



May 24, 2011

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

Re: Garnishment of Accounts Containing Federal Benefit Payments; Interim Final Rule With Request for Comment issued by the following agencies (collectively referred to as the Agencies):

Office of Personnel Management (RIN 3206-AM17)
Railroad Retirement Board (RIN 3220-AB63)
Social Security Administration (RIN 0960-AH18)
Department of the Treasury, Fiscal Service (RIN 1505-AC20)
Department of Veterans Affairs (RIN 2900-AN67)

Dear Mr. Grippo:

The American Bankers Association¹ (ABA) and The Clearing House² (TCH) appreciate the opportunity to share our views on the Agencies' Interim Final Rule regarding Garnishments of Accounts Containing Federal Benefit Payments (the Interim Rule or Rule).³

The Interim Rule seeks to address the implementation challenges that can occur when a creditor is ordered to garnish a bank⁴ account of a Federal benefit payment recipient. In these

¹ The American Bankers Association brings together banks of all sizes and charters into one association. The ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.3 trillion in assets and employ over 2 million men and women.

² Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which employ 1.4 million people in the U.S. and hold more than half of all U.S. deposits. TCH is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs and white papers the interests of its owner banks on a variety of systemically important banking issues. The Clearing House Payments Company provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily and representing nearly half of the automated clearinghouse, funds-transfer, and check-image payments made in the U.S. See TCH's web page at www.theclearinghouse.org.

³ 76 Fed. Reg. 9939 (Feb. 23, 2011).

situations, the bank receiving the order 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 up to the full amount of the money judgment. On the other hand, a debtor that receives benefit payments that are exempt from garnishment expects the bank to refuse to pay to the creditor funds that are presumably protected. Given the fungibility of money and the frequent impossibility of reliably determining which funds in an account should be considered covered benefit payments, a bank often concludes that the interests of everyone will be best served by freezing the account until the debtor and creditor can resolve the dispute.

The Interim Rule imposes new requirements on banks that already have caused the banks to make significant changes to the processes by which garnishment orders are handled. This burden is being added at a time when the industry already is struggling with the enormous burden imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). However, our members understand the need to address the hardships that can occur when funds needed to live on are frozen, and we believe that the Interim Rule presents a workable balance of competing interests. Accordingly, we support adoption of the Rule, with several changes as suggested below, as an improvement over the current no-win situation in which banks find themselves.

1. Definition of “garnishment order or order” (§ 212.3). The Interim Rule defines “garnishment order or order” as –

a writ, order, notice, summons, judgment, or similar written instruction issued by a court or a State child support enforcement agency, including a lien arising by operation of law for overdue child support, to effect a garnishment against a debtor.

The question most frequently posed to ABA and TCH concerning the Rule is whether various forms of documents are “garnishment orders” as that term is defined. Many bankers have raised a question regarding, for instance, whether tax levies issued by a state agency are “garnishment orders” as that term is used in the Rule. We note that Treasury has addressed this issue generally in Frequently Asked Questions (FAQs)⁵ by stating, in FAQ #2, as follows:

Currently, the requirements of the rule are triggered by the receipt of a “garnishment order,” which is defined as an order issued by a court or a state child support enforcement agency. Accordingly, Federal or State tax levies issued directly by a taxing authority are not subject to the rule.

We assume that this point will be clarified in the final rule, and we encourage Treasury and the other Agencies to do so.

We also encourage the Agencies to clarify several related issues, including the following:

- Is a tax levy considered to be a “garnishment order” under the Interim Rule if, although issued by a state agency, it refers on the face of the levy to a court-issued judgment for taxes?

⁴ For ease of reference, the term “bank” as used herein refers to all insured depository institutions.

⁵ The FAQs are available at <http://www.fms.treas.gov/greenbook/FAQs-May-12-trsy-ver1.pdf>.

- Does the rule apply to seizures in criminal actions? The Interim Rule appears to address only orders in civil proceedings, although the removal in the Rule of the phrase “to enforce a money judgment” that originally was used in the Notice of Proposed Rulemaking creates an ambiguity.
- Are orders issued by an attorney acting in his or her capacity as an officer of the court – such as in the case of the issuance of a New York restraining notice – considered to be issued by a court? We assume that orders issued by attorneys in this circumstance would be treated as “garnishment orders” under the Interim Rule but would appreciate confirmation.

