise constituted a cause of action). In fact, the FCCS specifically provide that termination of collection activity does not preclude the agency from retaining a record of the account for the purposes of: (1) selling the debt; (2) pursuing collection at a subsequent date; (3) offsetting against future income or assets; or (4) screening future applicants for prior indebtedness. 31 CFR § 903.3(b).

An agency’s determination to suspend or terminate active collection action on a claim does not prevent the agency from revisiting this determination and pursuing active collection action in the future. *Id.* § 903.5(a) (stating that “[w]hen collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date”); *id.* § 903.3(b) (stating that termination does not preclude an agency from selling debt or undertaking future collection). Unlike the compromise of a debt, the suspension or termination of debt collection action neither affects the rights of the debtor nor precludes the agency from revisiting its determination. *Id.* Suspension and termination decisions do not have the same kind of finality as decisions to compromise a claim. *Id.* Whereas compromises are “final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact,” 31 U.S.C. § 3711(c), suspension and termination determinations are revocable. 31 CFR § 903.3(b); *id.* § 903.5(a) (“[w]hen collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date”).

D. STANDARDS FOR SUSPENSION OF DEBT COLLECTION ACTION

Although federal agencies operate under a broad mandate to “collect all debts arising out of activities of, or referred or transferred for collection services to, that agency,” such agencies also have express statutory and regulatory authority to temporarily suspend collection of these debts. 31 CFR § 901.1; *see also* 31 U.S.C. § 3711(a). An agency’s determination to suspend active collection action on a claim does not bar the agency from resuming active collection at a later time, or from utilizing passive collection tools during the period of the suspension.

Generally, the agency’s determination regarding whether to suspend active collection is discretionary, but there are some situations where suspension is mandatory. Given the affirmative duty to collect the debts they are servicing, agencies must comply with the FCCS when suspending collection action. The FCCS permit suspension when: “(1) The agency cannot locate the debtor; (2) The debtor’s financial condition is expected to improve; or (3) The debtor has requested a waiver or review of the debt.” 31 CFR § 903.2(a). Moreover, agencies must suspend debt collection action when legally required by a statute, including statutes that require suspension when an agency is conducting a review or when certain debt collection actions are precluded due to bankruptcy. 31 CFR § 903.2(c)-(d); *see, e.g.*, 11 U.S.C. § 362 (generally requiring creditors to cease collection action upon debtor’s filing of a bankruptcy petition).

A determination of whether to suspend collection efforts should be made on a case-by-case basis. FCCS, 65 Fed. Reg. 70,391, 70,394 (Nov. 22, 2000). An agency may suspend active collection action on a class of claims, however, if one or more of the suspension standards applies to all claims within the class. *Id.* (providing that “[n]othing in the FCCS prohibits suspension of collection activity by the agency for groups or categories of debtors when appropriate”). For example, the suspension of debt collection efforts on certain types of consumer debt might be appropriate for every debtor located in a geographic area affected by a natural disaster.

I. Inability to Locate the Debtor

An agency may suspend active collection of a claim if “[t]he agency cannot locate the debtor.” 31 CFR § 903.2(a)(1). To invoke this justification for suspension of collection action, agencies must first undertake diligent efforts to locate the debtor. *See* 31 U.S.C. § 3711(a) (requiring agencies to attempt collection); 31 CFR § 901.1 (requiring collection action). The 1984 version of the FCCS provided a more detailed explanation of this justification, providing that an agency could suspend collection “when the debtor cannot be located after diligent effort and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim, with due consideration for the size and amount which may be realized thereon.” FCCS, 49 Fed. Reg. 8,889, 8,903 (Mar. 9, 1984). The 2000 FCCS amended the regulations to “provide agencies with greater latitude to adopt agency-specific regulations, tailored to the legal and policy requirements applicable to the various types of Federal debt.” FCCS, 65 Fed. Reg. at 70,390. What will constitute diligent efforts to locate a debtor will depend on the circumstances. *See id.*; *see also* *To the U.S. Army Fin. and Accounting Ctr., Dep’t*

of the Army, 62 Comp. Gen. 91, 98-99 (1982) (holding that “one letter that was returned unclaimed . . . does not constitute diligent collection action”).⁶

