CBA | CONSUMER BANKERS ASSOCIATION

Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

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

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1—5
Washington, DC 20219

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

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Electronic Delivery

Dear Sir/Madam:

The Consumer Bankers Association ("CBA") is pleased to submit comments on the processing of attachments, executions and similar forms of legal process seeking funds from deposit accounts (referred to herein as "Garnishments"). The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

Proposed Guidance

The federal bank regulatory agencies (the "Agencies"), including the Office of the Comptroller of the Currency, published a list of proposed "best practices" entitled

Garnishment of Exempt Federal Benefit Funds in the Federal Register (the "Guidance") on September 28, 2007, and solicited comments on concerns associated with Garnishment of exempt federal benefit payments, such as Social Security benefits, Supplemental Security Income benefits, Veteran's benefits, Federal Civil Service retirement benefits, and Federal Railroad retirement benefits. Under federal law, subject to certain exceptions, these payments are generally exempt from Garnishment orders. These federally protected benefits often constitute an important portion of a recipient's income. Consequently, when a financial institution imposes a hold on, or takes money from, a deposit account containing these exempt funds pursuant to a Garnishment, the depositor may suffer hardship even if the hold is temporary, while the Garnishment and the recipient's exemption rights are being processed by the financial institution or court. The Guidance at issue is intended to mitigate that hardship.

Operational Overview

Many of what appear to be primary assumptions underlying the practices suggested in the Guidance are flawed and present infeasible or impossible operational challenges. For example, the Guidance seems to assume that financial institutions can readily identify accounts that receive government benefit funds. A number of years ago, a customer had to notify the financial institution and obtain its approval before establishing a direct deposit arrangement with the government or other benefit payors. Today, however, the process of arrangement for such payments does not involve the bank; it simply receives credits through the Automated Clearing House system, without knowing the nature of the payment—that is, whether it is exempt income or otherwise. Similarly, when paper deposits are made into an account, the financial institution does not review or record the nature of the funds, beyond, perhaps noting the source of the funds as part of its determination of whether or how long to place a funds availability hold on the deposit. Once that process is completed, the bank does not normally retain this information, other than by reference to microfilm or electronic copies of the paper that was deposited. In other words, at many (if not most) of CBA's member financial institutions, a labor-intensive, manual identification process would be required if the bank were required to research every account reached by a Garnishment to determine whether funds might be

exempt—a time-consuming process that carries with it substantial risks of error. Furthermore, even if it can be determined that benefit funds are in an account, there are no clear legal rules under state or federal law to determine (i) to what extent the character of the funds as benefit funds lose that character when commingled with other funds in a deposit account, or (ii) if they persist as benefit funds when deposited to a deposit account, how the bank determines what amount of funds in the account still constitutes benefit funds among a number of possibilities, such as when there are other non-benefit deposits, various payments/withdrawals from the account, joint ownership, etc. These problems are further complicated when the Garnishment order is continuing in nature, i.e., it must be applied to future deposits. Moreover, to our knowledge, the operational capability to offer accounts that allow direct deposit of only Social Security benefits, for example, is extremely limited and fraught with difficulties because of the dynamic nature of deposit accounts; even where an attempt to implement such accounts has been made, a lack of consumer interest in establishing such a limited-use account has made such accounts infeasible.

Essentially, when a Garnishment is received, the bank is the innocent third party caught between a creditor and a debtor, operating without clear rules governing how it is supposed to respond, but having all the liability if it errs in favor of one side or the other. There are many state laws governing Garnishments, some prescribing notices, some containing exemptions similar to, but usually in some respect different from, the exemptions available under federal law; and the procedural aspects of Garnishments vary from state to state. Any uniform rule or guidance will inevitably conflict with state laws and could impose operational burdens banks are incapable of resolving, thereby increasing liability and operational costs and introducing confusion to the Garnishment process. This will benefit neither bank nor depositor. In our opinion, imposition of a set of federal requirements (or even regulatory "guidance") superimposed over the various state statutes already in existence would do far more harm than good.

Process Improvements

One step that CBA's members believe would facilitate compliance with laws relating to exempted benefits deposits would be a standard identification process implemented by

those entities providing benefit payments to recipients through the Automated Clearing House system. While codes currently exist to identify such payments, they lack the clarity needed to create the fully operational automated systems that are necessary to handle the extensive volume of garnishments received by financial institutions.
As further discussed below, a standard government-produced form explaining depositors' rights in the Garnishment context would be helpful in establishing a base level of understanding among consumers as to their rights. CBA stands ready to explore these and any other ideas that could mitigate the effects of Garnishments on depositors' accounts within the constraints of applicable law.

