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TESTIMONY OF

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Before the

COMMITTEE ON FINANCE

of the

UNITED STATES SENATE

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Statement Required by 12 U.S.C. § 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

INTRODUCTION

Chairman Baucus, Ranking Member Grassley, and members of the Committee, my name is Julie Williams, and I am Chief Counsel and First Senior Deputy Comptroller of the Office of the Comptroller of the Currency (OCC). Today's hearing highlights the hardships faced by recipients of Social Security, Veterans', and other federal benefits when they are unable to access funds in their deposit accounts to meet their day-to-day living expenses because the account has been frozen in response to a garnishment order. We appreciate the opportunity to present the views of the Office of the Comptroller of the Currency on this problem. My written statement covers four key points:

First, we completely agree that there is a problem that needs to be addressed.

Second, this problem is complex. No one agency has the solution. A solution will require involvement and actions by multiple agencies, including those before you today and other agencies as well. The issues presented include unclear and undefined provisions of Federal law, state laws and judicial processes that may unintentionally produce results conflicting with Federal public policy objectives, and questionable practices by debt collectors. The issues presented also implicate important Federal policy objectives affecting how Federal benefits payments are made.

Third, there are certain things that the federal banking agencies can do – and we will do – to help, and I discuss those initiatives later in this statement. But the actions that we can take are not a complete solution.

Finally, obtaining a comprehensive resolution of these issues will require coordinated action by multiple parties on multiple fronts. It could well require Congress to enact legislation to clarify intersections of Federal and State law, unless agencies such

as the Social Security Administration and Department of Veteran's Affairs conclude that, under their respective statutes, current law provides them sufficient authority to provide definitive answers to key unresolved issues in this area. We defer to those agencies to advise the Committee on whether or not they have sufficient authority to address these concerns under existing law.

Description of the Problem

The process for garnishing a consumer's deposit account is generally established by state law and state judicial processes. While the specific processes vary among states, they generally contain some common elements. For example, a creditor typically will obtain an order from a state court enabling collection on a default judgment by garnishing or levying against the debtor's funds or other property. Generally, state laws require that the debtor be provided notice of the issuance of, or request for, a garnishment or similar order. In many cases, state laws or court orders direct a financial institution receiving a garnishment order to place a freeze or hold on the customer's account. This step was designed to preserve the funds in the account and to provide the customer with an opportunity to assert any exemptions or challenges to the garnishment order. However, as we see today, it may also result in significant hardships for customers because they are unable to use the account for any purpose during the freeze. Where financial institutions impose a freeze on an account, as noted above, they are doing so pursuant to court orders or state law procedures.

Many state laws also prescribe the contents of the notice, and some require that information be provided to the debtor about the types of funds that are exempt from

garnishment and about how to claim those exemptions. For example, the laws of Arizona, Florida, Illinois, and New York provide model language for the notice to the debtor, which includes a statement that state and federal law may limit the types of funds that may be garnished. The model notice provides specific examples of exempt funds such as Social Security and other federal benefits, and it explains how a debtor may claim an exemption. Generally, a consumer may request a hearing on these claims, and these notices also typically provide information on how to request a hearing. In most states, either the creditor or the court provides these notices to the debtor. In a small number of states, a third party such as a depository institution that receives a court garnishment order must mail a copy of the order and applicable notices to the debtor.

In order to claim that some or all of the funds targeted by a garnishment order are exempt, state laws typically appear to require the debtor to assert the exemption(s) as an affirmative defense to the garnishment proceeding. The state laws with which we are familiar generally do not impose an affirmative obligation on depository institutions to determine whether the targeted assets are exempt from garnishment. A couple of states take a different approach, however. For example, Pennsylvania and California provide an exemption to their general procedures in debt collection cases involving Social Security or other specified benefits that are directly deposited into an account on a recurring basis. It is our understanding that Pennsylvania rules provide that where the debtor's funds are deposited electronically on a recurring basis and are identifiable as exempt, the bank or other financial institution holding the account should not attach any of the funds on deposit. California law provides that a specified amount in each account containing direct deposits of Social Security funds may not be attached ($2,425 for

accounts with one depositor and $3,650 if two or more depositors receive Social Security benefit payments). The debtor must follow state procedures and request an exemption for any funds in excess of the statutory minimum amounts.

