June 18, 2010

Mr. Gary Grippo
Deputy Assistant Secretary
Fiscal Operations and Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Room 2112
Washington, DC 20220

Re: Garnishment of Accounts Containing Federal Benefit Payments; Joint Notice of Proposed Rulemaking by:
Department of the Treasury, Fiscal Service (RIN 1505-AC-20)
Social Security Administration (RIN 0960-AH180
Department of Veterans Affairs (RIN 2900-AN67)
Railroad Retirement Board (RIN 3220-AB63)
Office of Personnel Management (RIN 3206-AM17)

Dear Mr. Grippo:

The American Bankers Association (ABA)[1] appreciates the opportunity to submit these comments on the Notice of Proposed Rulemaking (NPR) regarding the garnishment of accounts that contain Federal benefits payments.[2]

The NPR proposes a process that is designed to avoid the hardships that can occur when a creditor garnishes the account of a Federal benefit payment recipient. In these situations, a bank can find itself caught in a no-win situation. On the one hand, a creditor, having received a court order entitling it to payment, expects the bank to comply with that order or risk incurring liability for the full amount of the judgment. On the other hand, a debtor that receives benefits payments that are exempt from garnishment expects the bank to refuse to pay to the creditor funds that are presumably protected. A bank faced with this dilemma often concludes that the interests of everyone will be best served by freezing the account until the debtor and creditor can resolve the dispute.

Federal benefits payments covered by the NPR are protected by federal statutes from seizure under most legal process.[3] However, there are no procedural mechanisms in federal law to enforce those protections effectively. While some states' laws provide effective protection for some or all federal benefit payments,[4] other states' procedural rules prohibit the bank from even asserting the customer's rights to exemptions.[5] In other states, such as New York and Illinois, orders that require the

[1] The ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

[2] 75 *Fed. Reg*. 20299 (April 19, 2010).

[3] 42 U.S.C. §§ 407(a), 1383(d)(1); 38 U.S.C. § 5301(a); 45 U.S.C. §§ 231m(a), 352(e); 5 U.S.C. §§ 8346, 8470.

[4] *See, e.g*., Cal. Code Civ. Pro. §704. 080, which automatically protects a certain amount of funds (currently $2875) from execution if any Social Security benefits have been directly deposited in the account.

[5] *See, e.g*., *Conley v. Chilcote,* 25 Ohio St. 320, 1874 WL 71 (Ohio 1874); *Holbrook v. Fyffe,* 164 Ky. 435, 175 S.W. 977, 979 (1915).

bank to capture all future deposits make it impossible for banks to allow ready access to exempt funds. And in most states, if there are both exempt and non-exempt funds deposited to an account the bank cannot determine what the correct exemption amount is, so must restrain the full amount of the account pursuant to the garnishment order.

These situations typically involve commingled funds – *i.e*., funds from more than one source combined in one account – making it impossible for a bank to know what funds on deposit in the account are exempt from garnishment and what funds should be paid to the creditor. Frequently the situation is complicated even further by the use of joint accounts and by laws that create exceptions to the exemption from garnishment, such as those that permit the collection of child support and alimony from any funds, including Federal benefits.

The NPR tries to address these issues by requiring a bank that receives a garnishment order (a) to review an account to see if protected payments have been directly deposited during the preceding 60 days; (b) to preserve access to any such payments; and (c) to notify the customer. This rule would impose significant new burdens on the banking industry at a time when existing and proposed burdens threaten to destroy the viability of many banks.[6] However, our members understand the need to avoid the hardships noted above, and we believe the NPR presents a workable balance of competing interests. Accordingly, we support adoption of the proposal, with several changes as suggested below, as an improvement over the current no-win situation in which banks find themselves. The suggestions are presented according to the section of the NPR to which they apply.

§ 212.3 Definitions.

Account is defined in the NPR as "an account at a financial institution to which benefit payments can be delivered by direct deposit."[7] Benefits payments covered by the NPR are payable to individuals, not to business entities. However, the definition of "account" in proposed § 212.3 does not limit the accounts in which financial institutions must identify those benefit payments to personal accounts. Banks have no way of knowing if a payee has benefit payments deposited in the account of another person (a business entity). Accordingly, we suggest that the definition of "account" be revised to read as follows:

> *Account* means an account **held** at a financial institution **by a natural person for personal, family, or household purposes** to which benefit payments can be delivered by direct deposit.