II. Debtor’s Ability to Pay

Alternatively, an agency may suspend active collection of a claim if “[t]he debtor’s financial condition is expected to improve.” 31 CFR § 903.2(a)(2). The FCCS further provide that agencies may only suspend active collection based on this standard when “the debtor’s future prospects justify retention of the debt for periodic review and collection activity” and one of the following conditions is met: “(1) The applicable statute of limitations has not expired; or (2) Future collection can be effected by administrative offset . . . ; or (3) The debtor agrees to pay interest on the amount of the debt on which collection will be suspended, and such suspension is likely to enhance the debtor’s ability to pay the full amount of the principal of the debt with interest at a later date.” *Id.* § 903.2(b). The 2000 FCCS provided agencies with more leeway to adopt their own agency-specific regulations tailored to their own policy requirements, compared with the 1984 FCCS. 65 Fed. Reg. at 70,390. The Comptroller General interpreted this standard under the proposed version of the 1984 FCCS (48 Fed. Reg. 23,249 (May 24, 1983)):

this section authorizes agencies to temporarily suspend collection activity due to the hardship condition of the debtor, in conjunction with the reasonable anticipation that the debtor’s financial condition will improve in the not-too-distant future. This could be authorized even though the debtor is currently receiving Government benefits. . . . As is always the case, agencies should adhere to a ‘rule of reason’ when exercising discretion under the FCCS. Whatever action is taken must be calculated to adequately protect the Government’s interests. For example, we do not believe that it would be appropriate to . . . temporarily suspend collection if the agency lacked reasonable grounds to support the expectation that the debtor’s financial condition will improve in the not-too-distant future. Nor should such steps be taken in the absence of the debtor’s demonstration that immediate repayment, whether voluntary or involuntary, would impose a real and unreasonable hardship.

Soc. Sec. Admin., 62 Comp. Gen. 599, 603-04 (1983).

To suspend active collection of a claim under this standard, the agency must both (1) conduct a review of the debtor’s financial condition, and (2) determine whether at least one of the three factors listed above is met. 31 CFR § 903.2(b); *see also USDA Collection of Excess Advance Deficiency Payments on 1832 Corn and Grain Sorghum Crops*, 65 Comp. Gen. 245, 251 (1986)

⁶ Opinions of the Comptroller General are not binding on federal agencies in the debt collection context. General Accounting Office Act of 1996, Pub. L. 104-316, § 115(g), 110 Stat. 3826, 3835; Todd David Peterson, Deputy Assistant Attorney General, *Administrative Settlement of Disputes Concerning Determinations of Mineral Royalties Due the Government*, Office of Legal Counsel, 1998 OLC Lexis, 32, 14-15 (1998) (stating that GAO opinions provide useful guidance but are not binding on federal agencies); *see generally Bowsher v. Synar*, 478 U.S. 714 (1986).

(holding that “although the availability of future offset activity is relevant to suspension of collection under [the FCCS], it must be tied to an appropriate evaluation of the financial condition of the debtor (or appropriate class of debtors)”). Both determinations are required for an agency to appropriately suspend active collection action on a claim based on the debtor’s current financial condition. 31 CFR § 903.2(b).

III. Requests for Waiver or Administrative Review

If a debtor requests a waiver or administrative review of the debt, agencies may suspend debt collection action. *Id.* § 903.2(c). Agencies should examine the law governing the debt to determine whether suspension of debt collection action is required. If not, agencies should apply the general factors applicable to suspension set forth in this chapter to determine if suspension is authorized. Suspension of debt collection action due to a pending waiver request or administrative review, however, will not necessarily suspend the accrual of interest, penalties, and costs. *See id.* § 901.9(h) (requiring agencies to “set forth in their regulations the circumstances under which interest and related charges will not be imposed for periods during which collection activity has been suspending pending agency review”); *id.* § 903.2(b)(3) (allowing suspension for current inability to pay if the debtor agrees to pay interest and such suspension is likely to enhance the debtor’s ability to pay).