These questions underscore the broader need for additional clarity surrounding the issue of precisely what it means for an order to be issued by a court.

2. Notices when no funds are withheld (§ 212.6(e), § 212.7, Appendix A). Commenters urge in response to the initial proposal that no notice be required in situations in which there are no funds in the debtor’s account that exceed the protected amount. For instance, ABA stated in its comment letter to that proposal,

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.

The Interim Rule rejects this idea without any analysis. The preamble to the Interim Rule states only that “the Agencies do not agree that a notice should not be required where there are no funds in the customer’s account that exceed the protected amount.” While this makes it impossible to address the Agencies’ concerns at this point, we nevertheless urge the Agencies to revisit this issue given its importance.

There is, quite simply, no reason for a notice to be sent to the account holder if no funds are being tendered in response to a garnishment order. The customer obtains no benefit from such notice. There is nothing that the customer is required to do and no impact on the customer’s ability to access funds in the account. In short, the garnishment order is a non-event for the customer in this circumstance. Requiring notice simply adds wholly useless burden to the banking industry.

To avoid these problems, we urge that paragraphs (b) – (h) be redesignated as paragraphs (c) – (i), respectively, and that a new paragraph (b) be added to § 212.7 as follows:

(b) *No notice requirement*. Notwithstanding paragraph (a) of this section, notice is not required if there are no funds in the account on the date of account review that exceed the protected amount.

3. Relationship between State law and Federal notice requirement (§§ 212.4 and 212.7(a)). Some state laws protect a specified amount regardless of whether there is a “protected amount” as that term is defined in the Interim Rule. For instance, the New York Civil Practice Law & Rules provide that, if a garnished account has in it a sum that is less than or equal to a

certain amount (currently \$1740),⁶ then the account is not to be restrained and the restraining notice is to be deemed void. The practice in New York thus is to verify the customer's balance first to determine whether there are sufficient funds to cover the minimum exemption of \$1740. If the balance is at or below that figure, the garnishment order is deemed void, and no further action is taken against the account.

Section 212.7(a) of the Interim Rule states that a bank is to send a notice in cases where (among other things) the balance in the account on the date of account review is above zero dollars and the bank has established a protected amount. However, if the account balance is at or below the amount protected by State law, there is no need to conduct an account review to see if the account has a protected amount. Indeed, at that point there is no operable restraining order under laws like those in New York. To avoid whatever confusion may otherwise arise in states like New York, we urge the Agencies to clarify in the final rule that no account review is to be conducted in situations where a garnishment order is deemed void by operation of state law as a result of an insufficiently large balance. This could be done by adding a new paragraph (d) to § 212.4 that states as follows:

(d) *Accounts subject to State law minimum protections.* If a State law protects a minimum amount and deems garnishment orders void or otherwise no longer effective with respect to an account with a balance below that amount, a financial institution need not follow the requirements of §§ 212.5 through 212.7 and § 212.11.

4. Notice in case of joint account (§ 212.7(e) and Model Notice). The Interim Rule states that a bank “shall issue the notice directly to the account holder, or to a fiduciary who administers the account and receives communications on behalf of the account holder...” In explaining this section, the preamble to the Interim Rule states “[t]he Agencies believe that the notice should be sent to the account holder named in the garnishment order, and not to a co-owner of an affected account...” It is unclear from the Rule's text and preamble discussion whether a bank is prohibited from sending a notice to joint account holders. If that is the intent of the Agencies, we request that this issue be revisited.

Banks typically send notices regarding a joint account to all the account holders. Requiring that a garnishment order be sent solely to the person named in the order would require banks to change their processes and would result in information not being communicated that the other account holder likely would find important. Indeed, at least some states⁷ require banks to notify all account holders and to send a copy of the garnishment order. To avoid confusion on this issue, we request that the Agencies add a sentence at the end of § 212.7(e) in the final rule that states that a bank may follow its normal practice of communicating with joint account holders when sending a garnishment notice. We also request that a conforming change be made to the model notice that indicates that the recipient of the notice may be receiving it because he or she is a joint account holder of an account that has been garnished.

5. Method of issuing customer notice (§ 212.7(e)). Under § 212.7 a financial institution is required to “issue” a notice to an account holder. The Interim Rule is silent, however, on how the notice is to be issued. We request that the Agencies allow a bank to issue a notice, or make a

⁶ The amount is the result of multiplying the greater of the state or federal minimum wage by 240 and then multiplying the product by .90.