Benefit payment is defined in the NPR as a payment made "to a natural person or to a representative payee receiving payments on behalf of a natural person…."[8] We suggest that this definition be clarified to address situations where a representative receives payments on behalf of someone whose identify is not known by the bank. For instance, some recipients reside in nursing homes that maintain omnibus accounts at banks on behalf of their residents. If the bank receives an order to garnish funds in such a situation, the bank would have no way of knowing whether protected funds are commingled in the omnibus account. While this makes it impossible for a bank to identify a "protected amount," the benefit payment recipient is not disadvantaged since the account would not be

[6] At least 50 new rules have been imposed on the banking industry just in the past two years. Pending legislation will add considerably to that total.

[7] 75 *Fed. Reg*. at 20310.

[8] *Id*.

garnished anyway.[9] The proposed definition, however, could be read as creating an obligation that is impossible to fulfill. To avoid confusion, we suggest that the definition be amended to read as follows:

> *Benefit payment* means a direct deposit payment made by a benefit agency to a natural person**,** or to a representative payee receiving payments on behalf of a natural person **whose name appears in the bank's records as account owner,** under a Federal program listed in § 212.2(b).

Lookback period is defined as the "60-calendar-day period preceding the date on which a financial institution is served a garnishment order." We believe that the lookback process would be more reliable and less prone to error if it were tied to two calendar months instead of 60 days. The differing lengths of the months interject a variable that can be easily overlooked.

> *Lookback period* means the ~~60-calendar-day~~ **two-calendar-month** period preceding the date on which a financial institution is served a garnishment order.[10]

§ 212.4 Initial action upon receipt of a garnishment order.

Examination for orders obtained by the United States. The NPR provides that a bank is to follow its normal garnishment procedures if the order is obtained by the United States. In addition, it states that a garnishment order shall conclusively be considered to have been obtained by the United States if the plaintiff in the caption on the front page of a garnishment order is "United States of America," "United States," or "U.S." or if the order is accompanied by the Notice of Garnishment by the United States, as set out in Appendix B to the NPR. While the process outlined in the NPR is very helpful, banks often receive documents that purport to be from the United States government that are, in fact, from an entity that is not part of the government. To avoid confusion about a bank's obligations in these circumstances, we suggest that paragraph (a)(1) be deleted and that the process applicable to Federal government garnishments be triggered in the circumstances described in proposed (a)(2).

§ 212.5 Account review.

Review for benefit payment. The NPR states that a bank that receives a garnishment order that was obtained by a party other than the United States is to perform an account review "[n]o later than one business day following receipt of a garnishment order…."[11] This raises the following issues.

- Deficiencies in the garnishment documentation often require a bank to seek additional information from the garnishor in order to process the order. Thus, it may be impossible for a bank to comply with a duty to conduct a review within one day of receiving an order.
- There will be occasions when a bank receives a large batch of garnishment orders late in a day and is unable to process some of the orders until the next business day.

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[9] *See Goralsky v. Taylor*, 59 Ohio St. 3d 197 (1991).

[10] We are aware of suggestions being offered by some commenters to extend the lookback period to 65 days in order to ensure that two benefit payment cycles are captured during the account review. We do not object to the addition of 5 days to the lookback period but suggest, if the additional 5 days are included, that the lookback period be two calendar months (instead of 60 days) plus 5 days.

[11] 75 *Fed. Reg*. at 20311.

- Items sometimes are received after a bank's processing deadline and thus are not posted to the customer's account until the next business day.

To address these issues, we suggest that a bank be required to conduct the account review within a reasonable time after the business day on which the bank receives all information needed to process a garnishment order and that it look at all items posted as of the close of business on the last day of the lookback period. This would not adversely affect the customer; he or she still would be able to access the entire amount on deposit during any period in which the bank is obtaining the information needed to process the order. It would, however, provide certainty to a process that otherwise could prompt many questions.