Some agencies have specific statutes that prohibit the agency from continuing debt collection action until after the agency has made a waiver determination or conducted its review, including both active and passive collection activity. *Id.* § 903.2(c)(1). If the agency is subject to such a statute, it must suspend collection action “during the time required for consideration of the debtor’s request for waiver or administrative review of the debt.” *Id.*; *see also Califano v Yamasaki*, 442 U.S. 682 (1979) (holding that collection on claims under mandatory waiver statutes is barred until the agency appropriately determines that the waiver request is denied). Suspension will generally be required where a statute requires that an agency waive a debt if certain circumstances are met, as opposed to where the statute merely permits the agency to waive a debt if certain circumstances are met. *See* 31 CFR § 903.2(c)(1)-(2).

An agency “ordinarily should suspend collection action upon a request for waiver or review” if the agency is prohibited from issuing refunds of amounts collected during its review process. *Id.* § 903.2(c)(3). An agency is generally not permitted to refund amounts collected previously, unless it determines that the debt was never valid or if the agency has statutory authority to issue a refund. 31 CFR § 903.2(c)(3). If an agency lacks refund authority, it should have clear procedures on when suspension of debt collection action is appropriate. *See Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1190 (D. Ariz. 2011) (finding that the agency should have informed the debtor that collection action pending a determination on the waiver was suspended because the agency lacked the authority to issue refunds).

Some agencies have specific statutes that explicitly permit, but do not require, the agency to suspend debt collection action while considering a waiver request or conducting a review. Even without such agency-specific statutes, however, agencies are generally not required to suspend

their debt collection efforts pending an agency determination; rather, agencies may “use discretion, on a case-by-case basis” to make this determination. 31 CFR § 903.2(c)(2). An agency generally should not suspend collection action if it determines “that the request for waiver or review is frivolous or was made primarily to delay collection.” *Id.* The current FCCS do not prescribe specific factors that agencies must consider when determining if suspension is appropriate in permissive waiver cases.⁷

IV. Automatic Stay

Finally, if an agency discovers that a debtor has filed for bankruptcy protection and an automatic stay is in effect, both active and passive collection activity on a debt generally must be suspended, pursuant to the provisions of the Bankruptcy Code. 31 CFR § 903.2(d); *see also* 11 U.S.C. §§ 362, 1201, and 1301. However, while the use of traditional debt collection tools may be prohibited, at least temporarily, an agency should consider what means are available to pursue its claim in accordance with the Bankruptcy Code, including by filing a proof of claim and preserving its rights to setoff and collateral. *See id.* To the extent legally permitted, agencies should take the necessary steps to ensure that no funds or money are paid by the agency to the debtor until relief from the automatic stay is obtained. Agency personnel should consult with agency counsel and DOJ to determine what collection actions are legally permissible.

⁷ The 1984 FCCS, which have been superseded, provided three factors: (1) whether there is “a reasonable possibility that waiver will be granted, or that the debt (in whole or in part) will be found not owing from the debtor;” (2) whether the “government’s interests would be protected” if the suspension were granted; (3) whether “[c]ollection of the debt will cause undue hardship.” 4 CFR § 104.2(c)(2) (1984) (former FCCS). While consideration of these factors may be useful, they are not required by the current FCCS. Agencies should have clear procedures on when suspension of debt collection action is appropriate.

E. STANDARDS FOR TERMINATION OF DEBT COLLECTION ACTION

When pursuing further debt collection is no longer appropriate, agencies may terminate debt collection action. Congress has granted agencies the authority to “end collection action . . . when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.” 31 U.S.C. § 3711(a)(3). The FCCS interpret and provide guidance as to when it is appropriate to terminate collection action on a claim owed to the United States. *See* 31 CFR Part 903.

