Bank of America

Via Electronic Delivery

November 27, 2007

Office of the Comptroller of the Currency
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Mail Stop 1-5
Washington, DC 20219

Ms. Jennifer J. Johnson
Secretary
Federal Reserve Board of Governors
20th Street and Constitution Avenue
Washington, DC 220551

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Ms. Mary Rupp
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Notice of Proposed Guidance on Garnishment of Exempt Federal Benefit Funds (OCC: Docket ID OCC-2007-0015; Board: Docket No. OP-1294; TS: ID OTS-2007-0018)

Dear Sir or Madam:

Bank of America welcomes the opportunity to respond to the Proposed Joint Guidance on Garnishment of Exempt Federal Benefit Funds. Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving more than 55 million consumer and small business relationships with more than 5,700 retail banking offices, nearly 17,000 ATMs and award-winning online banking with more than 20 million active users.

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Each year, Bank of America handles more than a million garnishments (predominately post-judgment civil collection actions, and inclusive of levies and other attachment orders) from the 29 states in its retail franchise and from many states outside of its footprint. Garnishments pose financial risk to the bank and require extensive internal resources. This year to date, the cumulative amount demanded in garnishments exceeds $103.5 billion. The bank employs 117 full-time associates to comply with the panoply of state laws governing garnishments. Accordingly, the regulation of garnishments relative to federal benefits is of great interest and impact to Bank of America.

The Request for Comment speaks to the practical issues arising from the conflicts between state and federal laws. The most noteworthy area of "conflict" is with regard to federal exemptions from garnishment. The U.S. Code provisions that exempt benefits payments from garnishment are silent as to how banks are to comply with this requirement; whereas state laws put the onus on consumers to assert the exemption with a court that is competent to confirm funds are indeed exempt. As federal law is silent in this area, banks follow state law. Specifically, if a consumer has funds that are exempt from garnishment under federal or state laws, under state laws, the consumer is required to assert the exemption and the court will determine which funds are exempted. In this regard, state laws recognize the impracticality of expecting banks to be able to unilaterally decide whether garnished funds are exempt; and instead, leave these determinations to courts. Any attempt to make a decision becomes more precarious when a garnished account contains benefits exempt from garnishment commingled with other deposits, as is the case with most accounts. A bank assumes financial risk if it releases funds before the court determines how much of the account balance is subject to federal exemption.

The proposed guidance would require the bank to perform a manual review of deposits on every account subject to garnishment and to make decisions as to which funds are exempt. We believe that the potential burden of the proposed practices on banks far outweighs the potential benefit to consumers. Bank of America processes direct deposits of Social Security benefits and Supplemental Security Income for more than seven million customers. Each year, an extremely small number of accounts receiving only Social Security or Supplemental Security Income by direct deposit is subject to garnishment. During the 12 months, September 1, 2006, through August 31, 2007, Bank of America processed over one million garnishments, issuing from virtually every state. An ad hoc review of bank records during that period revealed that fewer than 1,230 of those one million garnishments reached accounts that received only direct deposits of Social Security or Supplemental Security Income. That represents approximately one-tenth of one percent of all garnished accounts and only two-tenths of one percent of accounts receiving only direct deposits of Social Security or Supplemental Security Income.

We acknowledge that state statutory garnishment processes can impose hardships on consumers. While we appreciate the intent of the proposed Guidance, we believe that it does nothing to mitigate the risks to banks posed by state garnishment laws. The Guidance would become a third source of regulation in an area that is already occupied by confusing and conflicting laws. As a

practical matter, banks will continue to minimize risk by strictly complying with the state laws, resulting in little real relief for consumers.

If a solution is needed, Bank of America respectfully suggests that it lies within the authority of the federal agencies that provide and protect the benefits. These agencies can work with Congress to enact laws that override state garnishment laws and provide banks with a methodology for identifying and preserving exempt funds from garnishment, while safeguarding compliant banks from state law liability.

By way of context, we have outlined below Bank of America's processes for handling garnishments. Next, we offer comments to each of the proposed best practices in the Guidance.

Note: Throughout this comment letter, we refer to "federal benefit deposits." The reference to federal benefits is limited to benefits that are directly deposited by the Department of the Treasury, via the Automated Clearinghouse ("ACH"). These funds constitute the overwhelming majority of deposits of federal benefit payments. We understand that the Guidance recognizes the impossibility of identifying check deposits and applies only to federal benefits that are paid through direct deposit.