We believe it also would be helpful to include an example in the text of the regulation of how the account review process is to work. Towards this end, we offer the following suggested edits to section 212.5(a):

> (a) *Review for benefit payment.* ~~No later than one business day~~ **Within a reasonable time** following ~~receipt~~ **the business day on which the bank receives all information necessary to process** a garnishment order issued against an account, a financial institution shall perform an account review. **The following example illustrates the institution's obligations:**
>
> **Assume a bank receives a garnishment order on June 10 and receives all information needed to process the order on June 11. The bank is to complete the account review within a reasonable time after receiving all necessary information. If this review is completed on June 11, the bank is to determine if any benefit payments were posted to the customer's account during the period that begins April 10 and ends at the close of business on June 9.**

§ 212.6 Rules and procedures to protect benefits

Notice. The introductory language to this section and paragraph (c) together require a bank that finds a benefit payment during the account review to notify the customer in accordance with § 212.7. We suggest that the notice requirement not apply in situations where a bank finds that there are no funds in the customer's account that exceed the protected amount when it conducts the account review. In such a situation, no funds would be restrained. Sending notice to the account holder provides no benefit in these cases because there is no action needed to protect the customer's funds. Indeed, many customers likely would find the notice confusing and frightening. The requirement also would be a significant burden on financial institutions. One bank estimates that approximately 60% of the orders it receives involve accounts where funds are not held, either because there are no funds in the account or because the funds that are present are fully exempt. That percentage will only increase if the proposed regulation becomes effective. As a result, generating and mailing notices to every one of these customers will impose a significant cost on the financial institution with no corresponding benefit to the account holders or any other person.

Fees. Proposed paragraph (g) of § 212.6 prohibits a financial institution from charging or collecting a garnishment fee after the date of account review. Current practice of some institutions is to collect a "legal processing fee" at the time funds are paid under a garnishment order, although the institutions place a hold for that fee and consider it to be earned at the time they place a hold on the account. The result of this practice is that if the account holder reaches an agreement with the judgment creditor to release the hold so that the creditor is paid in some other way, the institution

generally does not collect the fee. The requirement that an institution both charge and collect the fee at the time the order is first served could result in significant programming changes, and could also result in an increase in the amount of fees collected from account holders. It therefore benefits no party to the transaction. We suggest that § 212.6(g) be revised to delete "and may not charge or collect a garnishment fee after the date of account review." The retained language in § 212.6(f) would still limit the ability of banks to collect a garnishment fee only against funds in the account in excess of the protected amount of the date of account review.

The changes to § 212.6 suggested above are reflected in the following suggested edits:

§ 212.6 Rules and procedures to protect benefits.

The following provisions apply if an account review shows that a benefit agency deposited a benefit payment into an account during the lookback period.

* * *

(c) *Notice*. The financial institution shall issue a notice to the account holder, in accordance with § 212.7**, if there are funds above the protected amount**.

* * *

(g) *Impermissible garnishment fee.* The financial institution may not charge or collect a garnishment fee against a protected amount ~~and may not charge or collect a garnishment fee after the date of account review~~.

§ 212.7 Notice to account holder; Appendix A.

The NPR requires a bank to provide a customer with a notice containing specified information if the garnished account received a direct deposit of a benefit payment during the lookback period. Appendix A provides a Model Notice and states that, while banks are not required to use the Model Notice, any bank that does will be deemed to comply with the notice requirements.

Disclosure of protected amount. As discussed above, we believe no notice should be required if no funds would be held by a bank. If that change were to be adopted, then the language of paragraph (a)(5) of § 212.7 would need to delete the possibility that there would be no protected funds.

Exemplary list of exemptions. Proposed paragraph (a)(7) of § 212.7 requires that the notice include "an exemplary list of Federal, State, and other benefits generally exempt from garnishment." The model form states "In addition, you may have rights to protect other funds in your account from garnishment, such as public assistance (welfare), disability benefits, workers compensation benefits, and pension benefits." We believe that the exemplary list is confusing and misleading, both because account holders may construe it to mean that the funds should not have been held and because in many states these funds are not exempt once deposited in a bank account. We request that this paragraph be amended to state simply that Federal or State law may provide additional exemptions and that comparable changes be made to the model form.

Asserting claims for additional sums. Paragraph (a)(8) of § 212.7 states that the notice is to inform accountholders of their right to assert a further garnishment exemption for amounts above the

protected amount. This provision (and a related provision in § 212.8(a)) should clarify that the claims are not against a bank that has complied with the requirements set out in the NPR. Otherwise, the notice may confuse the customer about available remedies and the next steps he or she should take.

Contact information. We also suggest that the rule not require banks to provide the means of contacting the judgment creditor and court of jurisdiction (*i.e.*, paragraphs (a)(9) and (a)(10) of § 212.7) if the garnishment order does not provide that information. While most garnishment orders will contain this information, not all do. The duty to obtain it is more appropriately placed on the judgment debtor who wishes to communicate with the creditor or court.