⁷ See, e.g., Illinois law at 205 ILCS 5/48.1.

notice available, electronically, such as through an email or a proprietary Web site in instances where an account holder has consented to such electronic communication. Electronic notices provide an account holder the notice promptly and securely while allowing banks to avoid unnecessary compliance costs.

6. Model notice (Appendix A). The Interim Rule provides a model notice that banks may elect to use. We believe that the notice provided in the Interim Rule is a significant improvement over the prior draft, and we commend the Agencies for your efforts.

We request that the Agencies permit a bank to use either the model notice or an alternative version that provides the same information but in a more streamlined way. The alternative notice would have a copy of the garnishment order attached and would refer back to the order in places where the model notice requires information to be added that is unique to the garnishment in question. Attaching the order would provide the customer with additional valuable information (such as details regarding local rules or procedures and who to contact to challenge the garnishment order). It also would help streamline the model notice, making it easier for the customer to read and understand the notice. Banks would benefit by not having to re-enter the information from the garnishment order into the model notice and by not having to provide state-specific garnishment information.

We have attached to this letter a proposed alternative model notice for your consideration. As noted above, we suggest that this be offered along with the Agencies' model notice as two alternatives that are available to any bank that elects not to prepare its own notice.

7. Account reviews (§ 212.5). The Interim Rule requires banks to conduct an account review when served with a garnishment order. However, there will be situations where a bank may determine that it should not act on a garnishment order.

One such instance can arise when an account holder has more than one account and the first account review reveals (a) no protected amount and (b) sufficient funds to satisfy the judgment. In such situations, the bank's obligation to garnish ends when the bank tenders over an amount to pay the debt. By logical extension, a bank's obligation to review the other account(s) in the account holder's name also should end. However, a literal reading of § 212.5(f) could lead to the absurd result of requiring reviews of the other account(s) even when there is no remaining debt. This, in turn, could lead to the equally absurd result of requiring a notice to be sent to the account holder if a review of a second or third account revealed the presence of a protected amount.

As noted in Treasury FAQ #4, there will be other instances as well when a bank concludes that it is inappropriate to act on a garnishment order. To avoid imposing the Rule's requirements in these situations, we suggest that the Agencies clarify § 212.5 by adding a new paragraph (g) that codifies the Treasury guidance in FAQ #4.

8. Exception for fraud (perhaps as a new paragraph (i) of § 212.6). Occasionally, questions will arise regarding whether federal benefit payments were obtained through fraudulent means. In a situation where a court determines that the payments were fraudulently obtained, clearly such payments should not be protected from garnishment. In these situations, the court should have the ability to state on the face of a garnishment order that the payments

were obtained fraudulently and that the bank is to follow the court's instructions irrespective of any protection from garnishment that otherwise would apply to properly-obtained benefit payments. This could be done by adding the following new paragraph (i) to the end of § 212.6:

(i) *Exception in case of fraud.* Notwithstanding any other provision of this rule, a bank is to comply with a garnishment order that states that a benefit payment was obtained fraudulently.

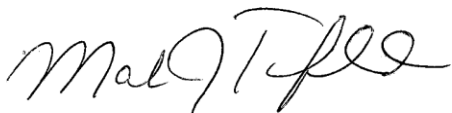
9. Definition of "account balance" (§ 212.7 and Appendix C). The Interim Rule uses the term "account balance" in two places without defining how that balance is to be computed. While Treasury's FAQ #5 states that "account balance" means "ledger balance," there may be some types of accounts into which benefit payments are directly deposited for which the concept of a "ledger balance" may be inappropriate. For instance, some accounts hold securities, alternative investments, real estate, and other assets. For those, we suggest that the Agencies clarify that the account balance is the available market value, which would be the opening balance on the day of account review minus intraday activity. Given the questions that prompted the FAQ on "account balance" and the question of how this applies in the context of accounts that hold assets other than deposited funds, we suggest that the Agencies add a definition of "account balance" in § 212.3 that clarifies these points.

10. Preemption (§ 212.9). The Interim Rule provides a general preemption provision that states, in essence, that a state law or regulation that is inconsistent with the federal regulation is preempted to the extent of the inconsistency. We understand that state bankers' associations and other commenters intend to submit letters that ask how the federal regulation works in the context of a specific state law. We encourage Treasury to provide additional clarity in response to these requests, perhaps in the form of an "evergreen" set of FAQs that are updated as issues are addressed.

