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November 27, 2007

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
(Sent via e-mail to regs.comments@occ.treas.gov)

Re: Docket ID OCC-2007-0015

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
(Sent via e-mail to regs.comments@federalreserve.gov)

Re: Docket No. OP-1294

Mr. Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
(Sent via e-mail to comments@FDIC.gov)

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
(Sent via e-mail to regs.comments@ots.treas.gov)

Attention: ID OTS-2007-0018

Ms. Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
(Sent via e-mail to regcomments@ncua.gov)

Dear Ladies and Gentlemen:

AARP is pleased to comment on the proposed guidance entitled Garnishment of Exempt Federal Benefit Funds. This document addresses the four issues raised in the request for comments. Although AARP supports the establishment of standards that constitute "best practices" in this area, best practices are mere suggestions or guidance on how banks should comply with orders for garnishment. Absent stricter directives, the best practices alone are not enough to protect exempt Federal funds from garnishment.

Garnishment of Exempt Federal Benefit Funds - Summary of Position

Although some banks already have policies and procedures in place to protect exempt funds from garnishment, AARP urges that all banks maintain mechanisms to protect exempt funds and to implement safeguards for customers whose accounts contain exempt funds. Additionally, the imposition of fees and penalties resulting from the garnishment is unfair and this practice should be suspended. AARP believes that banks can utilize the technology and policies already in place to protect exempt funds from garnishment.

Comments on Stated Questions

1. **Are there practices that would enable an institution to avoid freezing funds altogether by determining at the time of receipt of a garnishment order that the funds are Federally protected and not subject to an exception?**

Currently, there is no consistent approach to the garnishment of exempt Federal funds. The process for garnishing funds is established by state law and generally funds may not be seized absent a court order. Although it is well established that Social Security benefits, SSI benefits, Veterans' benefits, and Railroad Retirement benefits are protected against garnishment, once those benefits are commingled with nonexempt funds, exempt funds are often subject to garnishment. Several large states have laws specifically addressing the garnishment of Federally protected funds. Under Pennsylvania's law, it is impermissible to garnish any bank account holding both exempt and non-exempt funds.[1] California, New York, and Connecticut limit garnishment from an account holding both exempt and nonexempt funds by prohibiting garnishment below a threshold amount. New York's law goes further by extending protection to banks that fail to comply with a garnishment order on the grounds that the funds in the bank account are exempt.[2]

It is difficult to reconcile the argument that the application of garnishment exemptions to commingled funds is a burdensome task when existing banking procedures can be used to identify the source of the funds. Under existing banking procedures, all direct deposits are electronically tagged to identify the source of the deposit. In other words, deposits solely consisting of federally exempt funds are easily identifiable because the source of the deposit is clearly marked as Federal funds. Additionally, Federal benefit payments

[1] 231 PA Code Ch. 3000, Rule 3111.1.
[2] 1 New York Civil Practice: CPLR P 5251.14.

only increase once a year and the same amount is deposited each month to a recipient's account. If banks review the record of deposits to the account over the course of 90 days, they can easily identify which accounts only contain exempt funds as those deposits are usually made once a month and are designated as Federal funds.

While banks may fear legal repercussions for rejecting garnishment claims, the instances of a bank incurring liability for failure to comply with a garnishment order because the funds were exempt are nonexistent. In fact, courts have held banks liable when a bank has ignored clear evidence of the exempt status of funds, and courts have also held banks liable for failing to release funds even after the customer has presented proof of exempt status.[3] Federal law is clear that exempt funds can not be garnished,[4] and Federal law preempts any state court effort to enforce a state based directive requiring garnishment of exempt funds. Agency action should clarify in regulations the authority for banks to reject state garnishment orders.

Banks can also use the "Last In First Out" (LIFO) method to segregate exempt and nonexempt funds in the same account. For those banks reluctant to implement a separate system to address accounts containing exempt funds, the LIFO method is an alternative as it allows banks to safeguard exempt funds within the current framework of banking operations. Under the LIFO method, exempt funds will be considered to have been deposited last and withdrawn first. For example, if $1400 ($1200 exempt and $200 nonexempt) are deposited into an account and a $50 debit is presented the remaining balance would be $1350 ($1200 exempt and $150 nonexempt). This method allows banks to identify electronically deposited exempt funds and freeze only nonexempt funds upon the receipt of a garnishment order.

