



OVERVIEW OF THE CENTRALIZED OFFSET OF PAYMENTS REPRESENTING REIMBURSEMENT OF ATTORNEY’S FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

Summary

On June 14, 2010, the Supreme Court unanimously held in *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010), that the term, “prevailing party,” as used in the Equal Access to Justice Act (EAJA), is a “term of art” that refers to the prevailing litigant, and not his/her attorney. Thus, the EAJA award in the *Ratliff* case belonged to the social security claimant and not her attorney. As a result, the Court held that the Department of the Treasury was entitled to offset the EAJA award to reimburse the federal government for a pre-existing debt owed to the government by the claimant. The following guidance explains how the Treasury Offset Program works in connection with awards of attorney’s fees under the EAJA and provides guidance for accepting third-party agreements allowing the Department of the Treasury to pay these fees directly to claimants’ attorneys.

The Bureau of the Fiscal Service¹

The Bureau of the Fiscal Service (Fiscal Service), a bureau of the U.S. Department of the Treasury, in its role as the U.S. Government’s money manager, serves as the disbursing office for the executive branch of the Federal Government (excluding Department of Defense payments). Fiscal Service disburses more than \$2.1 trillion in federal payments annually to more than 100 million payees.² Fiscal Service also operates the Treasury Offset Program (TOP) to collect delinquent federal and state debts by reducing payments made to delinquent debtors.

¹ Effective October 7, 2012, Financial Management Service merged with the Bureau of the Public Debt to form the Bureau of the Fiscal Service.

² See <http://fms.treas.gov/aboutfms/index.html#payments>.

Relevant Legal Authorities

TOP carries out collection authorities set forth in several statutes and regulations.³ The authority to offset reimbursement of fees and costs obtained pursuant to the Equal Access to Justice Act (EAJA),⁴ is set forth in 31 U.S.C. § 3716 and the regulations found in 31 CFR 285.1 (Collection of past-due support by administrative offset), 31 CFR § 285.5 (Centralized offset of Federal payments to collect nontax debts owed to the United States), and 31 CFR § 285.6 (Administrative offset under reciprocal agreements with states).

Treasury Offset Program Operations

TOP is a fully automated system that works as follows: Agencies to which debts are owed (referred to as “creditor agencies”) submit information about delinquent debts to TOP. Federal agencies are required to submit information regarding debts to TOP, but state agencies do so voluntarily. TOP maintains the information in its delinquent debt database. On the payment side, payment agencies prepare and certify payment vouchers to federal disbursing officials (including those at Fiscal Service, the Department of Defense, the U.S. Postal Service and other Federal entities),⁵ who then disburse payments.⁶ The payment voucher contains information about the payment, including the name and taxpayer identifying number (TIN) of the person entitled to receive payment. At the time Fiscal Service disburses payments,⁷ TOP compares the payment information with debtor information in the TOP database. If a payee's name and TIN match the name and TIN associated with a debt, TOP offsets that payment, in whole or in part, to satisfy the debt. TOP then transmits amounts collected to the appropriate creditor agencies.

Creditor agencies can update information in TOP every day of the week, around the clock. Updates include adding a new debt; deactivating a debt that is no longer

³ See 5 U.S.C. § 5514; 26 U.S.C. § 6331(h), 26 U.S.C. § 6402; 31 U.S.C. § 3716; 31 U.S.C. § 3720A; and implementing regulations at 31 CFR Part 285, Subpart A.

⁴ The EAJA is codified in pertinent part at 28 U.S.C. § 2412.

⁵ 31 U.S.C. § 3716(c)(1)(A).

⁶ *Id.*

⁷ Disbursing offices other than Fiscal Service (referred to as “non-Treasury disbursing offices” or “NTDOs”) provide payment data to TOP prior to disbursement. TOP then matches the information with the delinquent debt database and sends information about matches back to the NTDO so that the disbursing official can conduct the offset and send collections back through TOP.

legally enforceable (e.g., subject to a stay in bankruptcy); closing a debt that has been paid or otherwise resolved; changing balances to reflect payments received outside TOP, accrued interest and penalties, and other adjustments; or correcting or updating any other information associated with the debt (e.g., debtor name, TIN, address, etc.). Because TOP can be updated at almost any moment, any information obtained from TOP regarding the existence, legal enforceability, or balance of a debt is only accurate as of the time that the inquiry is made. As a consequence, it is imperative that the government be able to determine the existence of a debt that may be subject to offset as close to the date of disbursement as possible. In the situation where the disbursement involves attorney's fees, for example, checking for debts when the plaintiff files a petition for an award of fees, before the government responds to the petition, or at any time before the court issues its order, generally will be premature, because any debt incurred by the plaintiff before a payment is disbursed is subject to offset.⁸

Disclosure of TOP Information

Legal Authorities. TOP information is protected from unauthorized disclosure pursuant to applicable federal laws, including the Privacy Act of 1974.⁹ Fiscal Service has published a "systems of records" notice (SORN) covering the data in TOP.¹⁰ The Privacy Act permits disclosure of information in several instances. The authorities relevant to disclosing EAJA offset information are: (a) if the individual requests it for him or herself; (b) if the individual provides written authorization for disclosure to a third party; (c) or if disclosure is authorized by a routine use published in the SORN.