Changes in technology, and changes in business practices, appear to be contributing to the severity of the recent concerns relating to debt collection actions against consumers receiving federal benefits payments. Over the past several years, a market has developed for the purchase of old, previously uncollectible consumer debts. These debts often are purchased in bulk from creditors, sometimes for pennies on the dollar, by so-called debt buyers. These collection accounts sometimes are repackaged and sold to small debt collection firms whose business model involves flooding small claims courts with collection actions. New reports indicate that these filings often may contain incorrect addresses for the alleged debtors, resulting in these individuals never receiving notice of the collection action. Many mass debt collection filings result in default judgments against the debtor. Advocates for these debtors assert that these filings sometimes lack documentary evidence of the validity of the debt and have been permitted to go forward even where questions exist concerning whether the debt collection is time-barred.

When a court grants a default judgment, debt collectors can now use e-mail to blanket depository institutions with demands on any funds on deposit belonging to the debtor. Frequently, these demands are mass mailed to banks in circumstances in which the debt collector may not have any reason to believe that a debtor has an account at the institution, or that any such account contains funds that lawfully may be attached.

When a deposit account is frozen pursuant to a court order, consumers generally are required by state laws or regulations to establish that their accounts contain exempt funds before the garnishment order may be dissolved, and before the freeze on access to the funds may be lifted. Unfortunately, nothing appears to prevent the debt collector from filing a new claim, and serving a depository institution with a new court order, on a regular basis thereafter seeking those same funds. We understand that some debt collectors repeatedly seek to levy against accounts after the consumer has established that the account contains exempt funds – and even though the debt collector does not have a reasonable basis to believe that nonexempt funds have since been deposited into the account that may be available for attachment or garnishment. In these situations, the consumer must again raise the exempt status of funds in the account as a defense to the action, and repeat the procedural steps required by state law, or else risk loss of his or her funds. These types of processes can present significant consumer hardships, and they are particularly daunting for elderly and disabled recipients of federal benefits payments.

The Problem is Complex

The issues underlying this problem are complex, in no small part due to significant uncertainty regarding the scope and application of provisions in Federal law protecting recipients of federal benefits payments against garnishment and attachment of their funds. For example, section 207 of the Social Security Act provides that "the right of any person to any future payment under this subchapter [of the SSA] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment,

garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."[1] This describes the basic protections provided for Social Security benefits. But it does not address what depository institutions should do when faced with court-issued garnishment orders directing a freeze or hold on funds in a customer's account – which may or may not lead to a garnishment. To our knowledge, the Social Security Administration has not spoken to this point and its internal Program Operations Manual System ("POMS") provides that the "responsibility [of the Social Security Administration] for protecting benefits against legal process and assignment ends when the beneficiary is paid" and "if a beneficiary is ordered to pay his/her benefits to someone else, or his/her benefits are taken by legal process, he/she can use [section 207] as a personal defense against such actions."[2] Our informal consultations with legal staff of the Social Security Administration have been consistent with the view that section 207 is a defense available to be asserted by the customer defense against garnishment.

Courts generally have reached similar conclusions on the matter, treating federal benefits as property rights protected by the Due Process Clause, and holding that the applicable garnishment or similar procedures established by state law must provide consumers sufficient notice and opportunity to contest the garnishment.[3] However,

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[1] 42 U.S.C. § 407(a). Payment of Veterans' benefits "shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *See* 38 U.S.C. § 5301.

But federal benefits may be garnished or setoff in certain circumstances. 42 U.S.C. § 659 (permitting garnishment for child support and alimony obligations); 31 U.S.C. § 3716 (permitting federal administrative offset notwithstanding § 207); *see also Lockhart v. U.S.*, 546 U.S. 142 (2005) (permitting administrative offset of Social Security benefits to repay defaulted federal student loans).

[2] POMS § GN 02410.001.

