



4810-25

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831, 841

RIN 3206-AM17

RAILROAD RETIREMENT BOARD

20 CFR Part 350

RIN 3220-AB63

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 416

RIN 0960-AH18

DEPARTMENT OF THE TREASURY

FISCAL SERVICE

31 CFR Part 212

RIN 1505-AC20

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900-AN67

Garnishment of Accounts Containing Federal Benefit Payments

AGENCIES: Department of the Treasury, Fiscal Service (Treasury); Social Security Administration (SSA); Department of Veterans Affairs (VA); Railroad Retirement Board (RRB); Office of Personnel Management (OPM).

ACTION: Final rule.

SUMMARY: Treasury, SSA, VA, RRB and OPM (Agencies) are adopting as final an interim rule to amend their regulation governing the garnishment of certain Federal benefit payments that are directly deposited to accounts at financial institutions. The rule establishes procedures that financial institutions must follow when they receive a garnishment order against an account holder who receives certain types of Federal benefit payments by direct deposit. The rule requires financial institutions that receive such a garnishment order to determine the sum of such Federal benefit payments deposited to the account during a two month period, and to ensure that the account holder has access to an amount equal to that sum or to the current balance of the account, whichever is lower.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

On April 19, 2010, the Agencies published a proposed rule to address concerns associated with the garnishment of certain exempt Federal benefit payments, including Social Security benefits, Supplemental Security Income (SSI) payments, VA benefits, Federal Railroad retirement

benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits and Federal Employees Retirement System benefits. See 75 FR 20299. The Agencies received 586 comments on the proposed rule. On February 23, 2011, the Agencies published an interim final rule and request for public comment. See 76 FR 9939. The Agencies received 39 comments on the interim final rule, including comments from individuals, consumer advocacy organizations, legal services organizations, an organization of credit and collection companies, a prepaid card association, and financial institutions and their trade associations. As described in Parts II and III of this SUPPLEMENTARY INFORMATION, this final rule amends certain provisions of the interim final rule to address certain issues raised by commenters.

Interim Final Rule

The interim final rule established procedures that financial institutions must follow when they receive a garnishment order for an account holder. Under the interim final rule, a financial institution that receives a garnishment order must first determine if the United States or a State child support enforcement agency is the plaintiff that obtained the order. If so, the financial institution follows its customary procedures for handling the order. If not, the financial institution must review the account history for the prior two-month period to determine whether, during this “lookback period,” one or more exempt benefit payments were directly deposited to the account. The financial institution may rely on the presence of certain Automated Clearing House (ACH) identifiers to determine whether a payment is an exempt benefit payment for purposes of the rule.

The financial institution must allow the account holder to have access to an amount equal to the lesser of the sum of exempt payments directly deposited to the account during the lookback period or the balance of the account on the date of the account review (the “protected amount”). In addition, the financial institution must notify the account holder that the financial institution has

received a garnishment order. The notice must briefly explain what a garnishment is and must also include other information regarding the account holder's rights. There is no requirement to send a notice if the balance in the account is zero or negative on the date of account review. Financial institutions may choose to use a model notice contained in the rule in order to be deemed to be in compliance with the notice content requirements.

For an account containing a protected amount, the financial institution may not collect a garnishment fee from the protected amount. The financial institution may only charge a garnishment fee against funds in the account in excess of the protected amount and may not charge or collect a garnishment fee after the date of account review. Financial institutions that comply with the rule's requirements are protected from liability.

II. Comments and Analysis

Scope (§ 212.2)

Some commenters urged that the Agencies move expeditiously to cover in the rule all Federal payments protected from garnishment by statute, including military retirement payments. One commenter proposed that the rule be expanded to protect certain non-Federal payments deposited to bank accounts – specifically, payments originating from Employment Retirement Income Security Act (ERISA) retirement plan distributions. Other commenters suggested that the Agencies contact the U.S. Senate and propose legislation to make all Federal benefit payments exempt from garnishment. In contrast, a financial institution commenter argued that Federal benefit payments should not be protected from garnishment. One consumer organization recommended that the rule be revised to cover benefit payments made by check as well as payments made by direct deposit.

An organization representing credit and collection companies requested that the final rule provide a procedure under which the creditor garnishing an account be granted access to the debtor's account information, including, but not limited to, the amount held in the garnished account, documentation supporting the financial institution's application of the final rule, and any calculations supporting the financial institution's decision to not freeze certain funds. The association expressed concern that without any transparency into the deliberative process that a financial institution uses to decide which funds are protected by law, an environment could be created in which financial institutions would refuse to freeze funds in the garnished accounts without clear explanation or verified justification.

As discussed in the preamble to the interim final rule, the Agencies have structured the rule to create a framework in which payments protected by statute from garnishment can be included in the future. Federal agencies that issue such payments can, through a public notice-and-comment rulemaking process, amend their regulations to provide that their exempt payments are covered by this rule. The Agencies would then issue a rulemaking to include those payments within the scope of the rule. The Agencies do not have authority to expand the rule to include non-Federal payments, nor do the Agencies believe it is appropriate to seek a legislative change to address Federal payments that they do not issue and over which they do not have regulatory jurisdiction. For the reasons discussed when promulgating the interim final rule, the Agencies do not believe it is feasible or necessary to address checks within the final rule. See 76 FR 9939, 9941.

The Agencies are not adopting the suggestion that creditors be granted access to debtors' account information. Account information is protected under various State and Federal privacy laws. Creditors who believe that a legal basis exists to permit disclosure of a debtor's account information should seek access to that information in accordance with such laws.

Definition of account (§ 212.3)

The interim final rule defined an account to mean “an account, including a master account or sub account, at a financial institution and to which an electronic payment may be directly routed.” The Agencies received various requests asking for clarification of this definition. One commenter requested that the Agencies clarify that a “master” account, under which multiple sub accounts may be established and held, does not require an aggregate account review as a separate and distinct “account” for purposes of the rule. Credit unions in particular requested clarification on whether a “whole share account,” as opposed to various sub accounts, is subject to the account review and lookback.

Some credit unions commented that credit unions typically assign an individual member (or “primary”) number to each member. The member may then open multiple accounts “under” or “within” this member number with each account being designated by different “sub accounts” or “suffixes.” The member number does not denote an account per se, but rather serves as a “prefix” for all individual sub accounts of the member to or from which deposits and withdrawals may be made. For example, a new member might be given member number 9876. When the member opens a savings (or a share) account, that individual savings account might be noted as sub account “S” or “01.” Similarly, if the same member establishes a checking (or share draft) account, that individual checking account might be noted as sub account “C” or “02.” Both are sub accounts of the member's “membership” account 9876.

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 payment recipient is assigned a member number that doesn’t represent an account per se, but that serves as a “prefix” for individual sub accounts, it is the individual sub account (and not the “master account”) that is subject to the

account review and lookback.