The following are CBA's specific responses to the proposed Guidance, addressing each of the questions posed by the agencies.

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?

Response

In order to fully respond to this question, there must first be an appreciation of the complex interplay between federal law and state law as to certain benefits payments, including those from Social Security and public benefits. It may be useful to examine the current practice under California law, which is based upon an extensive state statutory scheme. Examination of a single state law should not be viewed as proposing a simplistic solution to the issues at hand. It merely forms a context within which to explore the machinations of the Garnishment process. Indeed, the very complexity of the various state laws applicable to the Garnishment process is the primary reason no universal, federal process is workable.
When a civil Garnishment order is served on a California financial institution under a writ of execution issued under California's statutory process for the enforcement of judgments, if the deposit account receives direct deposits of Social Security benefits or

other specified types of public benefits, the account enjoys an automatic exemption, without the account owner having to seek a stay of the order, subject to certain dollar limitations set forth in the law:

- $1,225.00 where one depositor is the designated payee of a directly deposited public benefits payment other than Social Security benefits.
- $2,425.00 where one depositor is the designated payee of directly deposited Social Security benefits payments.
- $3,650.00 where two or more depositors are the designated payees of directly deposited Social Security benefits payments.

Garnishments Affecting Accounts Receiving Direct Benefit Deposits

Upon service of a Garnishment and following the bank's determination that the judgment debtor has a deposit account, the financial institution examines the account to determine whether the account receives directly deposited benefits that qualify for the automatic exemption. This investigation includes a review of the transaction history of the deposit account and an examination of regularly recurring ACH credit entries posting to the deposit account, if any, to determine if such entries originate with the United States Treasury or a California state agency. Upon confirming that the entries originate with the Treasury or a state agency, the financial institution examines the transaction history and the ACH record to confirm that the entries are Social Security benefits or other qualifying public benefits. Once the exempt nature of the entries are confirmed, the financial institution automatically asserts the exemption granted under California law on behalf of its depositor up to the statutory amount and reports the results through a memorandum of garnishee delivered to the levying officer within ten business days of the levy. While the Social Security benefits exemption granted under California law do not appear to cover the entire population of federal exemptions noted in the Guidance, by asserting such exemption, any freeze placed upon the account pending the exemption determination is relatively short, generally no longer that two or three days, at least to the extent of the automatic state statutory exemption or the state statutory exemption, or the balance in the account, whichever is lower. It does not matter whether the account receives funds from other, non-exempt sources—the full statutory exempt amount is released to the depositor,

without applying tracing protocols to a commingled balance. California law further protects depositors by requiring the bank to hold, under a freeze, any balance in the account above the automatically exempt amount, allowing the depositor and creditor to seek guidance of the court system to determine whether the exemption should extend beyond the statutorily specified amounts.

It is further our unconfirmed understanding that California may be the only jurisdiction in which such automatic exemptions are summarily granted by financial institutions to direct deposit Social Security and public benefits payments (or other, similar payments). Other jurisdictions require the judgment debtor to assert an exemption affirmatively, including those granted under the Social Security Act retirement and survivors' benefits, supplemental security income benefits, and disability insurance benefits. The duty is on the depositor to exploit the statutory exemptions.

As noted above, in the event a Social Security benefits recipient or the recipient of other federally protected payments has such payments directly deposited into a deposit account, a financial institution housing the deposit will be able in the ordinary course to determine the nature of recurring credit entries to a deposit account by reviewing the ACH record. Thus, in jurisdictions outside of California, if the deposit account is solely funded by such federally protected payments, a financial institution may be able to conclude with some reasonable degree of confidence that the funds in the account are not subject to the Garnishment order and could elect not to block such apparently protected funds. As a practical matter, however, most deposit accounts have deposits from multiple sources. The tracing of exempt funds may become difficult, even if a financial institution could identify federally protected funds that are not subject to execution.

The challenge for the financial services industry is segregating federally protected, exempt funds from other funds within a deposit account in instances where an account is funded from multiple sources. No commonly accepted protocol for tracing commingled deposits is available to our knowledge. While at least one jurisdiction (California) may use the "lowest intermediate balance principle" in order to identify exempt funds, no uniform rule appears to exist nationally. Thus, to the extent commingled deposits are at issue, a financial institution may at its peril elect to block suspected federally exempt funds in response to a Garnishment (if automatic exemptions are unavailable in the

jurisdiction at issue). If the funds in a deposit account are not in fact exempt, the financial institution may incur liability to the judgment creditor through a creditor's direct action if it grants availability to the funds to the judgment debtor and elects to disregard the Garnishment.

Benefits Deposited by Check, etc.