[3] *See e.g., Matthews v. Eldridge*, 424 U.S. 319, 332 (1975) (recognizing continued receipt of Social Security disability benefits are property rights protected by the Due Process Clause); *McCahey v. L.P. Investors*, 774 F.3d 543, 550 (2d Cir. 1985) (finding New York's statute requiring notice of garnishment, a "partial list" of exempt funds that included Social Security, and a "prompt opportunity" to be heard on exemptions claims, met Due Process Clause standards); *Finberg v. Sullivan*, 634 F.2d 50, 62-63 (3d Cir.

according to this line of cases, the burden remains on the consumer to raise the protections of section 207.[4] Moreover, we understand that neither the Social Security Administration nor the Department of Veterans Affairs has issued legal opinions that address the relationship between the protections in the federal laws they administer and various state law and state judicial procedural requirements associated with garnishment of protected federal benefits.

There also are important issues under Federal and state law about whether certain types of debt collection practices described above are unlawful. For example, the Fair Debt Collection Practices Act ("FDCPA") prohibits third-party debt collectors from employing deceptive, unfair, or abusive conduct in the collection of consumer debts incurred for personal, family, or household purposes. Creditors are generally exempt when they are collecting their own debts. The FDCPA prohibits making false, deceptive, or misleading representations in connection with collecting a debt; using unfair or unconscionable means to collect any debt; and engaging in conduct that harasses, oppresses, or abuses any person in connection with collecting a debt. It also lists examples of specific prohibited acts or practices that are deceptive, unfair or abusive, but its prohibitions are not limited to these examples.

The Federal Trade Commission and the federal banking agencies may enforce compliance with the FDCPA against the entities over which they, respectively, have

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1980) (finding the garnishment process established by Pennsylvania law, which did not include notice of exemptions or require a prompt hearing, was unconstitutional).

[4] One New York court expressly declined to place the burden on banks to determine whether funds in an attached account include exempt Social Security funds. *See Huggins v. Pataki*, 2002 WL 1732804, *4 (E.D.N.Y 2002) ("[T]he mere fact that banks are now better able to determine that payments are exempt" does not affect the case law precedent. "Perhaps arguments directed to the state legislature will produce a change in the law."). *But cf., Mayers v. New York Comm. Bancorp, Inc.*, 2005 WL 2105810 (E.D.N.Y.) (denying a motion to dismiss a challenge to state garnishment procedures that do not require a bank to determine if an account contains Federal benefits funds before freezing the account.)

jurisdiction; however, the third-party debt collectors whose practices have been highlighted recently are not entities subject to our supervisory jurisdiction. Moreover, the FDCPA *prohibits* the issuance of any regulations by the FTC or the banking agencies to implement its provisions. In light of this inability to specify in regulations the particular practices that violate the FDCPA, and in the absence of legislation, there will continue to be uncertainty about the legality of debt collection practices that have been criticized recently as abusive and unconscionable, such as seeking to attach funds in an account when the debt collector has been put on notice that the account contains solely exempt funds.

What the Federal Banking Agencies Can and Will Do

Notwithstanding the unresolved issues described above, there are actions the OCC and the other Federal banking agencies can and will take to try to alleviate important aspects the problem and hardship described above. But what we can do is by no means a comprehensive solution to the problem.

The OCC and the Federal banking agencies have reviewed the steps we can take, consistent with our respective regulatory and supervisory authority, to address some of the consumer hardships associated with the process of garnishment of Social Security, Veterans' and other specified Federal benefits payments. One step that we can take is to provide supervisory guidance to our regulated institutions concerning these matters.