Definition of Benefit Payment (§ 212.3)

Immediately following publication of the interim final rule, some financial institutions requested clarification on the definition of “benefit payment” for purposes of identifying Federal benefit payments. The interim final rule defines a benefit payment as a Federal benefit payment “with the character ‘XX’ encoded in positions 54 and 55 of the Company Entry Description field of the Batch Header Record of the direct deposit entry.” The Agencies were asked whether financial institutions may rely solely on the presence of the “XX,” without regard to whether there is a “2” in the “Originator Status Code” field of the Batch Header Record for the payment. Financial institutions pointed out that it is possible that payments other than Federal payments could contain an “XX” encoded in positions 54 or 55.

Following the inquiry, the Agencies published guidance stating that financial institutions must verify that a payment containing an “XX” encoded in positions 54 or 55 is in fact a Federal benefit payment, which they may do by checking for a “2” in the “Originator Status Code” field of the Batch Header Record (Position 79) or by reviewing the description of the payment in the ACH Batch Header Record Company Entry Description to ensure that the payment is one of the exempt Federal benefit types listed in the guidance.¹ The Agencies are codifying this guidance by amending the definition of benefit payment in the final rule to provide that both the “XX” and the “2” be present in the appropriate locations of the Batch Header Record.

Definition of Garnishment Order (§ 212.3)

The Agencies received many requests for clarification on the definition of “garnishment order” and some commenters indicated that confusion regarding the definition is resulting in

¹ See www.fms.treas.gov/greenbook/guidelines_garnish0311.pdf, at pp. 5-6.

compliance difficulties. Consumer advocacy groups, financial institutions, and banking associations recommend that the Agencies revise the definition of “garnishment order” so that it is clear exactly what kinds of documents are considered garnishment orders. The interim final rule includes a broad definition of “garnishment,” which closely tracks the definition in the Agencies’ statutes. However, the rule’s requirements are triggered only by the receipt of a “garnishment order,” which was defined more narrowly in the interim final rule as “a writ, order, notice, summons, judgment, or similar written instruction *issued by a court or a State child support enforcement agency. . .*” (emphasis supplied). Under this wording, levies issued directly by a State agency such as a State revenue department would not be subject to the rule.

The Agencies received many comments stating that levies are frequently issued directly by State agencies or municipalities to seize funds in bank accounts. Consumer advocacy groups expressed concern that the narrow definition of “garnishment order” leaves benefit payments exposed to improper garnishment and freezing. Some financial institutions commented that while they do not have a position on whether tax levies issued directly by a State agency should be included within the scope of the rule, guidance on the process of determining what sorts of orders or levies are within the scope of the rule would be helpful. One commenter suggested that the Agencies consider providing an exhaustive list and additional guidance as to exactly which garnishment orders are within the rule's scope.

Some commenters questioned whether the definition of garnishment order in the interim final rule applies to restraining orders, i.e., orders issued pursuant to judgments which restrain an account's funds pending future legal action. Several commenters asked if orders issued by an attorney acting in his or her capacity as an officer of the court are considered to be issued by a court. For example, in the State of New York, garnishment orders (commonly referred to as levies and

restraints) can be issued not only by courts, but also by attorneys acting on behalf of judgment creditors.² One commenter asked if the rule applied to seizures in criminal actions. This commenter noted that the proposed rule had defined “garnishment” as “execution, levy, attachment, garnishment, or other legal process *to enforce a money judgment*” (emphasis supplied), but that the phrase “to enforce a money judgment” was removed from the definition of “garnishment” in the interim final rule. The commenter questioned whether by removing the phrase, the Agencies intended that the rule cover not only civil money judgments, but also seizures in criminal actions.

The Agencies are revising the definition of garnishment order to include orders or levies issued by a State or State agency or municipality. To remove any doubt as to whether the rule applies to restraining orders, the Agencies are amending the definition of garnishment order to include “an order to freeze the assets in an account.” With regard to the question of whether a “garnishment order” includes an order issued by the clerk of the court or an attorney acting in his or her capacity as an officer of the court, it was not the Agencies’ intention that an order “issued by a court” be so narrowly construed as to exclude such orders. The Agencies’ view is an order issued by the clerk of the court or an attorney acting in his or her capacity as an officer of the court in accordance with State law constitutes an order issued by the court. Lastly, the Agencies did intend by removing the phrase “to enforce a money judgment” from the definition of “garnishment” in the interim final rule to ensure that the rule is not limited to civil money judgments.

Definition of Lookback Period (§ 212.3)

One commenter urged that the lookback period be extended from 2 months to 65 days, while another commenter urged that it be shortened from 2 months to 30 days. For the reasons discussed

² New York CPLR5230 provides that “at any time before a judgment is satisfied....An execution may be issued from the Supreme Court...By the clerk of the court....or the attorney for the judgment creditor as an officer of the court. ...”

in promulgating the interim final rule, the Agencies believe that a 2 month lookback period is appropriate. See 76 FR 9939, 9942.

Definition of Protected Amount (§ 212.3)

Several financial institutions requested guidance on how the account balance should be computed when conducting an account review and establishing a protected amount. The interim final rule defined the “protected amount” as the lesser of: (i) the sum of all benefit payments posted to an account between the close of business on the beginning date of the lookback period and the open of business on the ending date of the lookback period and (ii) the balance in an account at the open of business on the date of the account review. Some financial institutions commented that it was not clear whether the account balance for purposes of clause (ii) refers to the ledger balance, the memo ledger balance, the Regulation CC³ available funds balance or the memo available funds balance. Other commenters noted that the procedure for calculating the protected amount does not take into account intraday postings of credits or debits. Therefore, depending on the time of day that an account review is performed and whether items have been posted to the account during the day, establishing a protected amount without taking into account intraday debits could result in the establishment of a protected amount that exceeds the funds in the account. For example, if \$1,000 in protected funds were deposited during the lookback period, and the account balance was \$600 at the open of business on the date of the account review, then the protected amount would be \$600. If, however, the account review is performed in the afternoon, and all \$600 had been withdrawn by the time the account review was performed, then the financial institution would be in the position of establishing and providing access to a \$600 protected amount for an account containing no funds.

To address this incongruity, the Agencies are amending the rule to provide that the relevant

³ Regulation CC, 12 CFR Part 229, is the Federal Reserve regulation governing when funds deposited to bank accounts must be made available for withdrawal by customers.

account balance is the account balance when the account review is performed, so that the balance will include intraday items such as ATM or cash withdrawals. Financial institutions should not use the Regulation CC available funds balance, but should be aware that the requirement to provide access to the protected amount is subject to the usual restrictions on funds availability under Regulation CC, as discussed in the preamble to the interim final rule.⁴ In addition, the Agencies do not intend that any line of credit associated with the account be considered as part of the “account balance” for this purpose.

One commenter questioned the calculation of the account balance in the context of accounts in which the concept of a “ledger balance” may be inappropriate. For instance, some accounts hold securities, alternative instruments, real estate, and other assets. For those accounts, the commenter suggested that the Agencies clarify that the account balance is the available market value of the account, which would be the opening balance on the day of account review minus intraday activity. The Agencies are not making this change because the rule applies only to deposit accounts held by a bank, savings association, credit union, or other entity chartered under Federal or State law to engage in the business of banking.⁵ The rule does not apply to asset accounts or address any protection that may exist for securities or other assets purchased with Federal benefit payments.

