

# COLLECTION MECHANISMS WITH RESPECT TO SBA DEBT

2015 DEBTOR/CREDITOR RIGHTS SEMINAR

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## **EXPECT TROUBLE IF YOU OWE A DEBT..**

- ...to the United States from loans made or guaranteed by the United States, and from fees, leases, rents, royalties, sales of real or personal property, overpayments, fines, penalties, damages, interest, forfeitures, or any other source AND
- The debt is reduced to a judgment, has been accelerated or has been due for at least 90 days.



## DEBT COLLECTION IMPROVEMENT ACT of 1996

Centralized the collection of non-tax  
debt of Treasury

### TREASURY OFFSET PROGRAM ("TOP")

- Administrative Offset– 31 U.S.C. 3716
- Salary Offset– 5 U.S.C. 5514
- IRS Tax Refund Offset– 31 U.S.C. 3720A

### CROSS-SERVICING

- Mandatory referral of delinquent debts to Treasury or another Debt Collection Center for purposes of collection.
- Administrative Wage Garnishment

# CROSS-SERVICING

- Federal agency is required to refer all non-tax debt delinquent over 180 days to Treasury for collection if they have not been successful at collecting these debts.
- There are five specific instances where debts are excluded from transfer. They are:
  - a. Debts that are in litigation or foreclosure;
  - b. Debts that will be disposed of under an asset sales program within 1 year after becoming eligible for sale, or later than 1 year if consistent with an asset sales program and a schedule established by the agency and approved by the Director of the OMB;
  - c. Debts that have been referred to a private collection contractor for collection for a period of time determined by Treasury;
  - d. Debts that have been referred to a Debt Collection Center with the consent of Treasury and for a period of time determined by Treasury; and
  - e. Debts that will be collected under internal offset if such offset is sufficient to collect the debt within 3 years after the debt is first delinquent.



# TREASURY OFFSET PROGRAM (“TOP”)

- Compares the names and tax identification numbers (“TIN’s”) of defendants with the names and TIN’s of recipients of federal payments.
- If there is a match, the federal payment is reduced or “offset” to satisfy the overdue debt.
- Payments include: vendor, federal retirement, federal salary and social security payments.



# Administrative Offset

- Federal government withholds part or all of a debtor's Federal payment to satisfy the debtor's delinquent debt owed to the government. This process is authorized by 31 U.S.C. 3716.
- Payments eligible for offset: Federal wages, salary, and retirement payments, vendor and expense reimbursement payments, certain benefit payments, travel advances and reimbursements, grants, fees, refunds, judgments.

# Administrative Offset - What the Courts Say...

- *U.S. v. Maxwell, 157 F. 3d 1099 (7<sup>th</sup> Cir., 1998)*: “Federal government is considered to be a single entity, that is entitled to set off one agency’s debt to a party against that party’s debt to another agency.”
- *Omegbu v. U.S. Dep't of Treasury, 118 F. App'x 989, 991 (7th Cir. 2004)*: Delinquent borrower of student loans challenged the legality of the offset of his social security payments by claiming that section 207 of the Social Security Act, 42 U.S.C. § 407, protects payments arising under the Social Security Act from attachment or legal process. However, Court noted that in 1996 Congress amended § 3716 expressly to authorize offset of payments made under the Social Security Act “notwithstanding” section 207. See 31 U.S.C. § 3716(c)(3)(A)(I); *Lee v. Paige*, 376 F.3d 1179, 1180 (8th Cir.2004); *Lockhart*, 376 F.3d at 1030.
- *Astrue v. Ratliff, 560 U.S. 586, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010)*: Attorney fees award in claimant’s successful suit against the United States Social Security Administration for Social Security benefits was subject to offset to satisfy claimant's pre-existing debt to Government.