Multiple accounts. If the customer has more than one account at a bank, the bank should have the option of sending one notice for all accounts or separate notices for each account. This would provide flexibility to design bank processes in the manner the bank deems most efficient while ensuring that the customer receives the information he or she needs.

The suggested edits to § 212.7 may be reflected in changes to the regulation text as follows:

§ 212.7 **Notice to the account holder.**

A financial institution shall issue the notice required by § 212.6(c) in accordance with the following provisions.

(a) *Notice content.* The financial institution shall notify the account holder of the following facts and events in readily understandable language.

* * *

(5) The protected amount~~, if any,~~ established by the financial institution.

* * *

(7) ~~An exemplary list of Federal, State, and other benefits generally exempt from garnishment.~~ **A statement that Federal or State law may provide additional exemptions.**

(8) The account holder's right to assert **against the creditor** a further garnishment exemption for amounts above the protected amount, by completing exemption claim forms, contacting the court of jurisdiction, or contacting the judgment creditor, as customarily applicable for a given jurisdiction.

(9) Means of contacting the judgment creditor **(if the contact information is contained in the garnishment order)**.

(10) Means of contacting the court of jurisdiction **(if the contact information is contained in the garnishment order)**.

* * *

(e) *Multiple accounts.* If the customer has more than one account at the financial institution, the institution may send one notice for all accounts or separate notices for each account.

The model notice includes a statement that the financial institution "received an order of garnishment to freeze or remove funds from your account." However, in many cases, the order will not use the term "garnish" or "garnishment." To avoid confusion, we suggest adding an explanation of what the sentence means, as follows:

> On [insert date of garnishment order receipt], [insert financial institution name] received an order ~~of garnishment~~ to freeze or remove funds from your account. **This type of order is called a "garnishment order" in this notice, but it may be called by any number of names, including an attachment, execution, citation, restraining notice, summons to trustee, or injunction.**

To address the point raised above about the need to avoid confusing the customer about other possible exemptions, we suggest that the notice be revised as follows:

> In addition, ~~you may have rights to protect other funds in your account from garnishment, such as public assistance (welfare), disability benefits, workers' compensation benefits, and pension benefits~~ **Federal or State law may give you rights to protect additional funds in your accounts from garnishment. However, these rights vary significantly from state to state, so you should consult with legal resources in your state.**

The proposal requires that the notice include an explanation of the account holder's right to assert exemptions for more than the protected amount, and the process for doing so. The model form includes the following:

> You can make a claim for these rights by (insert, as applicable and required for the jurisdiction, a standard instruction or a reference to the jurisdiction's notice for completing an exemption claim form, process for contacting the court, or process for contacting the judgment creditor).

For an institution with a presence in a large number of states, including different specific explanations for each state imposes a very large burden. In most cases, the exemptions relevant would be under state law as well, which is not within the scope of the federal concerns. The following statement would provide the customer with helpful information while striking a more appropriate balance of the proposal's benefits and burdens:

> You can make a claim for these rights by **completing an exemption claim form, if your state provides such a form, contacting the court issuing the garnishment order, if applicable, or contacting the judgment creditor or government agency seeking payment. If you need legal advice regarding exemptions, you should consult your attorney. If you're unable to afford a private attorney, visit the Legal Services Corporation Web site at www.lsc.gov to determine where to go in your area for assistance.**

§ 212.11 Compliance and record retention

Record retention. The NPR states that banks are to "maintain records of account activity and actions taken in response to garnishment orders sufficient to demonstrate compliance with" the rule.[12]

[12] *Id*. at 20312.

However, no duration is specified. To remove any doubts about the industry's obligations, we suggest that the final rule be amended as follows:

> **§ 212.11 Compliance and record retention**
>
> * * *
>
> (b) *Record retention.* A financial institution shall maintain records of account activity and actions taken in response to garnishment orders sufficient to demonstrate compliance with this part. **Such records shall be maintained for at least 12 months following the account review required by § 212.5.**

Other issues

Unique identifiers: We understand that Treasury has been working with NACHA to establish unique coding for Federal benefit payments made via the ACH Network so that financial institutions will be able to use this coding to determine the exempt status of transactions during the lookback period. We understand further that the NPR largely adopts NACHA's recommendations. However, in discussions with NACHA we are informed that they will offer the suggestions presented below. ABA supports these suggestions.