Initial action upon receipt of a garnishment order (§ 212.4)

The Agencies received comments noting that although the interim final rule establishes procedures that financial institutions must follow when served with a garnishment order, there will

⁴ See discussion of section 212.6(b) at 76 FR 9952 (“requirement that a financial institution ensure that the account holder has access to the protected amount would be subject to any limitation on funds availability to which the account is subject. For example, if funds on deposit are subject to a hold consistent with Regulation CC, [footnote omitted] or a limitation on withdrawal applicable to a time deposit, the proposed rule would not override or affect those limitations.”).

⁵ Federal benefit payments may be delivered only to deposit accounts at financial institutions (see 31 CFR 210.5(a)).

be situations where a financial institution determines that it will not act on a garnishment order. Commenters asked whether the rule's procedures must still be followed in these situations. One example provided by a commenter is 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 financial institution's obligation to garnish ends when the bank tenders over an amount to pay the debt. By logical extension, the commenter argued, the financial institution's obligation to review the other account(s) in the account holder's name also should end. However, the commenter pointed out that a literal reading of § 212.5(f) (which requires a separate account review for each account in the name of an account holder against whom a garnishment order has been issued) arguably requires reviews of the other account(s) even when there is no remaining debt. A review of a second or third account could then lead to the presence of another "protected amount" (even though the garnishment has been satisfied) and thereby trigger the requirement to send another notice.

Another example cited by a commenter postulated a situation in which a financial institution receives a garnishment order directed against the beneficiary of a "pay on death" or "revocable trust" account. In this situation, the beneficiary has only a contingent interest in the account, the beneficiary's name is not likely to be included on the account and the financial institution would not normally take action against the account based on the beneficiary's contingent interest. A third example, provided by a financial institution trade group, would occur if a financial institution determines that a garnishment order cannot be given effect under State law because all of the funds in the account are protected from garnishment under State law (for example, where State law establishes a dollar amount that is protected).

The Agencies agree that it serves no useful purpose to follow the rule's procedures in

situations where a financial institution has made a determination not to take any action affecting an account as the result of the receipt of a garnishment order. The first step required under the rule when a financial institution receives a garnishment order is to examine the order to determine if a Notice of Right to Garnish Federal Benefits is attached or included. The requirement to perform this first step, however, is prefaced by the words, “Prior to taking any other action related to a garnishment order issued against a debtor. . .” See § 212.4(a). Accordingly, if a financial institution has determined not to take action related to a garnishment order, neither this step nor any subsequent requirement of the rule is triggered. The Agencies have published a set of frequently asked questions (FAQs) on the garnishment rule that states that if a financial institution will not be freezing or removing funds from an account in response to a garnishment order, then the financial institution should not perform an account review to determine if a protected amount should be established.⁶ In light of this guidance and the wording of § 212.4(a), the Agencies do not believe it is necessary to revise the rule itself on this point.

Exception for orders obtained by State Child Support Enforcement Agencies or the United States (§ 212.4)

One consumer advocacy organization opposed permitting any garnishment of exempt funds by the United States or a State Child Support Enforcement Agency. This commenter argued that an agency that is statutorily permitted to seize exempt Federal benefits should proceed through the Federal benefit offset program because the bank garnishment process is not well suited for such collections and should not be permitted. Several consumer advocacy organizations commented that the interim final rule’s exception allowing for the processing of child support orders issued by State child support agencies illegally and inappropriately permits the seizure of SSI payments and VA

⁶ See www.fms.treas.gov/greenbook/FAQs-May-12-trsy-ver1.pdf .

payments to pay child support obligations. Some organizations argued that the garnishment of these benefits for child support obligations is prohibited by 42 U.S.C. 659, a statute that permits garnishment orders to be served on the United States. Others commented that the rule should not provide the basis for garnishment of exempt Federal funds from bank accounts that cannot legally be offset directly from the Federal paying agency. Some commenters recommended that the Agencies incorporate in the rule the limitations that apply when child support arrearages are collected by offset directly from the Federal benefit agency, and ensure that these limits are applied to the garnishment of Federal funds from bank accounts.

One commenter suggested that the Agencies establish a minimum amount to be protected in every bank account even from garnishment orders issued from State child support enforcement agencies. This commenter recommended that the final rule provide that for garnishment pursuant to child support orders, the protected amount would include the lesser of the sum of 2 months' exempt deposits or \$750 (one twelfth of \$9,000). The Agencies note, however, that although Federal benefit payments deposited to a bank account are protected by statute from garnishment for most debts, Federal and state law provides that this protection generally does not extend to garnishments for child support once these benefits have been deposited into a bank account, with exceptions for certain benefits.

Another commenter suggested that the Agencies protect SSI payments from seizure for child support garnishment by adopting a procedure for financial institutions to follow when they receive a garnishment order from a State child support enforcement agency. That procedure would require financial institutions to examine every order that includes a "Notice of Right to Garnish Federal Benefits" to determine whether the order was obtained by a child support enforcement agency. For all such orders, the financial institution would have to conduct an account review to determine

whether SSI payments were deposited to the account during the lookback period. To make it possible for financial institutions to identify SSI payments without manually reviewing the account history, financial institutions would have to make the programming changes necessary to detect the identifier for SSI payments located in positions 56-63 of the Company Entry Description field of the ACH Batch Header Record.

The Agencies did not previously seek comment on imposing a process on banks to prevent the potential garnishment of SSI or VA payments by child support enforcement agencies, because they were aware of U.S. Department of Health and Human Services Office of Child Support Enforcement (DHHS OCSE) instructions that direct State child support enforcement agencies not to serve orders on financial institutions to garnish SSI payments and DHHS OCSE's public information that VA payments are generally not subject to garnishment.⁷ DHHS OCSE has recently issued additional guidance to State child support enforcement agencies reiterating its policy that SSI payments are not to be garnished and urging state agencies to implement automated and manual processes to prevent improper garnishments. See Dear Colleague Letter [DCL-13-06] and Fact Sheet "Garnishing Federal Benefits for Child Support."

The Agencies do not have information on the difficulty or burden that would be associated with manually reviewing every order that includes a Notice. The Agencies also do not have information on the costs to financial institutions of making programming changes necessary to identify SSI or VA payments delivered to an account. However, these procedures would seem to

⁷ See Dear Colleague Letter 00-103 (Oct. 6, 2000) <<http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-103.htm>>. DHHS OCSE also provides public information regarding garnishment of VA payments for child support. See OCSE VA, Income Withholding and Veteran's Benefits, Guides/Publications/Reports (March 1, 2012) at <http://www.acf.hhs.gov/programs/css/resource/income-withholding-and-veterans-benefits>.

impose an additional burden on financial institutions. In light of this potential burden, the Agencies have sought to evaluate the extent to which the garnishment of SSI or VA payments by child support enforcement agencies presents a genuine hardship for noncustodial parents.