Under the FCCS, before terminating collection of a claim, the agency should have pursued “all appropriate means of collection” and determined, based on these efforts, “that the debt is uncollectible.” *Id.* § 903.3(b). Because agencies have an affirmative duty to collect their debts, “termination of collection action should be viewed as a ‘last resort.’” 62 Comp. Gen. at 604. The FCCS specifically list examples of the debt collection tools that an agency should use before terminating debt collection action, including: administrative offset; tax refund offset; federal salary offset; referral to Treasury, Treasury-designated debt collection centers or private collection contractors; credit bureau reporting; wage garnishment; litigation; and foreclosure. 31 CFR § 903.5(a).

Just like suspension, for an agency to appropriately terminate collection of a debt, an agency must do so based on a reasonable determination that one or more of the standards for termination provided in the FCCS is applicable. *See Jeffcoat*, B-212337, 1984 WL 43986 (Comp. Gen. Feb. 17, 1984) (holding that the Department of Defense could not establish regulations which terminated collection actions “simply because trainees have departed from their U.S. or overseas training activities” because, under the FCCS, “termination of claims collection activity [must] be based on an assessment of the collectability of the claim”); *see also* B-160506, 1970 WL 4917 (Comp. Gen. Apr. 10, 1970) (holding that the FCCS permit agency heads to terminate collection action only when one of the listed standards is applicable); B-152680 (Comp. Gen. Oct. 28, 1966), *available at* <https://www.gao.gov/products/b-152680> (holding that unless the agency could show some valid basis for termination under the FCCS, the agency had to proceed with collection of the full amount of the debt). Given the affirmative duty to collect the debts, agencies may only terminate collection action on a claim when:

- (1) The agency is unable to collect any substantial amount through its own efforts or through the efforts of others;
- (2) The agency is unable to locate the debtor;
- (3) Costs of collection are anticipated to exceed the amount recoverable;
- (4) The debt is legally without merit or enforcement of the debt is barred by any applicable statute of limitations;
- (5) The debt cannot be substantiated; or
- (6) The debt against the debtor has been discharged in bankruptcy.

31 CFR § 903.3(a). Furthermore, agencies must have adequate support for their determination that one or more of these standards applies.⁸

Termination of collection action does not preclude passive collection efforts such as offset through the Treasury Offset Program or credit bureau reporting. After terminating collection action, agencies are required to sell the debt if doing so “is in the best interest of the United States,” as determined by Treasury. 31 U.S.C. § 3711(i); *see also* OMB Circular A-129, Sec. IV.C.1 (stating that “agencies are required to sell any non-tax debts that are delinquent for more than one year for which collection action has been terminated, if the Secretary of the Treasury determines that the sale is in the best interest of the United States Government.”).

I. Inability to Collect and Inability to Locate the Debtor

An agency may terminate collection activity when it “is unable to collect any substantial amount through its own efforts or through the efforts of others.” 31 CFR § 903.3(a)(1). For example, termination of debt collection action is appropriate if no amount of effort will yield collection. Similarly, an agency may terminate collection action if it cannot locate the debtor after diligent efforts to do so, and if it believes that its inability to locate the debtor will continue for the foreseeable future. *Id.* § 903.3(a)(2).

II. Cost-Benefit Analysis

The FCCA was enacted to address, among other things, the problem that “agencies [could not] terminate or suspend efforts to collect a claim even when the very futility of these efforts serve[d] to add to the cost of Government and therefore compound[ed] the loss to the United States.” S. Rep. No. 89-1331, at 1. The FCCS therefore provide that a federal agency may terminate collection of a claim when the “[c]osts of collection are anticipated to exceed the amount recoverable.” 31 CFR § 903.3(a)(3). In other words, agencies are only required to pursue collection actions if they can do so cost-effectively. *Id.*

In determining what constitutes cost-effective debt collection, agencies may consider costs if there is a substantial likelihood that such costs will be incurred in a particular case. If an agency believes that a particular debtor will likely request a hearing or other form of administrative review, then the agency may include the anticipated costs of this review in its determination of whether continued collection will be cost-effective.⁹ When the claim is relatively small, “[c]ollection costs may be a substantial factor.” 31 CFR § 902.2(e). As such, “[a]gency collection procedures should provide for periodic comparison of costs incurred and amounts

⁸ B-117604, 1968 WL 3639, at *1 (Comp. Gen. May 27, 1968) (“While section 104.3 [now 31 CFR § 903.3] provides for termination of collection activity on claims on any one of [six] stipulated bases, or a combination thereof, it was not contemplated that any of these bases would be applied in the absence of detailed support of such application.”).

