New York State
Credit Union League, Inc.
and Affiliates

"Serving and supporting credit unions since 1917."

November 26, 2007

Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Via: E-Mail

RE: Proposed Guidance on Garnishment of Exempt Federal Benefit Funds

Dear Ms. Rupp:

On behalf of the 400 credit unions represented by the New York State Credit Union League, I would like to take this opportunity to comment on the NCUA's Proposed Guidance on Garnishment of Exempt Federal Benefit Funds.

Many of the credit unions that contacted us regarding this proposal expressed empathy for the underlying goal of minimizing the burden placed on some of our most vulnerable members as a result of overly broad restraining orders and levies. Nevertheless, in spite of the worthy ends that this guidance seeks to foster, this guidance employs inappropriate means to do so.

The proposed best practices would have several negative consequences for credit unions. Most importantly, it would result in credit unions making legal judgments (as to which funds are and are not properly subject to garnishment) they are not empowered to make under New York State law; would potentially ensnare credit unions in legal disputes to which they are not a party (i.e., by encouraging them to contact the member when a garnishment order is received and contacting the appropriate court regarding potentially exempt funds); and would place additional burdens on credit unions and all financial institutions (by encouraging increased analysis of accounts to determine whether they contain exempt funds and encouraging the creation and monitoring accounts containing exclusively exempt funds).

BACKGROUND

In order to put our concerns about this proposal in context, it is instructive to get an overview of the current practices in New York State in relation to garnishment.

Currently, Section 5222 of New York's Civil Procedure Law and Rules (CPLR) outlines the steps that creditors must take when garnishing a member's account. Most importantly, creditors must inform debtors within four (4) days that their account is now subject to a restraining order and such notice must indicate in writing those funds that are exempt from garnishment. In fact, the creditor seeking to restrain funds has a constitutional obligation to provide adequate notice

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as to what funds otherwise subject to garnishment may be exempt as a matter of federal law. See *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178 D.C.N.Y., 1982.[1]

When a party seeks to execute a judgment it must demonstrate that adequate notice as to exempt funds has been given to the debtor. If adequate notice is given, it is ultimately the responsibility of the debtor to prove that funds otherwise subject to garnishment are subject to federal exemptions [See *Lincoln Financial Services, Inc. v. Miceli* (Slip Op. 2007 WL 2917242)]. Once issued, a restraining notice is in "every sense an injunction and acts as such under the signature of the lawyer..." As a result, disobedience of a restraining notice is punishable as a contempt of court. See New York Practice 3rd Ed. Siegel §508.

In summary, New York State like many states across the country already has an intricate system of collections which, when implemented properly, apportions responsibilities between the debtor and creditor and which provides ample written notice that certain funds may be exempt from garnishment. Under the existing framework (1) a restraining order is a legally binding document with which all financial institutions are required to comply; (2) it is the responsibility of creditor attorneys to promptly notify the parties that certain funds may not be subject to garnishment, and (3) it is also ultimately the responsibility of a debtor, who is of course subject to a restraining order precisely because a court has found them legally responsible for outstanding debt, to take the steps necessary to demonstrate what funds are exempt under federal and state law. Consequently, in response to a question posed in the Guidance, the existing framework adequately informs members of their rights and does so by placing the burden of disclosure on the appropriate parties.

CONCERNS WITH THIS PROPOSED GUIDANCE

The Guidance asks if there are any practices that would enable a financial institution to avoid freezing funds altogether by determining at the time of receipt of a garnishment order that the funds are federally protected? The very premise of the question is flawed since garnishment orders are court orders with which the credit union is obligated to comply.

The question as to whether funds otherwise subject to garnishment should be exempt from such orders is a legal determination which ultimately must be made by the courts and a legal representative of the parties involved. It is not surprising that some of our credit unions responding to this proposal expressed concerns that in attempting to fulfill its implicit purpose they would be exposing themselves to liability since any decision they make with regard to funds which may or may not be subject to a restraining order are subject to dispute by either the debtor or creditor. In this regard, it should be noted that one or more credit unions informed us they have on their own instituted some of the best practices outlining the proposal and in so doing has exposed the credit union to legal risk and liabilities of which it should not fairly have to assume, especially since the Credit Union is not a stakeholder in the underlying dispute.

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[1] In this case, New York's existing garnishment and execution practices were found to be unconstitutional for failing to give debtors adequate notice as to what funds were exempt as a matter of federal law. Effectively, the court ruled that subject to statutes violated the due process of the court of the Constitution and as a result of this law Reg Z amended its statutes to place the burden on creditors seeking to restrain funds to provide adequate notice to debtors of exempt funds.

Even if this guidance could be implemented consistent with existing legal restraints it places undue burdens on financial institutions. For example, all the credit unions responding to this proposal pointed out that the best practices would entail more staff and time-intensive review of accounts. In addition, New York's experience in the field of garnishments is a cautionary tale arguing against imposing additional mandates in this area. Information subpoenas represent legal orders by creditor attorneys to investigate whether a named individual has funds, which the creditor may be entitled to collect. Some of our larger credit unions receive more than 100 such subpoenas a week and spend up to $23,000 annually complying with these legal documents. Good faith compliance with this Guidance would impose even more costs on credit unions.

The proposal asks if there is operational justification for fees charged against garnished accounts. As New York State's experience demonstrates, the garnishment process already imposes tremendous burdens on the resources of existing credit unions. To impose additional requirements in the form of best practices, while concurrently criticizing credit unions for imposing fees designed to mitigate the cost of such services, ignores the financial reality that guidance in this area may impose on credit unions.

Some credit unions already take steps to assist members with garnished accounts by, for example, quickly making account statements available to members so that they can demonstrate that an account has exempt funds. However, it is one thing for credit unions to have operational flexibility on a case-by-case basis and quite another to impose federal guidelines on an area of law dealt with almost exclusively by state law. To the extent there are problems in this area, the solution lays with legislative enactments which place greater burdens on creditors to insure tat they are acting in good faith to collect debts and inform debtors of their rights.

I hope these comments have been helpful to you.

Sincerely,

William J. Mellin
President/CEO