After further consultation with DHHS OCSE, it does not appear that the garnishment of SSI or VA payments by child support enforcement agencies raises the same concerns that are raised by the garnishment of Federal benefits by commercial creditors. First, noncustodial parents receive substantial advance due process before a child support enforcement order is issued. This is in marked contrast to garnishment orders obtained by commercial creditors, where there is no advance due process and therefore no opportunity for the debtor to challenge the garnishment of benefit payments in a bank account until after the order has been executed. A noncustodial parent has the opportunity, before a child support enforcement order is issued, to notify the agency that the parent receives SSI or VA payments. Second, DHHS OCSE has instructed child support enforcement agencies not to serve orders on financial institutions to garnish SSI payments and has provided public information that VA payments generally are not subject to garnishment by child support enforcement agencies. Specifically, Federal payments subject to garnishment by child support enforcement agencies under 42 U.S.C. 659 are limited to payments based on remuneration for employment, which do not include SSI payments or VA payments other than those representing compensation for a service-connected disability paid to a former member of the Armed Forces who is in receipt of retired or retainer pay and who has waived a portion of the retired or retainer pay in order to receive such compensation.⁸

Finally, if an account containing SSI or VA payments is garnished by a state child support enforcement agency, the noncustodial parent is not required to go to court to have the funds released

⁸ See 42 U.S.C. 659(h)(1)(A)(ii)(V).

and therefore does not necessarily face a time-consuming, expensive, and confusing process to free the funds. Rather, a noncustodial parent whose account is garnished for child support can contact the child support enforcement agency directly (usually by phone), explain that the account being garnished contains SSI or VA payments, and provide a copy of his or her SSI or VA payments statement in order to have the benefits released.

In the notice of proposed rulemaking, the Agencies explained the need for the rule:

Creditors and debt collectors are often able to obtain court orders garnishing funds in an individual's account at a financial institution. . . . Although state laws provide account owners with an opportunity to assert any rights, exemptions, and challenges to the garnishment order, including the exemptions under applicable Federal benefits laws, the freezing of funds during the time it takes to file and adjudicate such a claim can cause significant hardship for account owners. . . . If their accounts are frozen, these individuals may find themselves without access to the funds in their account unless and until they contest the garnishment order in court, a process that can be confusing, protracted and expensive. 75 FR 20300.

It was the significant hardship posed by this after-the-fact due process procedure that the rule is designed to eliminate. Because the child support enforcement process does not raise the same concerns, and in light of the burden for financial institutions that would be created by instituting a new and separate process for handling child support enforcement orders, the Agencies are not revising the exception in the rule allowing for the processing of orders from State child support enforcement agencies when the appropriate notice is attached to the order. The Agencies note that nothing in the rule restricts or prevents an individual who receives SSI payments, VA payments or any other Federal benefit payments from challenging in court the garnishment of those payments for child support obligations in the event a State child support enforcement agency does serve such a garnishment order on a financial institution. The Agencies further note that nothing in this rule restricts or prevents an individual from challenging, in court, any order of garnishment against a benefit payment.

A State child support enforcement agency commented that the requirement to attach a Notice of Right to Garnish Federal Benefits places an additional and unnecessary compliance burden on States. The commenter also noted that as more States expand their electronic processing capabilities to include the transmission of documents, including garnishment orders/notices, the mandatory notice conflicts with the rationale for the electronic transmission of documents and serves to mitigate any associated cost benefits. The commenter recommended the requirement to attach the notice be made optional, and that the Agencies set forth the content or prescribed language for the certification of the right to garnish benefits. States could then choose to use the model notice to be deemed compliant or to ensure that their garnishment notices/orders contain the appropriate identifying language.

The Agencies believe that it is important that financial institutions be able to quickly identify whether a garnishment order was obtained by a State child support enforcement agency, without searching through the order itself to locate verbiage. Moreover, the Agencies do not believe that the inclusion of the notice precludes the electronic transmission of a garnishment order. Accordingly, the Agencies are not revising the requirement that the notice be attached to an order obtained by a State child support enforcement agency for such an order to be excluded from the rule's requirements.

Account Review (§ 212.5)

One commenter urged the Agencies not to allow 2 business days in which to examine orders for the inclusion of a Notice of Right to Garnish Federal Benefit Payment and (if not present) conduct an account review. The commenter observed that court orders generally require garnishments to be processed on the day of receipt, and that banks that delay account reviews, but then find no benefit payments, will violate court orders. Another commenter suggested that the

Agencies define "business day" with a cross reference to an existing regulation, preferably Regulation CC.

A trade association representing prepaid card providers commented that the 2 business day deadline for conducting the account review is unrealistic for financial institutions that issue prepaid cards because of the complexity in the administration of prepaid card programs. This commenter stated that financial institutions commonly support multiple prepaid card programs affiliated with a number of different programs and data processors, making the logistics of coordination more complex and time-consuming than with a regular deposit account. According to the commenter, determining the protected funds in such cases will require communication with several third-party vendors in addition to coordination of the account review by bank personnel. The commenter suggested that 5 business days would be an appropriate deadline.

A consumer advocacy organization commented that the Agencies should not exclude funds transferred from one account to another from the account review and the establishment of the protected amount if the benefit funds are transferred to special purpose savings accounts such as 529 plans and Individual Development Accounts.

Based on the extensive comments received on the interim final rule regarding the time allowed for conducting the account review, the Agencies believe it is necessary to allow 2 business days for financial institutions to identify orders subject to the rule and conduct account reviews, if required. It should be noted that financial institutions will not violate State law by utilizing the 2-day period, because the rule preempts any State requirement that an order be processed on the day of receipt. The Agencies understand that processing garnishment orders may involve more complexity in the context of prepaid card accounts, but believe that prepaid card holders who receive benefit payments on prepaid cards should have the same protection against improper

garnishment orders as individuals whose benefit payments are directly deposited to conventional bank accounts. Accordingly, the Agencies are not extending the time period permitted for the account review for prepaid card accounts.

The Agencies are retaining in § 212.5(f) of the final rule the provision that funds transferred from one account to another are excluded from the account review and the establishment of the protected amount. Although the Agencies understand that exempt funds may be transferred to a special savings or other account following the initial deposit, requiring the examination of all account transfers after a Federal benefit payment has been identified would impose a significant burden on financial institutions, since they would not be able to rely on a transaction indicator, like the ACH identifier, in searching account histories to determine whether transferred funds should be classified as exempt. Moreover, the Agencies note that nothing in the rule restricts or prevents an individual from asserting that the benefit retained its exempt character and, thus, was not subject to garnishment.