⁹ *Termination of Claims Against Federal Civilian and Military Personnel Based on Costs of Collection*, 65 Comp. Gen. 893, 898 (1986) (interpreting the 1984 FCCS and stating that “agencies may (but are not required to) take the costs of administrative procedures required by law into account when deciding whether to terminate the collection of debts.”).

collected” to “establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries . . . and establish minimum debt amounts below which collection efforts need not be taken.” *Id.* § 901.10.

The establishment of either points of diminishing returns or minimum debt amounts should be supported by cost studies which show a “periodic comparison of costs incurred and amounts collected.” 31 CFR § 901.10; *see also Dep’t of the Interior*, 58 Comp. Gen. 372, 375 (1979) (holding that “there is no need to pursue collection action with respect to [claims] in amounts of \$1 or less”); *Alaska Railroad*, B-198903, 1981 WL 23596, at *6-7 (Comp. Gen. Aug. 6, 1981) (holding that termination of collection action on a class of claims was appropriate because “the administrative costs of conducting a full audit to identify overpayments and maintaining such a large number of relatively small individual collection actions are likely to exceed the realistic estimated recovery and go far beyond the point of diminishing returns”); *Clark Air Base*, B-181467, 1976 WL 9957 (July 29, 1976) (holding that a large number of overpayment claims could appropriately be terminated when “the administrative costs of collection [were] likely to exceed the estimated recovery and would go beyond the point of diminishing returns”).

In the context of the collection of certain overpayments, specifically claims arising from reasonably foreseeable overpayments by the United States, agencies may still perform a termination analysis despite a previous GAO decision to the contrary. GAO previously found that the standards authorizing agencies to establish minimum debt amounts below which active collection will not be pursued “have no application” in cases “where it is known prior to payment that an overpayment will be made” because authorizing such terminations “would have the effect of authorizing disbursing officers to make a known overpayment.” 49 Comp. Gen. 359, 360 (1969). While agencies may consider this GAO finding as a factor in determining whether termination of debt collection action is appropriate, an agency is not precluded from establishing points of diminishing returns and minimum debt amounts to justify the termination of collection of claims arising from even reasonably foreseeable overpayments by the United States.

When administrative tools are available, agencies generally should not terminate collection action simply because judicial enforcement is barred by a statute of limitations. Although the FCCS provides that termination is authorized when enforcement of the debt is barred by any applicable statute of limitations for bringing a claim in court, 31 CFR § 903.3(a)(4), this authorization presumes that the debt cannot be collected through administrative means. Since most administrative debt collection tools have no statute of limitations, they should be employed to the extent they are cost-effective, regardless of the expiration of the statute of limitations.

III. Debt is Legally Without Merit

Agencies should terminate active collection of a claim when “[t]he debt is legally without merit.” 31 CFR § 903.3(a)(4). Continuing to pursue active collection of meritless claims is not cost-beneficial to the United States. A claim is legally without merit “only if there is no legal basis for recovery by the United States.” *Soil Conservation Serv.*, 68 Comp. Gen. 609, 611 (1989) (holding that termination was inappropriate because the Comptroller General could not

“conclude that if the United States were to sue on this claim it would be unsuccessful”); *see also Debt Collection Due to Overpayment of Former President Ford’s Staff*, B-218989, 1986 WL 63051, at *4 (Comp. Gen. Jan. 27, 1986); *Stephenson*, 65 Comp. Gen. 177, 182 (1986).