2. Are there other permissible practices that would better serve the interests of consumers who have accounts containing Federal benefit payments? Are there ways to provide consumers with reasonable access to their funds during the garnishment process?

Although some banks maintain that it is too onerous to differentiate between exempt funds and nonexempt funds, currently several banks have procedures or policies in place to protect customers who have exempt funds directly deposited into their accounts. New York Community Bank, Astoria Federal Savings, Roslyn Savings Bank, and JP Morgan Chase examine bank accounts to determine whether they contain only electronically deposited Federally exempt funds, and they "will not honor a restraining order as long as it can be determined that the accounts contain only exempt funds, such as SSI."[5] Banco Popular, a bank based in Puerto Rico with U.S. and Caribbean operations, will reject a garnishment order if account deposits for the past 90 days are entirely comprised of

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[3] *Chung v. Bank of America*, 2004 WL 1938272 (Cal. Ct. App. 2004) (unpublished) (stating that bank garnishee had duty to verify whether funds were exempt, not creditor); *Lukaksik v. Bank North*, 2005 WL 1219755 (Conn. Super. Ct. Apr. 26, 2005) (plaintiff pleaded exceptional circumstances sufficient to maintain action for breach of fiduciary duty).

[4] 42 U.S.C. § 407.

[5] Margot Saunders, National Consumer Law Center, Testimony before the Senate Committee on Finance, (Sept. 20, 2007).

exempt funds. Upon discovery of commingled exempt and nonexempt funds, Banco Popular notifies the creditor. This practice of reviewing accounts to determine the source of deposits and identifying those that only contain exempt funds should be the standard practice for all banks.

Banks should promote and educate their customers about Electronic Transfer Accounts (ETA) sponsored by the Department of Treasury. An ETA is a low cost account at a bank, credit union or savings and loan to which Federal benefit payments are deposited electronically. Anyone who receives a Federal benefit payment is eligible and the maximum monthly account fee for an ETA is $3.00, but it could be offered for less at the discretion of the ETA provider. Currently, an ETA is only available through participating Federally insured financial institutions and few recipients are aware of their existence. Although maintaining a large number of ETAs is not a lucrative venture for banks, it is one option for banks to avoid spending time and resources on handling garnishment requests.

Another option is to require banks to offer separate bank accounts that are primarily for exempt fund deposits with no commingling of funds from other sources. For example, Astoria Federal Savings offers a checking account designed specifically for individuals over the age of 50 without charging a monthly fee. By requiring banks to offer accounts that are solely for the deposit of Federal benefit payments, it will be easier for banks to segregate funds.

After a bank account has been frozen, the account holder is unable to write checks or withdraw money from the account. There are no other means of providing recipients with access to their exempt funds during the garnishment process other than canceling direct deposit and requesting paper checks.

3. Are customers adequately informed of their rights when a creditor attempts to garnish their funds? What could be done to provide consumers with better information?

Although most states require that bank holders be notified after their accounts have been frozen, most recipients of exempt funds are generally not aware of the exceptions to garnishment. In fact, most recipients are unaware even at the time they begin receiving benefits that their benefits are exempt from garnishment. It is only after the account has been frozen that recipients learn that they can file a claim with a debt collector to have those federal benefits (e.g., Social Security, SSI, Veterans', and Railroad Retirement benefits) exempted from garnishment. Federal law is silent on who is responsible for informing recipients at the outset that their funds are exempt from garnishment. The Social Security Administration's website also fails to educate recipients of the exemptions that are available to protect their benefits. Unfortunately, many of those who learn about the notice and opportunity to seek exemption from garnishment learn only after they have suffered tremendous financial hardship.