Access to Account (§ 212.6)

One commenter suggested that the Agencies ensure that the requirement to provide “full and customary” access to an account containing a protected amount is not abused by explicitly stating that financial institutions are prohibited from closing such accounts. Another commenter requested guidance on the “full and customary access” requirement in States where a continuing garnishment order is served, requiring that any deposits into the account before the date on which the garnishment order expires (the “return date”) be garnished and any withdrawals before the return date be prevented. The commenter explained that there could be situations, in States that allow continuing garnishments, in which a protected amount is established for an account, but another account held by the account holder containing no protected amount would be subject to a continuing

freeze. The commenter stated that it is customary for financial institutions to temporarily suspend the use of a debit card on all accounts connected to that debit card and that financial institutions cannot apply this suspension on an account-by-account basis. The commenter asked how a financial institution could comply with the requirement to freeze the second account while still allowing “full and customary access” to the account containing the protected amount.

The final rule does not address the conditions under which financial institutions may close accounts, which the Agencies believe is beyond the scope of this rule. The Agencies have conducted research into the ability of financial institutions to suspend debit card access to one account held by an account holder while enabling debit card access to another account. It appears that many financial institutions have the capability to do so. Moreover, the number of States in which this issue might arise is very small, since most States do not provide for continuing garnishments. The Agencies indicated in the preamble to the interim final rule that the requirement to provide the account holder with “full and customary” access to the protected amount was intended to ensure that after a garnishment order is received, the account holder continues to have the same degree of access to the protected funds that was provided prior to the receipt of the order. The Agencies’ view is that where an account holder had debit card access to an account prior to the receipt of a garnishment order, the requirement to provide full and customary access to the protected amount means that the account holder should have debit card access to that amount.

Same versus new or different garnishment order (§212.6(f))

Some commenters requested clarification on when a garnishment order constitutes a new or different order as opposed to the same order. In some States, financial institutions are served with recurring, short-term continuing garnishments. These garnishments are customarily re-issued after the date on which they expire (the “return date”). The reissued garnishment pertains to the same

matter and the same parties and is procedurally required to continue to pursue collection of a judgment. The garnishment would have the same case number but be filed under a different execution number. Commenters questioned whether a garnishment order that is re-issued after its return date would be considered the "same" or a "new" garnishment order.

The Agencies have published a FAQ stating that a “new” garnishment order means that the creditor has gone back to court and obtained a new order, as opposed to re-filing an order that was previously served.⁹ The FAQ indicated that, in the case of an order from a State child support enforcement agency, a new order would be an order that is not simply the re-delivery of the same order. The Agencies’ view is that a garnishment order that is re-issued after the return date, under a different execution number, would not constitute a “new” garnishment order.

Garnishment Fee (§ 212.6(h))

A number of financial institutions and their trade associations commented that financial institutions should be allowed to assess reasonable garnishment fees whether or not an account has excess funds beyond any protected amounts, and even if imposing the fee would create an overdraft in the account. Several commenters asserted that costs to financial institutions of processing garnishment orders will increase as a result of the rule and that in light of the fee restrictions imposed by the rule, banks may decide to close accounts. Financial institutions asserted that garnishment order processing and compliance is a very time-consuming and often complex process and that it is unreasonable for financial institutions, which are generally not a party to the dispute between the creditor and the debtor, not to be compensated for the expenses and liabilities they incur. Expenses cited by financial institutions in processing garnishment orders include salaries and benefits for staff receiving and logging garnishment orders, performing account searches,

⁹ See www.fms.treas.gov/greenbook/FAQs-May-12-trsy-ver1.pdf.

conducting account reviews, identifying and calculating available and protected funds, placing hold orders, processing remittances, mailing and filing notices and documentation, and handling inquiries from depositors and creditors, as well as legal and compliance support staff. Financial institutions argued that without the ability to charge the customer a fee each time an account review commences, the financial institution will be forced to recoup costs against all customers, creating unfairness to both the financial institution and the financial institution's other customers.

These commenters requested that the rule be revised to allow financial institutions to assess reasonable garnishment fees even in instances where the fee must be collected either partially or fully from protected amounts. They also requested that the Agencies revise the prohibition in § 212.6(g) against charging or collecting a garnishment fee after the date of the account review. In addition, a financial institution trade association requested that the final rule clarify that garnishment fee limitations do not apply to attorney's fees assessed by a court, and that such attorney's fees can be recovered from future nonprotected balances.

In contrast, a consumer advocacy group commented that the prohibition on charging a garnishment fee against a protected amount or charging a garnishment fee after the date of the account review should be extended to protect funds from any other fees triggered by the garnishment order. Another commenter proposed that the Agencies require the creditor to pay the garnishment fee charged by the financial institution upon filing the legal document and then have the creditor add this fee to the amount owed to the creditor by the debtor.

One commenter asked for clarification on whether the rule prohibits charging a garnishment fee in the following scenario: a customer has multiple separate accounts or subaccounts, only one of which receives electronic Federal benefit payments. The other accounts are not subject to the rule. The commenter asked if the financial institution could collect an agreed upon garnishment fee

from accounts not subject to the rule. The commenter also asked if a financial institution could collect a garnishment fee from an account that is not subject to the regulation after the account review by taking that account balance negative.

The Agencies continue to believe that financial institutions should not be permitted to collect a fee from the protected amount and are not amending that provision of the rule. The Agencies are not expanding the prohibition on garnishment fees to encompass “any fee that arises as a result of a garnishment,” because such a definition would be overly broad. However, in light of the comments received, the Agencies have decided to amend the rule to provide financial institutions with an opportunity, for 5 days following the account review, to impose a garnishment fee in the event that nonprotected funds become available following the account review.

The Agencies stated in the preamble to the interim final rule that the prohibition on charging a garnishment fee after the date of account review was necessary because otherwise the rule would need to prescribe procedures that financial institutions would follow to monitor accounts in real time to track deposits and withdrawals, determine whether new deposits are exempt or not, and determine whether a garnishment fee could be imposed. In light of the comments received from financial institutions, the Agencies have decided to establish a procedure that financial institutions may follow, if they choose, for a limited time following the account review to determine whether nonprotected funds are available to support the imposition of a garnishment fee. If funds other than a benefit payment are deposited to an account during the 5 business days following the date of the account review, the financial institution may charge or collect a fee from the additional funds. In order to impose such a fee, a financial institution could choose to check the account at any time during the 5 days after the account review to determine if funds other than benefit payments were deposited.

In response to the question as to whether a garnishment fee may be collected from accounts that do not contain a protected amount, the Agencies emphasize that such accounts are not subject to any restrictions under this rule, and that a financial institution may collect an agreed upon garnishment fee from such accounts in accordance with the customer agreement and any applicable laws.

Notice to Account Holder (§ 212.7)

A number of comments were received regarding the form, contents and means of delivery of the notice that must be provided to account holders. One commenter stated that financial institutions should not be required to provide a notice to the account holder and that it would be appropriate to put this burden on the party issuing the garnishment order. Other commenters urged the Agencies to revise the rule to require a notice to an account holder only in cases where there are funds in the account in excess of the protected amount. The interim final rule requires that a financial institution send a notice to the account holder if the balance in the account on the date of the account review is above zero dollars and the financial institution establishes a protected amount. A number of financial institutions noted that this requirement means that a financial institution must notify an account holder when a garnishment order is received for an account into which exempt benefit payments have been electronically deposited during the lookback period even in cases where no account funds are frozen. Financial institutions commented that providing a notice in this situation is of no benefit to account holders and will result in unnecessary confusion to account holders, many of whom will be unlikely to read the entire notice and will erroneously believe that their entire account balance has been frozen. These commenters stated that financial institutions will incur the expense of preparing and mailing garnishment notices for accounts in which no funds will be turned over to a creditor, as well as for responding to inquiries from account holders

confused by the notices.