IV. Debt Cannot be Substantiated

Agencies should maintain detailed records of all claims owed to them or for which they are responsible for collecting. *See* 31 CFR § 904.3. If, however, the agency does not have adequate evidentiary support that a claim exists, it may terminate debt collection action. *Id.* § 903.3(a)(5) (providing that agencies may terminate active collection when “[t]he debt cannot be substantiated”).

V. Debt Discharged in Bankruptcy

If a debt has been discharged in bankruptcy, the agency may no longer have a right to pursue collection of the debt from the discharged debtor, and debt collection action against that debtor generally should be terminated. *Id.* § 903.3(a)(6). Termination of debt collection action on debts discharged in bankruptcy is appropriate “regardless of the amount” of the claim. *Id.* § 903.3(c). If an agency learns that a debtor has filed for bankruptcy protection, it should consult its legal counsel to determine what rights it retains to the debt in question and, to the extent feasible, protect the agency’s right to recover the debt. Even if a debt has been discharged, the agency may be able to collect the debt through offset and recoupment, or by foreclosing on any property that secures repayment of the debt. The agency may also be able to recover through a plan of reorganization or, if the agency did not have notice of the bankruptcy case, the claim may survive the general bankruptcy discharge.

VI. Exception to Termination for Enforcement Policy

“When a significant enforcement policy is involved, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions,” agencies may refer the claim to DOJ even if termination would have otherwise been appropriate. *Id.* § 903.4. Agencies may choose to continue pursuing collection because “countervailing Government policies dictate that collection be attempted, despite the costs.” 65 Comp. Gen. at 897; *see also Lenane*, B-197146, 1980 WL 15953, at *4 (Comp. Gen. Sept. 22, 1980) (noting that “cost benefit analyses should not always be the sole determinant for the termination of claims,” and that unquantifiable factors, like “the integrity of a collection program, should also be considered”). For example, an agency may be concerned that if it develops a reputation for terminating collection action of debts under \$200 upon a hearing request, other debtors may request a hearing simply to benefit from the termination of collection action as well. To avoid this, the agency may choose, in its discretion, to not terminate collection action of such claims, even though in particular instances it might cost the Government more than \$200 to collect the claim. In other words, an agency may thus choose not to terminate active collection efforts, even if such a termination would be the cost-efficient choice in the instant case. 65 Comp. Gen. at 897.

F. WRITE-OFF AND REPORTING DISCHARGE OF INDEBTEDNESS

I. Termination of Debt Collection Action, Discharge, and Close Out

Write-off is an accounting concept that allows agencies to accurately reflect the value of their receivables on their books. Write-off is mandatory for debts delinquent for more than two years, unless a decision to not write off a debt is documented and justified to OMB in consultation with Treasury. See OMB Circ. A-129, Sec. V.E, for write-off requirements. When writing off a debt, agencies classify the debts as either “currently not collectible” (CNC) or “closed-out.” A classification of CNC generally indicates that the agency will continue its collection efforts after write-off, while close-out indicates that the agency has terminated both active and passive debt collection activity.

Closing out a claim functions as a final disposition of the debt for agency accounting and management records. See OMB Circ. A-129, Sec. V.E; 31 CFR § 903.5(a); FCCS, 65 Fed. Reg. at 70,394. In other words, the agency is no longer obligated to pursue collection or monitor the debt. See *id.* The Government can (but is not required to) “re-open” the debt at any point it believes continued collection action is appropriate. 31 C.F.R § 903.3(b). The agency may maintain its debt records for this and other purposes. *Id.* When an agency closes out a debt, it must request that litigation counsel release any liens of record securing the debt. *Id.* § 903.5(d).

Write-off of a debt (and classification as either “CNC” or “close-out”) has no effect on the agency’s ability to assert its claim against the debtor. It is only an internal accounting and management tool.

II. Requirement to Report Discharge of Indebtedness to the Internal Revenue Service

Creditors are generally required to report a discharge of indebtedness to the Internal Revenue Service (IRS) using Form 1099-C after an “identifiable event,” such as when a creditor decides to give up on its collection efforts (that is, terminates debt collection action). Discharge of indebtedness reporting provides the IRS with the information it needs to determine whether the debtor has received income as a result of the agency’s decision to forego collection. See 26 U.S.C. § 6050P and 26 CFR § 1.6050P-1 for reporting requirements.