# Federal Salary Offset

- If the debtor is a federal employee (a civilian employee as defined by [5 U.S.C. 2105](#), an employee of the U.S. Postal Service or Postal Rate Commission, or a member of the Uniformed Services or Reserve of the Uniformed Services), SBA may deduct payments owed to SBA or another federal agency from the debtor's paycheck. This procedure is a “salary offset” and is authorized by [5 U.S.C. 5514](#).
- **(i)** Offset may not exceed 15 percent of a debtor's disposable pay, unless the debtor agrees in writing to a greater percentage.
- **(ii)** SBA also may collect against travel advances, training expenses, disallowed payments, retirement benefits, or any other amount due the employee, including lump-sum payments.
- **(iii)** If an employee has terminated employment after salary offset has been initiated, there are no limitations on the amount that can be withheld or offset.



# IRS Tax Refund Offset

- SBA may request that IRS reduce a debtor's tax refund by the amount of the debt, as authorized by [31 U.S.C. 3720A](#).
- Therefore, 100% of a debtor's tax refund may be offset against the debt.
- Where available, administrative and salary offsets must be used before collection is attempted through income tax offset.
- SBA may refer a debt to the IRS for a tax refund offset and take additional action against the debtor to collect the debt at the same time or in sequence.



# Administrative Wage Garnishment

- SBA may order your employer to pay SBA a portion of your disposable pay to satisfy delinquent non-tax debt you owe to the United States. This process is authorized by [31 U.S.C. 3720D](#).
- This is not an exclusive remedy; SBA may simultaneously pursue alternative collection remedies as well.
- Agency must send written notice by first class mail to your last known address at least 30 days before initiating garnishment.
- Borrower must make a written request for a hearing within the 15<sup>th</sup> business day after the Agency mailed the pre-garnishment notice. Untimely hearing requests subject to hearing official's determination regarding whether delay was caused by circumstances beyond borrower's control.



# ADMINISTRATIVE WAGE GARNISHMENT

- Right to an oral hearing only if the Hearing Official determines that the issues in dispute cannot be resolved solely by review of the documentary evidence, for example, when the Hearing Official finds that the validity of the claim turns on the issue of credibility or veracity.
- If no oral hearing is needed, the Hearing Official will accord you a “paper hearing,” that is, the Hearing Official will decide the issues in dispute based upon a review of the written record. The Hearing Official will set a reasonable deadline for the submission of evidence.
- SBA’s Burden of Proof: to prove the existence or amount of the debt.
- Borrower’s Burden on Dispute: establish by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, present evidence that the terms of the repayment schedule are unlawful, would cause you a financial hardship, or that collection of the debt may not be pursued due to operation of law.

## **DO NOT LET YOUR CLIENT**



- i. 60 day letter from the SBA  
What would be referenced in 60 day letter from SBA?
- ii. Responding/contesting 60 day letter  
Putting forth evidence and proceeding with hearing

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**"...if you have already sent us your payment,  
please accept our apology for the death threat  
and warm wishes for the holiday season."**

- By the time you get to the 60th day, the fat lady has sung.

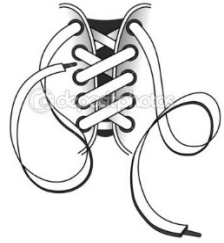


# THE REAL WONDER WOMAN

- However, the mechanics of having a 60 day letter retracted are not specified in the regulations.
- Through perseverance and creativity, we have been able to have accomplished and proceed with offer in compromise.



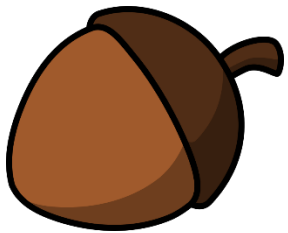
# OFFER IN COMPROMISE PROCESS IS . . .



1. Lace up your shoes for a time consuming, frustrating experience sometimes involving SBA personnel that don't always cooperate.



2. Just like a HAMP application for loan modification or short sale, there will be multiple times you have to submit the same paperwork.



3. In a nutshell, it is an analysis to determine what assets are available by Borrower and Guarantor to the SBA to satisfy a debt.