* * *

We appreciate very much the Agencies' consideration of these comments, and we would be pleased to discuss them further.

Sincerely,



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Appendix

Alternative Model Notice

[Financial institution name, city, and State, shown as letterhead or otherwise printed at the beginning of the notice and toll free telephone number]

IMPORTANT INFORMATION ABOUT YOUR DEPOSIT ACCOUNT(S)

Date:

Notice to:

Why am I receiving this notice?

[Name of financial institution] received the enclosed garnishment order from a court to freeze or remove funds in your deposit account(s). We are sending you this notice to let you know what we have done in response to the garnishment order.

What is garnishment?

Garnishment is a legal process that allows a creditor to remove funds from your [bank]/[credit union] deposit account(s) to satisfy a judgment against you that you have not paid. In other words, if you owe money to a person or company, they can obtain a court order directing your [bank]/[credit union] to take money out of your deposit account(s) to pay off your debt. If this happens, you cannot use that money in your account(s).

What has happened to my account(s)?

As described in detail in the chart below, we researched your deposit accounts and identified one or more Federal benefit payments electronically deposited in the last 2 months. In most cases, Federal benefit payments are protected from garnishment. However, we are required by Federal regulations to establish a “protected amount” of Federal benefit payments electronically deposited to your account(s) in the last 2 months. This “protected amount” will remain available to you and will not be frozen or removed from your account(s) in response to the garnishment order.

While we have established the “protected amount” as required by Federal regulations, you might be entitled to protect additional funds from the garnishment as provided under your state garnishment procedures. This includes Federal benefit payments deposited by check into your account(s). See the reverse side for more information.

If indicated below, your account(s) contained additional money above the “protected amount” that may not be protected from garnishment. As required by law, we have placed a hold or removed these funds in the amount shown in the chart below and may have to turn these funds over to your creditor as directed by the enclosed garnishment order.

The chart below summarizes this information about your account(s):

Account Summary as of _____ (the date of our review of your account(s))

<i>Deposit Account Number</i>	<i>Amount in Account</i>	<i>Amount Protected</i>	<i>Amount subject to garnishment (now frozen/ removed)</i>	<i>Garnishment fee charged</i>

Please note that these amount(s) may be affected by deposits or withdrawals after the protected amount was calculated on the date of our review shown above.

PLEASE SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Do I need to do anything to access my protected funds?

You may use the “protected amount” of money in your account(s) as you normally would. There is nothing else that you need to do to make sure that the “protected amount” is safe.

Who garnished my account(s)?

The creditor who obtained a garnishment order against you is indicated in the enclosed garnishment order.

What types of Federal benefit payments are protected from garnishment?

In most cases, you have protections from garnishment if the funds in your account(s) include one or more of the following Federal benefit payments:

- Social Security benefits
- Supplemental Security Income benefits
- Veterans benefits
- Railroad retirement benefits
- Railroad Unemployment Insurance benefits
- Civil Service Retirement System benefits
- Federal Employees Retirement System benefits

The amount of these funds in your account(s) might be more than the “protected amount” we are required to establish by Federal regulations.

What should I do if I think that additional funds in my account(s) are from Federal benefit payments?

If you believe that additional funds in your account(s) are from Federal benefit payments and should not have been frozen or removed, there are several things you can do:

- **Please read the enclosed garnishment order carefully.** It might provide important information regarding your garnishment proceeding including the date and location of any upcoming garnishment hearing. The garnishment order might also provide helpful information about the garnishment process and any special rights that you might be entitled to in your state. For example, your state might allow you to fill out a garnishment exemption form and submit it directly to the court.

- You may contact the creditor that garnished your account(s) and explain that additional funds are from Federal benefit payments and should be released back to you. The creditor may be contacted as provided in the enclosed garnishment order.
- You may contact the court that issued the garnishment order for further assistance. While they cannot provide you with legal advice, they might be able to provide you with important information regarding the court's procedures for handling the garnishment proceeding as well as your right to claim additional funds as protected from the garnishment. The court may be contacted as indicated in the enclosed garnishment order.
- You may also consult an attorney (lawyer) to help you prove to the creditor who garnished your account(s) that additional funds are from Federal benefit payments and cannot be taken. If you cannot afford an attorney, you can seek assistance from a free attorney or a legal aid society that might be in your area.

By issuing this notice to you, we are not providing legal advice.