As noted in the NPRM, the Agencies will do two things to uniquely identify exempt Federal payments to assist financial institutions to determine whether exempt funds were directly deposited during the lookback period.

> First, Treasury will encode an ''X'' in position 20 of the ''Company Name'' Field of the Batch Header Record for each Agency exempt benefit Automated Clearing House (ACH) payment. For example, a typical Social Security benefit payment would have a company name of ''US TREASURY 303X.'' This encoding, along with the current practice of encoding a ''2'' in the ''Originator Status Code'' Field in the Batch Header Record to designate payments originated from the Federal government, will allow financial institutions to identify Federal exempt payments through either manual or systems inspection.
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> Second, the Agencies will publish a list of the unique ''Entry Detail Description'' Fields in the Batch Header Record for all of their exempt benefit payments. For example, the ''SUPP SEC'' entry denotes an exempt Supplemental Security Income benefit payment, and ''VA CH31'' denotes an exempt VA Vocational Rehabilitation & Education benefit payment.

Treasury also will update the "Green Book," *A Guide to Federal Government ACH Payments and Collections*, to reflect these unique identifiers as Federal policy.

We very much appreciate these efforts. The identifiers are key to the ability of banks to distinguish benefit payments from other funds that are commingled in the same account. Without them, banks would remain unable to know whether an account has received a potentially exempt benefit payment, thus perpetuating the need for banks to impose a freeze on the affected account in order to ensure that the rights of all parties are preserved.

For operational reasons, if only one distinguishing character is to be used in the *Company Name Field* of the Batch Header Record, we recommend that instead of encoding an ''X'' in position 20 (the last character position of that field), the "X" instead be encoded in position 5 of the field (the first character of the field). The Agencies may also wish to consider encoding an "X" in both position 5 and position 6 of the *Company Name Field* to reduce the potential for false positives where a non-Federal agency company name begins with the letter "X" (and assuming the financial institution is not or cannot systematically look at both the *Company Name Field* and the *Originator Status Code Field* simultaneously during an automated lookback routine).

These changes to the manner in which Federal benefit payments are encoded should substantially improve a financial institution's ability systematically to identify exempt funds in an account during the lookback process. Further, because information in the *Company Name Field* and the *Entry Detail Description Field* is typically included on the account holder's statement, it is more likely that a financial institution's standard customer service or account maintenance screens will allow for visual identification.

Reliance on identifiers: The Supplementary Information also states that financial institutions will be able to rely on the combination of the three identifiers described above to determine whether exempt payments were deposited to an account during the lookback period. We appreciate this statement and the Agencies' recognition of the identifiers' importance, and we urge you to revise the text of the regulation to include a comparable statement. There are at least two places where the regulation could be amended:

- The definition of "benefit payment" in § 212.3 could be amended to include at the end of the text the following:

  A payment shall not be considered a 'benefit payment' unless it is properly identified in (a) the "Company Name" Field of the Batch Header Record for each Agency exempt benefit Automated Clearing House payment, (b) the "Entry Detail Description" Fields in the Batch Header Record for all of the Agencies' exempt benefit payments, and (c) the Green Book, *A Guide to Federal Government ACH Payments and Collections*.

- Section 215.5(a) could be amended to state that

  …a financial institution shall perform an account review **to determine if the customer has received a benefit payment that is identified as such in (a) the "Company Name" Field of the Batch Header Record for each Agency exempt benefit Automated Clearing House payment, (b) the "Entry Detail Description" Fields in the Batch Header Record for all of the Agencies' exempt benefit payments, and (c) the Green Book, *A Guide to Federal Government ACH Payments and Collections*.**

Effective date: The NPR is silent on when the rule would be effective if it were to be adopted. As noted above, the process outlined in the NPR will impose significant new burdens on banks, requiring in many cases substantial reprogramming of computer codes and other changes to data processing. These changes cannot be made until the changes described above to the Batch Header Records are made. Once those changes are complete, banks will need at least one year to make the programming and data processing changes, test the changes, and train employees. Thus, we request that the

obligations imposed on banks under the final rule not become effective until at least one year following the completion of all of the required changes to the identifiers. To avoid confusion about the effective date, we urge the Agencies to publish a notice in the *Federal Register* that informs the public about when the last of these changes are completed.

* * *

We appreciate your consideration of these views and would be happy to provide any additional information you would find helpful.

Sincerely,

Mark J. Tenhundfeld