# THE AMOUNT BEING OFFERED MUST BEAR A REASONABLE RELATIONSHIP TO THE ESTIMATED NET PRESENT VALUE OF THE PROJECTED AMOUNT OF RECOVERY AVAILABLE THROUGH ENFORCED COLLECTION

The offer in compromise (“OIC”) process is by assembling and presenting financial information in accordance with SBA regulations consisting of the following:

1. OIC Information Sheet
2. Obligors/Collateral Worksheet
3. Recovery Worksheet
4. Summary
5. Financial Analysis
6. SBA Required Documentation
7. Asset Valuations
8. Litigative Risks

# 1. OIC INFORMATION SHEET

- Essentially a cover sheet

Information Sheet **1**

Lender Name

Borrower Name

SBA Loan Number

Companion Loan

Date

**Lender Contact Information:**

Contact Name

Phone Number

Email

1. OFFEROR:

Ongoing Business Concern? Yes  No

Who is making offer? Indicate whether the offeror is the borrower, assumpor, limited or full guarantor, and explain the offeror's relationship to borrower and other guarantors or obligors.  
Releases/Compromises without a monetary payment will generally not be accepted.

Offeror	Offeror Type
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>

2. TYPE AND AMOUNT OF COMPROMISE:

a. Cash \$

Term \$  payable at \$  monthly at a rate of

for a term of months/years  (Maximum 5 years)

b. SOURCE OF FUNDS:

List pertinent details on any assets being sold to raise the funds, and if the funds are being obtained through a loan, state what collateral is being offered for the loan:

- Although permitted, critical distinction is that if business is “Ongoing Business Concern”, very little chance offer in compromise will be a viable option.
- Offer in compromise permits payments over time up to 5 years but better to make lump sum offer.

# 2. OBLIGORS/COLLATERAL WORKSHEET

- List of all assets and their disposition.
- Also includes summary of guarantors and whether any of them have been released or filed bankruptcy.

**Collateral Worksheet**

	Collateral	Lien Position Per Loan Authorization	Current Lien Position	Remaining	Liquidated	Substituted	Abandoned
1				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Guarantor Worksheet**

	Guarantor Per Loan Authorization	Remaining	Released	Offeror	Bankrupt
1		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

# 3. RECOVERY WORKSHEET

- Need to account for proceeds received from liquidations.

Please summarize all recoveries received from sale of collateral that secured obligation using the spreadsheet below. You must include all supporting documentation (i.e. HUD 1 sheet(s), auctioneer's report, settlement statement(s), and purchase agreements).

	Date	Collateral	Amount Applied to Indebtedness
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			

Total Recovery

## 4. SUMMARY

- Consists of 5 categories:
  - Summarize major features of loan and reasons for problems.
  - Indicate extent of involvement of offeror in borrower's business.
  - Give offeror's current employment, present earnings, number of dependents, general health.
  - Explain any possible fraud or misrepresentation, including any apparent effort to place assets beyond the reach of lender/SBA and details/status of pending or previous OIG referral, if any.
  - Was offeror cooperative in achieving best possible recovery from business assets?
- Best to provide detailed narrative to justify your actions and reasons behind inability to pay back loan.

# 5. FINANCIAL ANALYSIS

- Consists of 3 components:
  - Comprehensive Evaluation
    - 2 years tax returns
    - Address assets disclosed on current and prior personal financial statements
    - Address obstacles involved in liquidation of any assets
      - Environmental issues
      - Zoning issues
      - Junior or senior liens
      - Restrictive covenants
  - Comments of Lender
    - Summarize efforts to reach compromise with original lender
  - Recommendation of Lender
    - Steps necessary to effectuate offer
      - (Sale of assets)
      - Release of junior liens
      - Loan or gift from third party

## 6. SBA REQUIRED DOCUMENTATION

- A.
  - A copy of the SBA Loan Authorization
  - A current completed and signed SBA Form 1150
  - A current completed and signed SBA Form 770 or equivalent must be used
  - A copy of the original personal financial statements from origination, SBA Form 413
  - A current completed and signed IRS Form 4506-T
- B.
  - Going Concerns – Obligors must submit current interim and last year-end financial statements.
  - Affiliates – SBA requires submission of current business financial statements to verify income.
- C. Income Tax Returns – If the obligor has affiliates, please attach a copy of the last two years of tax returns from the obligor(s) wishing to be released as well as the business tax returns on all entities owned by the obligor(s) to this tab. If tax returns are unavailable, please provide a copy of a filed extension or other explanation.
- D. Credit Reports – Please attach a copy of a recent credit report for the guarantor(s) wishing to be released.