One commenter recommended that financial institutions be permitted to mail the notice to the customer's address according to its records. Other commenters stated that it is unclear whether a bank is prohibited from sending notice to joint account holders. Financial institutions commented that they typically send notices regarding a joint account to all the account holders and that requiring that a garnishment order be sent solely to the person named in the order would require them to change their processes and would result in information not being communicated that the account holder likely would find important. In some States, according to commenters, State law requires banks to notify all account holders of a garnishment order that has been received and to send a copy of it to the account holders. Commenters therefore requested 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. They also requested 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 holder of an account that has been garnished.

One financial institution trade group noted that § 212.7(e), which addresses delivery of the notice to the account holder, says only that a financial institution shall “issue” the notice directly to the account holder. This trade group stated that electronic notices can be provided promptly and securely and help banks to avoid unnecessary compliance costs, and requested that the Agencies allow a financial institution to issue a notice, or make a notice available, electronically, through an email or a proprietary web site in instances where an account holder has consented to electronic communication.

The same commenter requested 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. As proposed by the commenter, 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.

With regard to the requirement that contact information for the creditor be included in the notice, a commenter noted that generally garnishments served on our clients arrive with limited information about the creditor, but full contact information for the attorney for the creditor. The commenter questioned whether financial institutions should include, in lieu of limited information on the creditor, the full information to contact the attorney for the creditor. Another commenter recommended that the list of protected payments be removed from the model notice because the list must be updated continuously.

The Agencies agree that the requirement to send a notice to account holders in cases where there are no funds in excess of the protected amount may be of little benefit and is likely to result in unnecessary confusion for some account holders. Accordingly, the Agencies are revising the rule to require a notice to an account holder only in cases where there are funds in the account in excess of the protected amount. With regard to the delivery of notices, the Agencies believe it is acceptable for financial institutions to mail the notice to the address of record, and do not believe that anything in the rule suggests otherwise. In the case of joint accounts affected by a garnishment order, financial institutions may deliver the notice to both account holders, but there is no obligation to do so. The Agencies do not believe it is necessary to amend the rule to state specifically that a bank may follow its normal practice of communicating with joint account holders when sending a garnishment notice. In such a case, the financial institution may indicate in its notice that the recipient of the notice may be receiving it because he or she is a joint holder of an account that has

been garnished. The rule does not specify the means of delivery of the notice, so that any method of delivery for notices agreed to between the financial institution and the account holder, including electronic delivery, would be acceptable.

The Agencies are not creating an alternative to the model notice. Financial institutions are not required to use the model notice and may create their own alternative notices. In cases where a financial institution receives a garnishment order with limited information about the creditor, but full contact information for the creditor's attorney, the Agencies' view is that the financial institution may include, in lieu of limited information on the creditor, the full information to contact the attorney for the creditor.

The Agencies are not removing the list of protected payments from the notice because this information is likely to be helpful to account holders. The payments included in the list have been protected from garnishment by Federal statutes for many years and there is no reason to anticipate a change in these statutes.

Preemption of State Law (§ 212.9)

Some financial institutions expressed confusion over the interplay of the rule with State law and questioned how the preemption of State law would work in certain situations. One commenter posed a scenario in which State law treats a joint account held by two spouses as being held in tenancy by the entirety, and protects the account from garnishment unless the garnishment order is in both spouses' names. The commenter pointed out that where a garnishment order naming just one spouse is served on the financial institution, and protected benefit payments are deposited to the account, the rule would require that an account review be performed and a protected amount established. However, under State law, the account would not be subject to garnishment at all. The commenter questioned the interplay between the rule and State law in this scenario. Another

commenter questioned whether, when protected benefit payments are deposited to an account, the rule is to be applied exclusively, or whether the rule is to be applied to determine a protected amount followed by the application of a more protective State law to funds exceeding the protected amount in the same account.

A financial institution trade group suggested that the Agencies provide guidance on how the rule operates in the context of a specific State law by maintaining an “evergreen” set of FAQs that are updated as issues are raised.

One credit union association commented that it conceptually opposes the rule in its entirety with specific note to the “continuing garnishment” provision at § 212.6(g) and argued that § 212.6(g) is both a logically unpermitted exercise of authority and unconstitutional.

As discussed above (See Initial action upon receipt of a garnishment order (§ 212.4)), the rule’s requirements presuppose that a financial institution would give effect to a garnishment order. It serves no useful purpose to follow the rule’s procedures in situations where a financial institution has made a determination not to take any action against an account on the basis of a garnishment order. Accordingly, if a financial institution will not act on a garnishment order due to the operation of State law, the financial institution need not examine the order to determine if a Notice of Right to Garnish Federal Benefits is attached or included or take any of the additional steps required under the rule.

The Agencies intend to maintain the FAQs that have been published as an “evergreen” document, meaning that they will be updated as appropriate. However, the Agencies do not intend to routinely address preemption questions within the FAQs.

The Agencies do not agree that the “continuing garnishment” provision at § 212.6(g) is an unconstitutional exercise of authority. As discussed in the preamble to the interim final rule, the

rule's treatment of continuing garnishments is necessary to give proper effect to the anti-garnishment statutes that the rule is implementing, since it is not possible to implement both a protected amount and give effect to continuing actions related to a garnishment order. See 76 FR 9946.

Record Keeping (§ 212.11)

A State banker's association commented that some banks would like more specificity as to what the record keeping requirement encompasses. This commenter suggested that the Agencies create a "job aid" for financial institutions that would make it clear what documentation a financial institution is required to maintain for 2 years. The Agencies believe that it is up to financial institutions to decide what documentation to retain, and that the appropriate documentation may vary depending on the circumstances of each situation.

Other Comments

Garnishment of fraudulently obtained benefit payments

A banking trade group commented that benefit payments should not be protected from garnishment where the garnishment order is for the purpose of recouping fraudulently obtained benefits. This commenter suggested that the Agencies address this scenario in the rule by creating an exception in the rule that would require financial institutions to give effect to an order that states on its face that benefit payments were obtained fraudulently, without regard to the protection from garnishment that otherwise would apply to properly-obtained benefit payments.

The Agencies do not believe that financial institutions should be required to read and make judgments on the basis for, and merits of, garnishment orders, and have structured the rule accordingly. In the case of garnishment orders to recover fraudulently issued Federal benefits, such benefits will typically be recovered in an action by the United States, which can attach a Notice of

Right to Garnish Federal Benefits, if applicable.

