

Date: Thursday, May 30, 2013

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Re: Final Rule: *Garnishment of Accounts Containing Federal Benefit Payments*

On Wednesday, May 29, 2013, the Treasury Department published a final rule amending the regulation governing the garnishment of designated Federal benefit payments that are directly deposited into accounts at financial institutions. The rule applies to Federal benefit payments such as Social Security benefits, VA benefits, and Federal Railroad retirement benefits that are subject to a general statutory exemption from garnishment.

*The final rule is effective June 28, 2013.*

Given the fungibility of money once a deposit is made, banks find themselves in a difficult position when accounts with these Federal benefit payments are garnished: either honor the garnishment order and risk allowing a creditor to obtain funds that should be protected, or ignore the order and allow a customer to withdraw funds in amounts that perhaps exceed the protected benefits. To avoid these outcomes, banks often froze accounts when a garnishment was received in order to let the debtor and creditor work out claims of priority. This has resulted in significant hardships for some depositors.

### ***Summary of the Rule:***

The rule establishes a multi-step process to identify when a garnishment order may or may not attach to a protected Federal benefit payment, and how to calculate the “protected amount” in an account when a garnishment order is served on an account containing protected Federal benefits. Upon receipt of a garnishment order, the rule requires a financial institution to determine the sum of Federal benefit payments deposited into the account during a 60-day “lookback” period. Then, the financial institution must ensure the account holder has access to an amount equal to the Federal benefits deposited within the prior 60 days, or the current balance of the account, whichever is lower.

- When a bank receives a garnishment order, it must first look to see if the creditor is the United States government or a State child support enforcement agency.
  - If the answer is yes, then the bank follows its customary procedures for handling garnishments and tenders over funds in the account, because these creditors have a right that trumps the general protection from garnishment.
  - If the answer is no, then the bank is to review the activity in the account for the prior two months to see if, during the “lookback period,” the customer received a *direct deposit* of Federal benefit payments. The bank may rely on ACH identifiers that will

be added to the payments' Batch Header Record to identify federal payments that are exempt from garnishment.

- If the customer received *direct deposits* of exempt payments during the two-month lookback period, then the bank must allow the customer to have access to the lesser of (a) all such benefits payments directly deposited during the lookback period, or (b) the balance in the account on the date the review is conducted.
- The bank also must notify the customer that a garnishment order was received, unless there are no funds in the account. Banks may use a model notice provided by the agencies in the rule.
- A bank may collect a garnishment fee only from funds in excess of the protected amount. Other types of fees are unaffected.
- A bank that complies with the regulation will be protected from liability from any source, including the customer and the customer's creditors.
- The rule preempts conflicting state laws, including laws that allow for a continuing garnishment. A state law will be considered to conflict with the federal law if it requires a bank to take actions that contradict the federal regulation. The regulation says that a state law that requires a bank to protect a greater amount than would be protected under the federal rule will not be preempted.

#### ***Revisions to 2012 Interim Final Rule:***

The final rule does not merely codify the 2012 interim final rule. There are several significant clarifications and amendments.

#### **Amendments:**

1. **Limited Definition of Benefit Payment:** A bank will identify a protected Federal benefit payment by the appearance of *both* the “XX” encoded in positions 54 or 55, *and* “2” in position 79 of the “Originator Status Code” of the ACH Batch Header Record.
2. **Expanded Definition of Garnishment Order:** The rule makes significant revisions to the definition of garnishment order to include:
  - a. “[O]rders or levies issued by a State or State agency or municipality[,]”
  - b. Restraining orders, described as “an order to freeze the assets of an account[,]”
  - c. Orders “issued by the clerk of the court or an attorney acting...as an officer of the court...[,]” and
  - d. Garnishments issued for both civil money and criminal judgments.
3. **Limited Definition of Protected Amount:** The rule states that the relevant account balance is the balance when the account review is performed and should include intraday items such as ATM or cash withdrawals. The account balance does *not* include (a) Regulation CC available funds balance, (b) any line of credit associated with the account, or (c) asset accounts holding securities, alternative instruments, real estate, or other assets purchased with Federal benefit payments.
4. **Creates 2-day Period for Account Review:** The rule will allow 2 business days for financial institutions to identify garnishments orders and conduct account reviews.

5. **Garnishment Fees May be Collected from Nonprotected Funds:** Although a bank may not collect a fee from protected funds, a bank may collect a fee from nonprotected funds deposited within 5 days of the account review. Also, a bank may collect a fee from other accounts as permitted by their governing customer agreement and State law.
6. **No Universal Notice to Account Holder :** A notice need only be sent to the account holder where there are funds in the account in excess of the protected amount.

#### Clarifications

1. **Definition of Account.** The requirement to perform an account review applies to the deposit account to which a Federal payment is routed and credited. In cases where a bank maintains subaccounts, it is the individual subaccount, not the “master account,” that is subject to the account review and lookback.
2. **Access to Accounts:** The Agencies elected not to address when a bank may close an account, but reiterates that if an account remains open, the account holder must have “full and customary access” to protected funds.
3. **Methods of Notice to the Account Holder:** Acknowledging that a bank’s ability to give notice is limited by the availability of information, a bank may (1) mail the notice to the address of record, (2) choose to deliver notice to both account holders on a joint account, (3) use any method of delivery as agreed to between the bank and the account holder, including electronic delivery, and (4) give the contact information for the creditor’s attorney, where contact information for the creditor is limited.
4. **Same, New, or Different Garnishment Order:** Although addressed in the 2011 FAQ, the final rule reiterates the Agencies view that a garnishment order that is re-issued after the return date, under a different execution number, would not constitute a “new” garnishment order.
5. **Record Keeping:** Financial institutions are expected to decide what documentation to retain, which may vary depending on individual circumstances.