The Garnishment Process

The bank is a third-party stakeholder in the garnishment arena; it does not initiate the garnishment nor does it seize account funds (this is the role of courts). When served with a garnishment, the bank is required by state law to hold funds and report them to the court that issued the writ. The bank is potentially liable for funds in the account at the time the writ is served and, in some states, the bank is liable for funds deposited for a period of time after the writ is served. The "freeze" maintains the status quo while the legal status of the funds is determined through civil procedure.

Most states require the consumer to raise exemptions as an affirmative defense to the garnishment. If the account contains deposits from multiple sources, the consumer will prove to the court the extent to which the account balance consists of exempt funds.

Bank of America utilizes centralized administrative units to process garnishments. When a garnishment is served on Bank of America, bank associates will research the account records and place holds on the funds on deposit. The associates then send a notice to the consumer, advising of the garnishment and the freeze on funds. In accordance with the particulars of state laws, the associates will prepare and file an answer or other response with the court. The administrative unit also handles inquiries from creditors and consumers.

On occasion, the administrative unit must prepare answers to interrogatories or appear at a hearing. In a limited number of states, the bank must hire outside counsel to respond to garnishments. Ultimately, the court will direct the bank to release the funds to the consumer or to

remit the funds to the creditor. The bank will apply an administrative fee to the account for processing the garnishment. At Bank of America, the administrative fee is reversed if the bank is notified that the funds are exempt.

Our processes are different for several states that provide statutory relief to consumers whose benefits are garnished. For example, California rules of civil procedure provide an automatic, specific dollar-amount exemption if an account received direct deposit of a California state benefit or federal benefit, notwithstanding any other deposits in the account. The bank is protected if these amounts remain available to the consumer during the garnishment proceedings, and Bank of America does not place holds on the statutory amounts. (CA Code of Civil Procedure 704.080 (2004).) Connecticut recently enacted a similar statute that protects the first $1000 in an account with "readily identifiable" federal benefit deposits that were made in the thirty days prior to garnishment. (Conn. Gen. Stat. 52-367b (2007).)

Proposed Best Practices

1) Promptly notify a consumer when a financial institution receives a garnishment and places a freeze on the consumer's account.

This proposed practice is already a requirement in most states. Garnishment statutes and court rules dictate the content, timing, and delivery of the bank's notice to consumers. Bank of America fully complies with state law requirements for consumer notice. Regardless of whether notice is required by law, it is our policy to mail a notice to the consumer advising of the garnishment and the freeze on funds. Consumers often receive statutory notice from the garnishing creditor, too.

Bank of America makes every effort to provide prompt notice so that the consumer does not write checks on the frozen funds that might create an overdraft. Anecdotally, we note that the more information the bank provides, the more the consumer looks to the bank for advice or relief. When we discuss a garnishment with a consumer, we run the risk of creating the perception that the bank is providing legal advice – so we make every effort to direct the consumer to the creditor or court for answers to questions. On balance, we believe that providing the consumer with notice of a garnishment is a best practice, and do not object to this aspect of the Guidance.

We ask that any final Guidance explicitly recognize that notices to consumers may be regulated by state law. It should provide that compliance with state law requirements constitutes compliance with the Guidance.

2) Provide the consumer with information about what types of federal benefit funds are exempt, including SSA and VA benefits, in order to aid the consumer in asserting federal protections.

The garnishment statutes and court rules for the majority of states in the Bank of America footprint already provide for notice to the consumer of available federal exemptions. In some

states, the notification of available exemptions is included on the face of the writ of garnishment served on the bank and on the consumer. In other states, a separate notice of exemptions is served on the consumer or on the bank. In the latter case, the bank is required to mail the separate notice to the consumer if funds are held in response to the garnishment. Bank of America fully complies with the statutory notice requirements.

The Request for Comment asks whether consumers are adequately informed of their rights when a creditor attempts to garnish their funds. It may be instructive to examine the information contained on the garnishments and on other forms provided to consumers under state laws and court procedures. On their face, these notices would appear to adequately inform consumers of potential federal exemptions.