The OCC and other federal banking agencies are issuing for comment proposed guidance on practices by depository institutions relating to the garnishment process as it affects accounts containing exempt funds. The proposed guidance reflects many of the

same concerns contained the questions posed in the Committee's letter of invitation. Specifically, in order for institutions to minimize the hardship to federal benefits recipients *and* comply with state garnishment orders, the proposed guidance advises institutions to have policies and procedures in place to expedite notice to the customer of the garnishment process and the release of customer funds as quickly as possible. The proposed guidance recommends the following practices:

- Promptly notifying a customer when a bank receives a garnishment order and places a freeze on the customer's account;
- Providing the customer with information about what types of funds are exempt, including SSA and VA benefits, in order to aid the customer in asserting federal protections;
- Promptly determining, as feasible, if an account contains only SSA, VA, or other readily identifiable exempt funds;
- Notifying the creditor, collection agent, or relevant state court that the account contains exempt funds in cases in which the bank 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 funds, acting accordingly if that determination is made;
- Minimizing the cost to a customer when the customer's account containing SSA or VA benefit funds is frozen;
- Granting the customer access to a portion of the account equivalent to the documented amount of SSA and VA benefits as soon as the institution determines that none of the exceptions to the federal protections against garnishment of SSA, VA, or other exempt funds are triggered by the garnishment order;
- Offering customers segregated accounts that contain only SSA and VA benefits without commingling of other funds; and
- Lifting the freeze on an account as soon as possible in accordance with state law.

The OCC also is taking steps to provide customers of national banks with more information to help understand what their rights, protections, and obligations are with respect to federal benefits and the garnishment process. We have been working with the Financial Management Service of the Treasury Department to develop, in a user-friendly "Questions and Answers" format, consumer information on garnishment of Social Security payments in a deposit account; what a consumer can do if his or her bank account containing Social Security benefits payments is frozen as a result of a garnishment order; and, what a consumer can do if he or she faces repeated garnishment attempts after a debt collector has been notified that the consumer's account contains exclusively protected federal benefits. We will be posting this information to www.helpwithmybank.gov, the financial consumer website sponsored by the OCC, in the very near future.

Need for Legislation and Rulemaking

Even though the Federal banking agencies are taking a number of steps jointly and individually to help minimize consumer hardship in situations involving attempted garnishment of federal benefits, a comprehensive resolution of these issues will be challenging, and will require coordinated action by multiple parties on multiple fronts. No one body, including bank regulators, can fully solve these issues.

As an initial matter, the OCC is encouraged that the Social Security Administration has recognized this complexity and has called for formation of an interagency working group to tackle these issues on a coordinated basis. The OCC looks forward to working with the Social Security Administration and the other participants in

this group to identify areas in which clarification of the law, and enhancement of consumer protections consistent with current law, would be appropriate.

As noted above, however, resolution of these issues could require rulemaking by the Social Security Administration, Department of Veterans Affairs, and other benefit-administering agencies, under their respective statutes, if they conclude that those laws currently provide them sufficient authority in this area. We defer to those agencies to advise the Committee on whether or not they have sufficient authority to address these concerns under existing law. It also is possible that some solutions may require Congress to adopt new legislation.

The issues that need to be addressed include: (1) whether the protections of the Social Security Act, and other federal benefits statutes, against garnishment of federal benefits payments encompass and supersede court-ordered freezes of consumer deposit accounts; (2) whether, and to what extent, those Federal laws impose affirmative duties on parties other than the creditor (or debt collector) and the benefit recipient, to investigate, identify and preserve federal benefit payments from garnishment; (3) whether state laws and procedural requirements that appear to place the burden on consumers to establish to the satisfaction of the courts that funds in their deposit accounts are exempt from garnishment, permit depository institutions not to impose a court-ordered account freeze if the institution can readily determine that the account contains solely exempt funds; (4) whether the Fair Debt Collection Practices Act prohibits particular third-party debt collection practices that have emerged in recent years affecting federal benefits recipients; (5) whether consumers have adequate information about their rights and avenues of legal recourse with respect to garnishment of federal benefits payments, and if

not, how to get it to them; and (6) the impact of responses to these issues on critical government objectives relating to direct deposit of federal benefits payments.

CONCLUSION

In conclusion, Mr. Chairman, and as I summarized at the outset of my statement, there is a very real and meaningful problem, and we must all work to solve it. The Federal banking agencies are addressing the aspects of the issue that are within their respective authorities, but a comprehensive resolution will require action by other key Federal agencies such as the Treasury Department, the Social Security Administration, and the Department of Veterans Affairs, and potentially the Congress and state legislatures. The OCC stands ready to participate in this effort.