Effective Date

A bank trade association recommended that the effective date of the final rule be delayed for 6 to 12 months following its publication, stating that it would take that long for most community banks to be able to implement the necessary systems programming and testing required to automate the detection of the unique ACH identifiers. A financial institution questioned whether the rule applies to continuing court orders already in place prior to May 1, 2011 or whether a Notice of Right to Garnish Federal Benefits must be provided in order for the financial institution to continue to honor such orders.

The interim final rule has been in effect since May 1, 2011, and the Agencies understand that financial institutions generally began implementing the rule's requirements as of that date. The amendments to the interim final rule in this rulemaking should not change or complicate compliance, and the Agencies therefore are not delaying the effective date of the final rule beyond the 30 days prescribed by the Administrative Procedure Act (5 U.S.C. 553(d)). The rule does not, however, apply retroactively to orders, including continuing orders, that were in place prior to the May 1, 2011 effective date.

FAQs

One commenter requested that the FAQs either be incorporated directly into the rule or attached as an appendix. The Agencies believe it would be cumbersome, and unnecessary, to amend the regulation to codify the informal interpretive guidance included in the FAQs. The Agencies anticipate that they may modify or add to the FAQs to clarify issues that may be raised in the future. Codifying the FAQs in the rule would preclude the Agencies from amending the FAQs without going through a notice-and-comment rulemaking process.

III. Section-by-Section Analysis

Section 212.3

The definition of “benefit payment” is revised to mean a direct deposit payment that includes not only an “XX” in positions 54 and 55 of the Company Entry Description field, but also the number “2” encoded in the Originator Status Code field of the Batch Header Record of the direct deposit entry.

The definition of “garnishment order” and “order” is revised to include a levy, and also to include orders issued by States and municipalities, as well as orders to freeze assets.

The definition of “protected amount” is revised to refer to the balance in an account when the account review is performed.

Section 212.6

Section 212.6(h) is revised to provide an exception to the prohibition against charging or collecting a garnishment fee after the date of account review, i.e., retroactively. Under the exception, if funds other than a benefit payment are deposited to the account at any time within 5 business days following the date of the account review, the financial institution may charge or collect a fee from the additional funds.

Section 212.7

Section 212.7 is revised to require that the financial institution send a notice to an account holder only where financial institution has established a protected amount and there are funds in the account in excess of the protected amount.

Appendix C to Part 212

The examples demonstrating how the protected amount is calculated have been revised to reflect the use of the account balance when the account review is performed rather than the opening balance in the account on the day of the account review.

IV. Regulatory Analysis

A. Executive Order 12866, and Executive Order 13563

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

B. Regulatory Flexibility Act

In the proposed rule, the Agencies prepared a joint Initial Regulatory Flexibility Analysis and requested comment on the proposed rule’s impact on small entities. Based on the Agencies’ analysis of the comments on the proposed rule and based on a survey of small credit unions conducted by the Treasury, the Agencies certified that the interim final rule would not have a significant economic impact on a substantial number of small entities. One credit union, one bank and one credit union association commented that in their opinion the interim final rule does impose a burden, that the burden on financial institutions will likely be more significant than the Agencies

believe, and that the burden will be more significant for small institutions. One of these commenters stated that it will take hours of manpower and some system reprogramming to meet the rule's requirements. Another commenter stated that smaller credit unions may not find it cost effective to upgrade their systems in order to automate the measurement of the lookback period and the performance of the account review in light of the small number of garnishment orders they receive. This commenter stated that although the time required to conduct an account review may be minimal, time spent reviewing the account is necessarily time the employee cannot spend working on his or her day-to-day responsibilities. None of the commenters provided any estimates of costs.

Some of the changes that the Agencies are adopting in the final rule will reduce the costs and burden of complying with the rule's requirements. Financial institutions will have an additional opportunity to charge a garnishment fee, and thereby recoup some costs, because the rule allows a fee to be charged against any nonprotected amounts deposited to an account within 5 business days following the account review. In addition, financial institutions will not be required to send a notice to an account holder unless there are funds in the account in excess of the protected amount. In light of these changes and for the reasons discussed in the interim final rulemaking, the Agencies certify that this final rule will not have a significant economic impact on a substantial number of small entities, in accordance with 5 U.S.C. 605(b).

C. Executive Order 13132 Determination

Executive Order 13132 outlines fundamental principles of Federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have "substantial direct effects" on the States, the relationship between the national government and States, or on the distribution of power and responsibilities

among the various levels of government. Federal agencies promulgating regulations that have these Federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Agencies' view, nothing in this final rule affects the Federalism implications already considered in the promulgation of the interim final rule. The Agencies stated, when promulgating the interim final rule, that the rule may have Federalism implications, because it has direct, although not substantial, effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government. The provision in the rule (§ 212.5) that establishes a process for financial institutions' treatment of accounts upon the receipt of a garnishment order could potentially conflict with State garnishment laws prescribing a formula for financial institutions to pay such claims.

The rule's central provision requiring a financial institution to establish a protected amount will affect only a very small percentage of all garnishment orders issued by State courts, since in the vast majority of cases an account will not contain an exempt Federal benefit payment. Moreover, States may choose to provide stronger protections against garnishment, and the regulation will only override State law to the minimum extent necessary to protect Federal benefits payments from garnishment.

Under 42 U.S.C. 407(a) and 42 U.S.C. 1383(d)(1), Federal Old-Age, Survivors, and Disability Insurance benefits and Supplemental Security Income payments are generally exempt from garnishment. 42 U.S.C. 405(a) provides the Commissioner of Social Security with the authority to make rules and regulations concerning Federal Old-Age, Survivors, and Disability Insurance benefits. The Social Security Act does not require State law to apply in the event of

conflict between State and Federal law.

Under 38 U.S.C. 5301(a), benefits administered by VA are generally exempt from garnishment. 38 U.S.C. 501(a) provides the Secretary of Veterans Affairs with the authority to make rules and regulations concerning VA benefits. The statutes governing VA benefits do not require State law to apply in the event of conflict between State and Federal law.

Under 45 U.S.C. 231m(a), Federal railroad retirement benefits are generally exempt from garnishment. 45 U.S.C. 231f(b)(5) provides the RRB with rulemaking authority over issues arising from the administration of Federal Railroad retirement benefits. The Railroad Retirement Act of 1974 does not require State law to apply in the event of conflict between State and Federal law.

Under 45 U.S.C. 352(e), Federal railroad unemployment and sickness benefits are generally exempt from garnishment. 45 U.S.C. 362(1) provides the RRB with rulemaking authority over issues arising from the administration of Federal railroad unemployment and sickness benefits. The Railroad Unemployment Insurance Act does not require State law to apply in the event of a conflict between State and Federal law.

Under 5 U.S.C. 8346, for the Civil Service Retirement System (CSRS) and under 5 U.S.C. 8470, for the Federal Employees Retirement Systems (FERS), Federal retirement benefits are generally exempt from garnishment. 5 U.S.C. 8347 and 5 U.S.C. 8461, respectively, provide the Director of OPM with the authority to make rules and regulations concerning CSRS and FERS benefits. OPM benefits statutes do not require State law to apply in the event of conflict between State and Federal law.