In the event the Agencies decide that additional notice is needed, we would suggest that the Agencies work with the federal benefit agencies (Social Security Administration, Veterans Administration, U.S. Railroad Retirement Board, Office of Personnel Management) to publish a standard notice for use by the state courts, creditors, and financial institutions in communications with consumers. The notice should encourage the consumer to look to their state process for asserting exemptions.

If the final Guidance includes a best practice on publishing information on exemptions, we ask that the Guidance provide a form notice and safe harbor to banks that provide the form notice to consumers.

3) Promptly determine, as feasible, if an account contains only exempt federal benefit funds, such as SSA or VA benefits.

At Bank of America, the majority of accounts receiving federal benefits also receive deposits from other sources. A recent ad hoc review of twelve months of benefits deposits revealed that 92% of Bank of America customers who receive Social Security or Supplemental Security Income also receive other deposits. Further, an extremely small proportion of these accounts -- two-tenths of one percent (0.2) -- was subject to garnishment during the year. If the proposal is adopted, substantial time and expense will be required to develop technology and perform research that would yield few "benefits only" accounts. With the number of attachments at Bank of America exceeding 90,000 per month, the effort would be staggering while the benefit to consumers would be minimal.

This proposed practice illustrates the difficulty in crafting guidance that is practicable. To ascertain whether an account contains only exempt federal benefits, Bank of America would have to: 1) develop an automated method to compare ACH codes for all protected federal benefits against account deposits; 2) search for the ACH codes in account records (potentially including archived records); and 3) manually search account records (potentially including archived records) for other deposits from any source, including teller deposits, ATM deposits, and

electronic transfers. (Due to the numerous sources of deposits, we understand that it would be virtually impossible to automate the search for "other deposits.")

Notwithstanding regulatory Guidance requiring banks to identify "benefits only" accounts, a bank has no protection from state law liability if it decides not to hold funds. Bank of America would expect to hold all garnished funds until the state court permits release of the funds.

If the Agencies promulgate best practices requiring identification of exempt deposits, we would request that banks be provided the means to reliably identify exempt deposits and reasonable time for technology and upgrades. Specifically, we would request:

1) Specific and easily identifiable ACH codes and descriptions for all exempt federal benefits payments. Banks will rely on the codes and descriptions to develop programming to detect and flag these deposits. To the extent that the current codes are not exclusive to exempt federal benefits or otherwise are not reliable means to identify federal benefits, we would ask for improvements to the codes before banks are required to identify federal benefit deposits.

2) A limited "look back" period for deposits to an account. The account balance is more likely to reflect recent deposits than deposits made months earlier. We recommend that the look back period not exceed the current statement cycle and the full previous statement cycle. Of course, a consumer is free to identify to the state court any federal benefits that were deposited in earlier months.

3) A reasonable length of time (at least twelve months) for the bank to put into place the staffing, training, and technology need to accommodate the changes required under this proposed practice.

Finally, we would again cite the benefits of the process used by the State of California to protect state and federal benefits. California law exempts specific dollar amounts if an account contains certain state or federal benefits, *notwithstanding the presence of other deposits*. This keeps the research simple: the bank can stop the search as soon as a state or federal benefit is found. There is no need to search for additional deposits or determine how to allocate commingled funds.

On balance, we believe that this proposal imposes significant burdens on banks that will not produce meaningful relief for most consumers.

4) Notify the creditor, collection agent, or relevant state court that the account contains exempt funds in cases in which the financial institution is aware that the account contains exempt funds.

The proposed practice would require the bank to make a judgment about the nature of funds on deposit in an account. Even when the bank is able to identify directly deposited federal benefits, it cannot be certain that the funds remaining in the account are only exempt funds. Deposits are

fungible and the majority of accounts that receive federal benefits also receive other, commingled deposits. The bank should not be asked to determine how the balance should be allocated to the deposits or designated as "exempt funds."

We believe that this proposal poses unnecessary risk to the bank. If the Agencies decide that this practice is necessary, we would ask that the practice be revised to read "that the account has received direct deposits of federal benefits, irrespective of other deposits." Again, while the bank may identify exempt deposits, we would still freeze all funds and await a judicial determination of exemption.