# 7. ASSET VALUATIONS

## Asset Valuations **7**

A Post-Default Appraisal is necessary to determine the Liquidation Value of real or personal property collateral.

Please provide a copy of a current independent third party valuation of any collateral that would be released as part of the proposed settlement offer. In addition, provide the Agency with current valuations of any property or assets the guarantor may own that may be attached or pursued.

	Collateral Type	Fair Market/Value	Amount	Date of Valuation	Equity
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

- Summary of all assets available to satisfy debts with copies of all post default appraisals and current appraisals.

# 8. LITIGATIVE RISKS

- Summary of pros and cons of litigation

## Examples:

- Litigation Expenses
- Statute of Limitations
- Bankruptcy Exemptions
- Homestead Exemptions
- Jointly Held Property
- Tenants by the Entirety
- Anti-Deficiency States
- Redemption Rights
- One Action Statutes

# WHERE IS THE OIC SUBMITTED?

1. Express and 504 Loan Packages should be forwarded to:  
**Fresno:** [fsc.504liquidations@sba.gov](mailto:fsc.504liquidations@sba.gov) or [fsc.servicing@sba.gov](mailto:fsc.servicing@sba.gov)  
**Little Rock:** [lpsc.504liquidations@sba.gov](mailto:lpsc.504liquidations@sba.gov) or [lpsc.servicing@sba.gov](mailto:lpsc.servicing@sba.gov)
2. 7a Commercial Loan Packages should be forwarded to: [loanresolution@sba.gov](mailto:loanresolution@sba.gov)

Submit Electronically:

(Select Loan Resolution @sba.gov as recipient)

Fax: (202) 481-4674

Mail: U.S. Small Business Administration

Attn: OIC Department

1145 Herndon Parkway

Herndon, VA 20170

# HOW DOES THE PROCESS WORK?

1. A liaison is appointed to make sure the OIC application is complete and a dialogue begins to make sure that all information is produced.
2. Assigned to a review committee and voted upon. The response is either yes, no or counter.
3. Obviously, depending on the response, you can accept or come back with a justification for some other amount to be compromised.



# CRITERIA FOR APPROVING OIC

1. Corroborating Evidence
2. Adequacy of Financial Disclosure
3. Amount Recoverable Through Enforced Collection
  - a. Recoverable Value of any collateral pledged by the Obligor that has not already been liquidated (e.g., the Obligor's personal residence)
  - b. Exemptions available under state and federal law
  - c. Amount that could be recovered from the Obligor's non-exempt assets that were not pledged as collateral through enforced collection proceedings, e.g., by obtaining a judgment and executing on it
  - d. Amount of present and potential income that could be obtained through enforced collection proceedings, e.g., administrative wage garnishment after referral to Treasury
  - e. Litigative risk, i.e., a real doubt concerning the ability of the Lender or SBA to prove its case in court because of legal issues or factual disputes
  - f. The necessary, reasonable and customary administrative and litigation expenses that would be incurred through enforced collection
  - g. The time it would take to enforce collection
  - h. The possibility that assets have been or will be concealed or fraudulently transferred
4. Obligor's Cooperativeness

# DOCUMENTING ACCEPTED OFFER



- The terms of the compromise must be set out in a written, legally enforceable document.
- Cash Compromise (Preferred) – The compromise amount should be paid in one lump sum on a specified date. Generally, payment should be received within 60 calendar days of the compromise approval date.
- Term Compromise (If necessary to maximize recovery) – The compromise amount should not be payable in installments unless installment payments are necessary in order to maximize recovery on the loan (31 C.F.R. § 902.2).
- The amount due under the compromise agreement must be evidenced by a promissory note with a specified maturity date.
- Payment of the promissory note should be secured by collateral.
- The compromise agreement should prohibit release of the collateral securing the promissory note until the entire compromise amount has been paid in full.
- The compromise agreement must provide that in the event of default, the full loan balance, less sums paid on the promissory note, will be reinstated and become immediately due and payable.
- The compromise agreement should provide for remedies in the event of default such as entry of a confession of judgment or delivery and recording of any deed or bill of sale to the collateral securing the promissory note.

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