

November 27, 2007

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

RE: Guidance on Garnishment of Exempt Federal Benefit Funds

Dear Ms. Rupp:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions (FCUs), in response to the National Credit Union Administration (NCUA) and other financial regulators (collectively, the Agencies) request for written comments regarding proposed joint guidance on garnishment of exempt federal benefit funds, including Social Security Income benefits, Veterans' benefits, Federal Civil Service retirement benefits, and Federal Railroad benefits.

NAFCU appreciates the Agencies' efforts in this matter and understands the importance of the issues involved to many benefit recipients across the country. While we support guidance in this area generally, we believe that many of the best practices proposed are burdensome and not warranted.

NAFCU is concerned that many the best practices included in the proposed joint guidance will 1) place significant burden on our members, 2) lead credit unions to make critical determinations that should be made by courts, and 3) force our members to police activities that should be carried out by the parties involved in the garnishment. Further, the proposed joint guidance and best practices may unnecessarily and unfairly place the focus on credit unions rather than other parties that are in better position to ensure that federally protected funds are not improperly frozen.

### **Regulatory Burden**

NAFCU highlights the following best practices in the proposed guidance as especially unnecessarily burdensome:



- Promptly determine, as feasible, if an account contains only exempt federal benefit funds such as SSA or VA benefits;
- Notify the creditor, collection agent, or relevant state court that the account contains exempt funds in which the financial institution is aware that the account contains exempt funds;
- 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;
- Minimize the cost to a consumer when the consumer's account containing exempt federal benefit funds is frozen, such as by refraining from imposing overdraft, NSF, or similar fees while the account is frozen or refunding such fees when the freeze has been lifted;
- 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 triggered by the garnishment order;

The result of instituting any of the best practices listed above would be that when a credit union receives a garnishment order, it would have to, at the least, (1) determine the source of funds in a particular member account, and (2) monitor the affected member's account to determine the source of the funding. Determining the source of funds and continuing to monitor the affected member's account is especially difficult when the funds are not directly deposited. A credit union, in such cases, would have to review any type of check deposit made through a teller, shared branches, or Automated Teller Machines. For many credit unions, this would involve a manual process. As such, this is a significant burden on credit unions and their members.

### **Courts, not Credit Unions, Should Make The Critical Determinations Involved**

Garnishment is a judicial proceeding in which a creditor asks a court to order a person or an institution to turn over property of the person whose property has been subject to garnishment. *See Garnishment*, Black's Law Dictionary (8<sup>th</sup> ed., 2004); *See also*, 38 C.J.S. *Garnishment* § 3, at 248-50 (2003). The garnishee (credit union) must abide by the garnishment order issued by the court. NAFCU believes that the best practices listed below can potentially place credit unions in a position to make determinations that run afoul with a court order:

- Notify the creditor, collection agent, or relevant state court that the account contains exempt funds in which the financial institution is aware that the account contains exempt funds;
- 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;



- 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 triggered by the garnishment order;

NAFCU does not believe the credit unions should assume the responsibility and potential liability associated with practices that would place the credit union in the middle of a controversy between the affected member and the creditor. We believe that it is imperative that credit unions remain neutral in these matters.

NAFCU is cognizant of the fact that several court cases have taken up the issue of garnishment of protected funds. Undoubtedly, some of these cases suggest that a financial institution would be liable in some situations. *See, e.g., Miller v. Bank of America*, 51 Cal. Rptr. 3d 223 (Cal. App. 1<sup>st</sup> Dist. 2006) (review granted by *Miller v. Bank of America*, 154 P.3d 997 (2007)). Importantly, however, the cases do not address the role of financial institutions in protecting the exempt funds from garnishment.

NAFCU believes that it is for the court that issued the garnishment order to determine the roles of the debtor, creditor and garnishee (credit union) in all aspects of the garnishment, including where federally protected funds may be involved. The courts, not the debtor, creditor, garnishee or federal regulators, should make these determinations on a case by case basis. Only the courts are equipped to make these determinations because of their unique competency to apply the law to specific facts.

### **Improper Policing of Activity**

NAFCU does not believe that the burden to resolve problems related to the garnishment of federally protected funds should be placed on credit unions and their members. We believe that the following three practices would improperly force credit unions to police members' share account activities:

- Promptly notify a consumer when a financial institution receives a garnishment order and places a freeze on the consumer's account;
- 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; and
- Offer consumers segregated accounts that contain only federal benefit funds without commingling of other funds;

We note that the parties involved in the garnishment are situated in a better position than credit unions to provide the notice and related information to the consumer. Further, the creation of segregated accounts will require credit unions to ensure that only exempt funds are contained



in such accounts. Accordingly, we encourage the Agencies to exclude these and each of the eight best practices discussed above from the final guidance.

NAFCU believes the following best practice in the proposed guidance is reasonable:

- Lift the freeze on an account as soon as permissible under state law.

Lastly, NAFCU urges the Agencies to take appropriate actions to ensure that the final guidance is not enforced as regulation. NAFCU members often seek guidance to comply with vast and complex laws and regulations. At the same time, however, our members continue to be concerned that guidance is often mistaken for regulation and enforced as such.

NAFCU appreciates the opportunity to comment on the proposed joint guidance. Should you have any questions or require additional information please call me or Tessema Tefferi, NAFCU's Associate Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 268.

Sincerely,



Carrie Hunt  
Senior Counsel and Director of Regulatory Affairs  
CRH/tt