While many (if not most) recipients of Social Security and other federally protected benefits payments have their payments directly deposited into a deposit account with a financial institution through ACH credit entries, some recipients may elect to receive their payments regularly by check. Under California law, the levying officer notifies the depositor of the pending Garnishment through service. The notice of levy informs the judgment debtor, *inter alia*, that the judgment debtor has a right to claim an exemption granted to the debtor under California law:

> "You may claim any available exemption for your property. A list of exemptions is attached."

Accompanying the notice of levy is a list of exemptions available to the judgment debtor, including the exemption granted to Social Security benefits payments pursuant to 42 U.S.C. § 407 and other federally protected payments. The judgment debtor may seek to have the Garnishment set aside in the event it reaches exempt Social Security benefits and other exempt funds. Pending the assertion of the exemption granted under federal law or state law as to Social Security benefits, a deposit account would be blocked in compliance with the Garnishment order, and if the exemption is not asserted within the 10 day return process, the funds would be forwarded to the levying officer, who, in turn would forward them to the levying creditor, unless the depositor asserts the exemption before that release. In other words, the financial institution is not involved with the exemption process for these deposits—it is up to the judgment debtor to advance its own interests as to exempt funds.

While we recognize the hardship that a Social Security benefits recipient may confront as a result of the blocking of a deposit account holding the proceeds of Social Security benefits payments and other protected benefits payments, we wish to emphasize

the burdensome nature of the required research of a deposit account to confirm that it holds such benefits:

- A copy of the items recently deposited into a deposit account would have to be reviewed. While a benefits payment from the Social Security Administration may be identifiable, the physical copy of the deposited item must be examined to confirm the source of funding. Moreover, the identification of other federally or state-protected payments may be even less transparent.
- Even if the financial institution is able to confirm that a deposit account holds the proceeds of Social Security benefits payments, it may be unable to identify the proceeds of such payments if the deposit account has other deposits at or about the time of the Garnishment. As explained above, no uniform tracing rule (e.g., first in—first out, last in—first out, lowest intermediate balance, etc.) exists nationally, as far as we know. Moreover, even if exempt funds may be traced through commonly available methods, such as the lowest intermediate balance principle, as a practical matter a financial institution is not in the position to undertake such an account analysis as to each and every account subject to levy. Even California state law recognizes that the burden of tracing an exempt funds lies with the judgment debtor, not the financial institution.

Operational problems are exacerbated in states that allow continuing Garnishments. In these cases, accounts must be continuously monitored and funds withheld where the Garnishment is not fully satisfied when served. As a result, such accounts must be frozen for a period of time even if exempt funds are being held in the account often resulting in additional checks being returned unpaid. Such a freeze must be placed on a continuing Garnishment in order to capture additional deposits made to the account during the applicable period for the Garnishment order. It is not unusual for larger institutions to receive up to 50,000 garnishments per month. It is easy to see how the monitoring and adjusting of many of these accounts on a continuing basis could create enormous and complex operational problems resulting in substantial costs (and possible liability) for financial institutions attempting to comply with Garnishment orders.

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?

Response

One possible method to better serve the consumer having deposit accounts containing federally protected benefits payments is to promote consumer education. This goal may be advanced by enhancing the content of communications sent by financial institutions alerting the consumer to the service of the Garnishment. As a courtesy and as a matter of common banking practice, many financial institutions, send letters to their depositors to alert them to the service of the Garnishment. While the notice of levy may inform the consumer of available exemptions under both federal and state law in some jurisdictions (e.g., California's notice of levy and the accompanying exemption list), a separate letter or other notice may more effectively inform the consumer of available exemptions, if applicable. In this regard, the Agencies may consider issuing model letters or other notices to be sent by financial institutions so that a national standard may be fostered. Nevertheless, the Agencies should not dictate use of a particular form, or any form at all, as the content, timing and general permissibility of such notifications could conflict with applicable state law.

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?

Response

As indicated above, the depositor as judgment debtor is typically provided with a notice of levy at or about the time of the Garnishment. In some states, that notice is accompanied by a detailed list of exemptions under state law available to the judgment debtor. While that list may differ to some extent from state to state and with the federal

exemptions detailed in the Guidance, the judgment debtor nevertheless is typically informed of some key exemptions available under state and federal law, such as those granted to Social Security benefits recipients under 42 U.S.C. § 407. However, these requirements are not uniform because of the non-uniform nature of state and federal laws affecting exemptions. If a form is deemed by the Agencies to be helpful, after consideration of conflicting state and federal laws (and after providing full flexibility to alter or decline to provide such notice because of the non-uniform nature of such laws), we recommend that the Agencies issue a model form of notice that financial institutions may provide to judgment debtors upon the service of a Garnishment order against their deposit accounts. This model form of notice may supplement the information provided under a notice of levy, if any. By issuing a model form of notice, the Agencies will foster a minimum standard to assist in informing depositors of their rights granted to them under federal law. A financial institution should be allowed to supplement the form with additional information regarding exemptions granted to the judgment debtor under applicable state law, if any; or to decline to provide a notice if legal or operational obstacles would make such notification contradictory or confusing.