To the extent that the Agencies require banks to notify parties of federal benefit deposits, the Guidance should permit banks to include the notice in the usual course of responding to the garnishment. Banks should not be required to produce an additional notice or pleading, nor should banks be required to send notice to parties outside of the usual response stream.

We respectfully suggest that the better approach rests with federal legislation.

5) If state law or the court order will permit a freeze not to be imposed if the account is determined to contain only exempt federal benefit funds, act accordingly if that determination is made.

Bank of America complies with applicable state laws and court orders with regard to freezes of assets, and will continue to do so.

We are not aware of a state that requires the bank to decide whether balances consist solely of exempt funds (the difficulties in making this determination are described above). We follow the instructions of the garnishing court and release funds promptly when the court determines that funds are exempt.

6) Minimize the cost to a consumer when the consumer's account containing exempt federal benefit funds is frozen, such as by refraining from imposing overdrafts, NSF, or similar fees while the account is frozen or refunding such fees when the freeze has been lifted.

Bank of America charges fees in accordance with federal regulation and its contracts with accountholders. The administrative fee is intended to reimburse internal and external expense incurred for researching customer accounts, preparing the answer or other response, answering interrogatories, fielding questions from consumers and creditors, making occasional court appearances, and paying outside attorney fees where outside counsel is required.

When Bank of America is notified by a court or creditor to release funds due to federal exemption, it is our practice to recredit the administrative fee charged for processing the garnishment, as a courtesy to the accountholder. Nonetheless, if the bank is required by

Guidance or otherwise to incur additional expense in researching accounts, we would expect to review and reconsider our policy.

Due to the dynamic nature of transaction accounts, it is difficult to identify an NSF fee or overdraft fee that is the direct result of a garnishment freeze of exempt funds. When a fee is incurred, Bank of America provides multiple avenues for consumers to discuss the fee and our associates have the ability to waive fees that result from the garnishment of exempt funds.

We would ask the Agencies not to supplant the judgment of the bank in establishing and assessing fees.

7) Allow the consumer access to a portion of the account equivalent to the documented amount of exempt federal benefit funds as soon as the financial institution determines that none of the exceptions to the federal protections against garnishment of exempt federal benefit funds are trigged by the garnishment order.

This proposed practice would force a bank to make judgments about the nature of the funds on deposit and to assume liability for funds that are not frozen. (*See* our response to Practice #4, above.)

The better approach is a legislative or regulatory process similar to California's rules of civil procedure, under which a specific dollar amount is not held if an account receives direct deposit of benefits. This bright-line rule affords the consumer a significant amount of protection from the garnishment and does not impose on banks the risks of determining which funds are exempt.

Due to the risks to the bank in the current statutory environment, Bank of America cannot support the proposed practice to allow the consumer access to "a portion of the account equivalent to the documented amount of exempt federal benefit funds."

8) *Offer consumers segregated accounts that contain only federal benefit funds without commingling of the other funds.*

At the request of the Department of the Treasury, Bank of America developed and introduced an electronic funds transfer account ("ETA") in 2001. The low-fee, limited-access account was intended to encourage individuals to receive federal benefits electronically. The ETA account could not accept non-benefit deposits and was not widely accepted by consumers. In 2005, Bank of America discontinued the ETA account and moved the approximately 6,500 ETA customers into other low-fee accounts.

The Department of the Treasury continues to promote the ETA. It may be instructive to ask Treasury about the consumer appetite for the ETA or other segregated accounts.

9) *Lift the freeze on an account as soon as possible under state law.*

Bank of America complies with applicable state laws and court orders with regard to freezes of assets, and will continue to do so. We do not wish to inconvenience consumers any longer than as necessitated by law.

Conclusion

Bank of America supports reforms that will provide relief to consumers without creating undue burdens or risks on banks. Several practices outlined in the Proposed Joint Guidance may help consumers to assert exemptions; however, we believe that the benefits anticipated by the proposed practices cannot occur so long as banks face risks under state garnishment laws. Ultimately, consumers will not see effective relief until state and federal laws strike a balance that protects consumers while affording a workable garnishment process to creditors and banks. Until then, banks will remain reluctantly and squarely in the middle of the garnishment / exemption tug-of-war.

Bank of America appreciates the opportunity to comment. For questions about the content of this letter, please contact Kathleen Kloiber Koch, at 813.225.8174.

Respectfully submitted,

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