The reporting of a discharge of indebtedness on Form 1099-C does not affect the rights of the creditor to collect a debt. While the Form 1099-C is named “Cancellation of Debt,” the issuance of a Form 1099-C does not actually “cancel” a debt. As such, an agency can terminate its debt collection efforts on a debt that it does not believe is collectible, issue a Form 1099-C, as required by law, and subsequently restart its collection efforts, if it later obtains new information about the debtor that indicates that the debt is collectible. See 26 CFR § 1.6050P-1(a) (stating in part that “*Solely for purposes of the reporting requirements of section 6050P and this section, a discharge of indebtedness is deemed to have occurred, except as provided in paragraph (b)(3) of this section, if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, whether or not an actual discharge of indebtedness has occurred on or before the*”).

date on which the identifiable event has occurred”) (emphasis added).¹⁰ If the agency is required to report such a discharge to the IRS, it may request that Fiscal Service file such a discharge report on its behalf if Fiscal Service attempted to collect the debt through its Cross-Servicing program. 31 CFR § 903.5(c).

¹⁰ See also *FDIC v. Cashion*, 720 F.3d 169, 178 (4th Cir. 2013) (explaining that, “tracking the plain language of the regulation, a creditor may be obligated to file a Form 1099-C even though an actual discharge of indebtedness has not yet occurred or is not contemplated”); *Gericke v. Truist*, No. 20-3053 (RMB/AMD), 2021 U.S. Dist. LEXIS 57968, at *17 (D. N.J. Mar. 26, 2021) (concluding that “[t]he fact of the matter is that the issuance of a Form 1099-C is not the end of the road in terms of the actual discharge of a debt”); *Wells Fargo Bank, N.A. v. Frazee*, No. 19-10499-GAO, 2020 U.S. Dist. LEXIS 58057, at *4 (D. Mass. Apr. 2, 2020) (“it appears that the Form 1099-C was filed to conform with IRS regulations, in satisfaction of a reporting requirement for tax purposes that arose regardless of whether ‘an actual discharge of indebtedness [had] occurred.’”); *Walker v. Ocwen Loan Servicing, LLC*, Civil Action No. 16-9157, 2017 U.S. Dist. LEXIS 106601, at *6 (D.N.J. July 11, 2017) (finding that it was not unlawful for the defendant to report cancellations of debt on the Form 1099-Cs when the defendant did not actually cancel the debt and the amount is still due); *United States v. Reed*, 2010 U.S. Dist. LEXIS 96079, at *5 (E.D. Tenn. Sept. 14, 2010) (explaining that the issuance of a Form 1099-C, “as a matter of law, does not operate to legally discharge a debtor from liability on the claim that is described in the form.”); *Bononi v. Bayer Employees Fed. Credit Union (In re Zilka)*, 407 B.R. 684, 689 (Bankr. W.D. Pa. 2009) (holding that “Bayer’s issuance of the Forms 1099-C did not itself operate to legally discharge the debtor from further liability on each of Bayer’s four claims. That is because Forms 1099-C, as a matter of law, do not themselves operate to legally discharge debtors from liability on those claims that are described in such Forms 1099-C.”); *Debt Buyers’ Association v. Snow*, 481 F. Supp. 2d 1, 14 (D.D.C. 2006) (stating that “a 1099-C must be issued as a result of an identifiable event regardless of whether an actual discharge of indebtedness has occurred on or before the date of such event”); IRS Info. Ltr. 2005-0207, 2005 WL 3561135 (Dec. 30, 2005) (available at <http://www.irs.gov/pub/irs-wd/05-0207.pdf>) (stating that “[t]he Internal Revenue Service does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection”); *Sims v. Commissioner*, 2002 Tax Ct. Summary LEXIS 78, at *4-5 (T.C. 2002) (holding that issuance of a Form 1099-C does not establish that the creditor ever actually discharged the debt).