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?

Response

While a financial institution normally handles a check presented against insufficient or uncollected available funds by automated means, the processing of Garnishment orders is substantially more labor intensive. While from time to time a financial institution may review the provisional decision to pay or dishonor a check drawn against insufficient or uncollected available funds, normally such review occurs only on a case-by-case basis and the decision process is limited to a quick determination whether it is likely the depositor is willing and able to cover the overdraft based upon its amount and the

depositor's past experience, both pieces of information being quickly available by computer.

However, when a Garnishment order is served against a financial institution at a branch office or by mail, a typical Garnishment-compliance process requires each order to be forwarded to, and examined by, an employee (perhaps in a central location) trained to inspect the court papers and accompanying documents to determine:

- The date, time and place of service.
- Whether the court papers are in proper order (for example, is the served financial institution the proper bank named in the Garnishment papers, were the papers served on the correct branch, etc.).
- Whether the judgment debtor maintains a deposit account at the bank, or if service is effective only on the served branch, at that branch. If a taxpayer identification number does not accompany the Garnishment papers, the financial institution may consider more than one potentially affected judgment debtor. In other cases, the provided identification number may not match the number in the bank's records. Sometimes extensive investigation may be necessary to determine if the target of the Garnishment is, indeed, a customer of the bank.

Further processing includes the following:

- Once a depositor is identified, the Garnishment papers usually are forwarded under a cover letter to alert the depositor that a Garnishment has been served.
- If the depositor does not respond to the letter, the Garnishment processor causes the issuance of a cashier's check to satisfy, in whole or in part, the Garnishment. This payment is sent under a cover letter.
- If the depositor disputes the Garnishment, the Garnishment processor invokes other procedures that often are driven by state law. Legal counsel may become involved on behalf of the financial institution to address any effort on the part of the judgment debtor to seek a stay or set aside the Garnishment.

The fees charged for handling Garnishments, when not set by state law, are set by financial institutions in part to cover at least part of the expenses incurred in processing

the transaction (it is not likely that the full amount of such expenses are recovered), and in part, where it is possible, to earn a profit on the services rendered. Insofar as the burdens associated with handling Garnishments are entirely different from those related to handling overdrafts, there is no reason to expect that the fees for the respective services should be the same.

The suggestion that charging one fee for handling a Garnishment and another for processing an overdraft caused by a freeze of the account while the Garnishment is being processed might be "double dipping" is not well founded. The assessment of both the fee for processing the Garnishment order and for dishonoring checks drawn against insufficient or uncollected funds is a reasonable attempt to recoup costs and to earn a reasonable profit from servicing the account. Two distinct services are rendered, often by entirely different personnel: the processing of the Garnishment order, as well as the handling of an overdraft item. The depositor is able to mitigate the risk of having to pay one or both of these fees in a number of ways, including by enrolling in overdraft protection programs; by providing additional deposits into the account subject to the Garnishment to cover outstanding checks; or by promptly arranging for payment of judgments or, if such payment would be difficult, approaching the judgment creditor and arranging for a payment schedule acceptable to both parties. Given the costly and labor-intensive nature of the separate services provided, it is not unreasonable to charge for each one. This is especially true in light of the depositor's ability to mitigate or prevent these charges from being imposed.

The Agencies should also remain mindful that honoring Garnishment orders is a requirement imposed by state authorities in order to facilitate the collection of judgments rendered by its courts. It is a service provided under compulsion of state law, with accompanying liability. This is not a service financial institutions have instituted of their own volition. The costs generated through the volume and complexity of the legal requirements for processing Garnishments, together with liability for errors should be borne by those account holders for whom financial institutions are <u>required</u> to provide these services. Otherwise, those depositors who have taken responsible steps to avoid or mitigate these charges will necessarily have the costs thrust upon them for financial

institutions to provide deposit account services. Costs should be borne by those incurring them.

CBA appreciates the opportunity to comment upon the proposed Guidance and is available to discuss the proper processing of Garnishments at your convenience. If you have any questions or wish to follow up with an in-person meeting, please contact the undersigned at (703) 276-3869 or by email at jcrouse@cbanet.org.

Sincerely,
Joseph R. Crouse
Legislative and Regulatory Counsel