Although the Federal government is responsible for distributing benefits, banks can do their part by informing account holders that their funds are exempt from garnishment. For example, if a bank requires individuals to use separate accounts for the deposit of their benefits, then at the time the account is opened the bank should inform the recipient the funds are protected from garnishment. Banks can also provide a notice on the monthly bank statement for those customers receiving exempt Federal benefits advising them of the exempt status of their benefits.

4. Institutions often charge customers a fee for freezing an account. How do these fees compare to those charged separately when an account holds insufficient funds to cover a check presented for payment? Are there operational justifications for both types of fees to be assessed?

Generally, the cost to account holders for freezing a bank account ranges from $100 to $175 dollars. Once an account is frozen, insufficient funds fees range from $25 to $39 dollars per check or transaction presented for payment. It can be quite lucrative for a bank to freeze an account. Typically, after an account is frozen, checks written prior to an account holder's knowledge of the freeze are returned for insufficient funds. These fees can dramatically reduce or wipe out entirely an individual's benefits. Losing benefits to cover bank fees is a common occurrence and is a matter of serious concern. Currently, it is standard practice in the banking industry to apply incoming deposits against outstanding overdrafts regardless of the source of the funds. AARP urges that banks be prohibited from assessing overdraft and other punitive fees against accounts consisting entirely of exempt Federal funds.

The Federal government saves money through the direct deposit of Federal benefits, and current recipients of Federal benefits are strongly encouraged to switch to direct deposit. And there is an increasing push to require new recipients to have their benefits directly deposited. Given the concerns raised by improper garnishment, however, the active promotion of direct deposit should be accompanied by providing additional protections to the recipients of Federal benefits from garnishment.

One potential alternative would to declare the assessment of fees against accounts containing only exempt funds an unfair trade or business practice. In 2006, banks earned approximately $17.5 billion dollars from fees assessed against customers who have insufficient funds in their bank accounts. Typically, the bank receives the garnishment order, freezes the bank account, and then notifies the customer of the freeze or hold on the account. Most often the customer has already written checks in good faith prior to receiving notification of the account freeze. Although it is well settled that banks may impose fees for legitimate non-garnishment related items that create an insufficient funds balance in an account, it is unfair for a bank to charge customers penalties and fees for an insufficient funds balance triggered by an improper garnishment. This is especially harsh for those receiving Federal benefits as their sole source of income. Debt collectors who pursue bank accounts that contain exempt Federal funds could be required to reimburse the bank or bank account holder for any freeze or insufficient funds fees charged to the account. Banks or debt collectors could also be required to reimburse freeze or

insufficient fund fees after it has been determined that those fees were incorrectly imposed against an account containing exempt Federal funds.

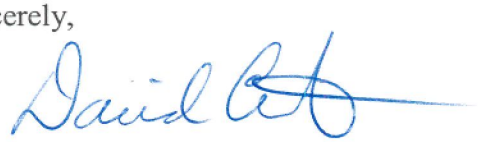
Conclusion

Although the "best practices" proposed by the various agencies provide guidance to banks on how to address the garnishment of exempt funds, these practices do not provide the tangible and immediate relief necessary to protect Federal benefits from garnishment. Federal agencies regulating the banking industry can and should do more to protect individuals, particularly those dependent upon Federal benefits, by requiring banks to implement procedures that safeguard exempt Federal funds. Although the Federal government is primarily responsible for ensuring that exempt funds are protected, it should be noted that states play an important role in the garnishment process and should be encouraged to revisit their policies on this issue.

The fact that many banks have already put mechanisms in place to prevent the garnishment of exempt Federal funds undercuts the position, taken by some, that implementing safeguards or policies to protect exempt Federal funds would be too costly or time consuming. This argument is further diminished by existing technology and tools to segregate funds that are widely available to protect exempt funds with little or no additional cost to banks. With 48 million recipients opting to receive their benefits via direct deposit, and with efforts underway to increase the use of direct deposit as the sole means of receiving benefits for future recipients, the time and need to address the garnishment issue is now.

AARP appreciates the opportunity to provide comments on the proposed guidance addressing the garnishment of exempt funds. If you have any questions or need further assistance, please do not hesitate to contact Evelyn Morton of the Federal Affairs staff at (202) 434-3760.

Sincerely,



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