⁸ As the Supreme Court acknowledged in *Astrue v. Ratliff*, 130 S. Ct. 2521, 2529 (2010), Treasury modified TOP in 2005 to offset "miscellaneous" payments, such as attorney's fees awards. In response, the government decided to continue direct payments to attorneys only in cases where "the plaintiff does not owe a debt to the government and assigns the right to receive the fees to the attorney." *Id.* (citation omitted). The Court further held that "nothing about the Government's past payment practices altered the statutory text that governs this case." *Id.* As a consequence, a court should not require the government to waive this right by ordering it to honor an agreement between the plaintiff and attorney regarding the payment of attorney's fees before the court approves or authorizes these fees.

⁹ Information about tax debts and offset of federal tax refunds to collect other debts is also protected by 26 U.S.C. § 6103; however, section 6103 does not apply to offset of EAJA reimbursement payments, as TOP does not reduce them to collect federal tax debts.

¹⁰ Treasury/FMS .014--Debt Collection Operations System. See 77 Fed. Reg. 8947 (2012).

Methods of Obtaining Information. TOP has established procedures for obtaining information from its database, which depend upon the requestor and, to some extent, the justification for permitting disclosure.

(a) Individual Request. An individual can request information about his or her own nontax debts by either sending a written request to Fiscal Service or by calling the TOP IVR at 800-304-3107. In either case, TOP will disclose the existence of the debt, the creditor agency name and contact information for the creditor agency. TOP does not disclose balances, because creditor agencies may have different balances in their system that they have not yet submitted to TOP,¹¹ and the balance may be updated with interest and administrative charges prior to the date the payment is disbursed.

(b) Authorized Third Party. An individual may authorize Fiscal Service to disclose information about his or her debts to any third party by providing such authorization to Fiscal Service in writing. Fiscal Service developed the Form 13, available on Fiscal Service's public web site, to provide a quick way to ensure Privacy Act compliance. Per the instructions on the form, once it is received by facsimile or mail, Fiscal Service will make disclosures to the party identified on the form.¹² Fiscal Service will also review other written authorizations, such as debtor letters and powers of attorney, to determine if they are sufficient to authorize disclosure.

(c) Federal Agency Involved in Litigation or Administrative Proceeding. Fiscal Service may disclose information to the Department of Justice or another federal agency when requested in connection with a legal proceeding, or to obtain concurrence in a decision to compromise, suspend, or terminate collection action on a debt.¹³ Such disclosure must be consistent with the purpose for which the data was collected, which is to collect the debt, including actions related to debt collection such as defending the United States in court.

Guidance for Accepting Agreements To Pay Third Parties. In instances where a payee has agreed to have payment made directly to a third party (like the payee's

¹¹ TOP can only collect the balance that the creditor agency indicated in its last records update. If, after TOP collects the entire balance in the system, the creditor agency discovers it has not collected enough, it must re-submit the debt. Conversely, if it has collected too much, the creditor agency is responsible for refunding the over-collection directly to the debtor.

¹² Fiscal Service will only disclose the existence of a nontax debt, due to restrictions in 26 U.S.C. § 6103, and because EAJA payments may not be offset to collect tax debts through TOP.

¹³ Routine use 6 in the SORN.

attorney),¹⁴ to protect the government's interest in collecting a debt the payee owes to the government, the federal agency responsible for payment should determine that no debt exists prior to honoring the agreement to pay the third party. One method for doing so would be for the payee to sign a Form 13 authorizing the federal agency to call the TOP IVR. Because the Form 13 permits the authorized person to obtain any information the individual could obtain, the IVR would disclose information about the creditor agency and any offsets that have occurred to date. However, as previously indicated, the IVR will not disclose balances.

The federal agency also may rely on the routine use for legal proceedings by providing written notice to Fiscal Service representing that it meets the description of the routine use. However, because the debt balance, delinquency date, creditor agency, and other information is not necessary for collecting the debt through offset, requests for such information (as opposed to the mere existence of an outstanding debt) will generally be denied pursuant to the Privacy Act. An agency may make a written case for why additional information regarding the debt at issue should be disclosed under the Privacy Act, and Fiscal Service's Office of Chief Counsel will review the request to see if such additional disclosure is permissible.

Whichever method is chosen, such inquiry, as explained, should be performed as close in time to the issuing of a payment as is practicable, in order to protect the United States' interest in collecting the debt. In addition, if the individual has managed to resolve the debt or otherwise provide reasons for its inactivation, making such inquiries as late as possible enables the TOP system to provide indications that a third-party payment agreement would be acceptable to the United States.

¹⁴ In the attorney's fees context, courts often refer to such a payment arrangement as an "assignment" by the client of the right to the fee award. See, e.g., *Ratliff*, 130 S. Ct. at 2529; *Mathews-Sheets v. Astrue*, 653 F.3d 560, 565 (7th Cir. 2011). But, to be valid, the "transfer" or "assignment" of claims against the United States, including the assignment of an attorney's fees award, 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 attorney's fees, as a practical matter, is not valid unless the government waives the Anti-Assignment Act and agrees to accept the assignment.

As the disbursing office, Fiscal Service performs an essentially ministerial task by paying the person the paying agency directs it to pay. However, because the amount of debt is not disclosed to the paying agency, the paying agency cannot direct Fiscal Service how to split the funds if there is debt. Additionally, there currently is no operational mechanism for an attorney who has a contractual arrangement with a claimant regarding payment of his or her EAJA fees to be paid the remainder of an EAJA payment after it has been offset due to debt. It should be noted, therefore, that debt balances will not be disclosed for the purpose of having a split disbursement to both the attorney and the claimant.

For questions, you may contact Debt Management Services is 202-874-6810.