In accordance with the principles of Federalism outlined in Executive Order 13132, the Agencies consulted with State officials on issues addressed in the interim final rule. Specifically, the Agencies sought perspective on those matters where Federalism implications could potentially

conflict with State garnishment laws. The final rule does not present new Federalism implications that have not already been considered during the promulgation of the interim final rule.

D. Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The Agencies have determined that this rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more. Accordingly, the Agencies have not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 31 CFR Part 212

Benefit payments, exempt payments, financial institutions, garnishment, preemption, recordkeeping.

Department of the Treasury, Fiscal Service (Treasury)

Authority and Issuance

Accordingly, the interim final rule which was published at 76 FR 9939 on February 23, 2011, is adopted as a final rule with the following changes:

PART 212—GARNISHMENT OF ACCOUNTS CONTAINING FEDERAL BENEFIT PAYMENTS

1. The authority citation for part 212 continues to read as follows:

Authority: 5 U.S.C. 8346; 5 U.S.C. 8470; 5 U.S.C. 1103; 31 U.S.C. 321; 31 U.S.C. 3321; 31 U.S.C. 3332; 38 U.S.C. 5301(a); 38 U.S.C. 501(a); 42 U.S.C. 405(a); 42 U.S.C. 407; 42 U.S.C. 659; 42 U.S.C. 1383(d)(1); 45 U.S.C. 231f(b); 45 U.S.C. 231m; 45 U.S.C. 352(e); 45 U.S.C. 362(1).

2. In § 212.3, revise the definitions of Benefit payment, Garnishment order or order, and Protected amount to read as follows:

§ 212.3 Definitions.

* * * * *

Benefit payment means a Federal benefit payment referred to in § 212.2(b) paid by direct deposit to an account with the character “XX” encoded in positions 54 and 55 of the Company Entry Description field and the number “2” encoded in the Originator Status Code field of the Batch Header Record of the direct deposit entry.

* * * * *

Garnishment order or order means a writ, order, notice, summons, judgment, levy or similar written instruction issued by a court, a State or State agency, a municipality or municipal corporation, or a State child support enforcement agency, including a lien arising by operation of law for overdue child support or an order to freeze the assets in an account, to effect a garnishment against a debtor.

* * * * *

Protected amount means the lesser of the sum of all benefit payments posted to an account between the close of business on the beginning date of the lookback period and the open of business on the ending date of the lookback period, or the balance in an account when the account review is performed. Examples illustrating the application of this definition are included in Appendix C to

this part.

* * * * *

3. Revise § 212.6(h), to read as follows:

§ 212.6 Rules and procedures to protect benefits.

* * * * *

(h) *Impermissible garnishment fee.* The financial institution may not charge or collect a garnishment fee against a protected amount. The financial institution may charge or collect a garnishment fee up to five business days after the account review if funds other than a benefit payment are deposited to the account within this period, provided that the fee may not exceed the amount of the non-benefit deposited funds.

4. In § 212.7, revise the introductory text and paragraph (a), to read as follows:

§ 212.7 Notice to the account holder.

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

(a) *Notice requirement.* The financial institution shall send the notice in cases where:

(1) A benefit agency deposited a benefit payment into an account during the lookback period;

(2) The balance in the account on the date of account review was above zero dollars and the financial institution established a protected amount; and

(3) There are funds in the account in excess of the protected amount.

* * * * *

5. In Appendix C to Part 212, revise the examples of the definition of protected amount to read as follows:

Appendix C to Part 212 – Examples of the Lookback Period and Protected Amount

* * * * *

The following examples illustrate the definition of protected amount.

Example 1: Account balance less than sum of benefit payments

A financial institution receives a garnishment order against an account holder for \$2,000 on May 20. The date of account review is the same day, May 20, and the balance in the account when the review is performed is \$1,000. The lookback period begins on May 19, the date preceding the date of account review, and ends on March 19, the corresponding date two months earlier. The account review shows that two Federal benefit payments were deposited to the account during the lookback period totaling \$2,500, one for \$1,250 on Friday, April 30 and one for \$1,250 on Tuesday, April 1. Since the \$1,000 balance in the account when the account review is performed is less than the \$2,500 sum of benefit payments posted to the account during the lookback period, the financial institution establishes the protected amount at \$1,000. The financial institution is not required to send a notice to the account holder.

Example 2: Three benefit payments during lookback period

A financial institution receives a garnishment order against an account holder for \$8,000 on December 2. The date of account review is the same day, December 2, and the balance in the account when the account review is performed is \$5,000. The lookback period begins on December 1, the date preceding the date of account review, and ends on October 1, the corresponding date two months earlier. The account review shows that three Federal benefit payments were deposited to the account during the lookback period totaling \$4,500, one for \$1,500 on December 1, another for \$1,500 on November 1, and a third for \$1,500 on October 1. Since the \$4,500 sum of the three benefit payments posted to the account during the lookback period is less than the \$5,000 balance in the account when the account review is performed, the financial institution establishes the protected amount at \$4,500 and seizes the remaining \$500 in the account consistent with State law. The financial institution is required to send a notice to the account holder.

Example 3: Intraday transactions

A financial institution receives a garnishment order against an account holder for \$4,000 on Friday, September 10. The date of account review is Monday, September 13, when the opening balance in the account is \$6,000. A cash withdrawal for \$1,000 is processed after the open of business on September 13, but before the financial institution has performed the account review, so that the

balance in the account is \$5,000 when the financial institution initiates an automated program to conduct the account review. The lookback period begins on Sunday, September 12, the date preceding the date of account review, and ends on Monday, July 12, the corresponding date two months earlier. The account review shows that two Federal benefit payments were deposited to the account during the lookback period totaling \$3,000, one for \$1,500 on Wednesday, July 21, and the other for \$1,500 on Wednesday, August 18. Since the \$3,000 sum of the two benefit payments posted to the account during the lookback period is less than the \$5,000 balance in the account when the account review is performed, the financial institution establishes the protected amount at \$3,000 and, consistent with State law, freezes the \$2,000 remaining in the account after the cash withdrawal. The financial institution is required to send a notice to the account holder.

Example 4: Benefit payment on date of account review

A financial institution receives a garnishment order against an account holder for \$5,000 on Thursday, July 1. The date of account review is the same day, July 1, when the opening balance in the account is \$3,000, and reflects a Federal benefit payment of \$1,000 posted that day. The lookback period begins on Wednesday, June 30, the date preceding the date of account review, and ends on Friday, April 30, the corresponding date two months earlier. The account review shows that two Federal benefit payments were deposited to the account during the lookback period totaling \$2,000, one for \$1,000 on Friday, April 30 and one for \$1,000 on Tuesday, June 1. Since the \$2,000 sum of the two benefit payments posted to the account during the lookback period is less than the \$3,000 balance in the account when the account review is performed, the financial institution establishes the protected amount at \$2,000 and places a hold on the remaining \$1,000 in the account in accordance with State law. The financial institution is required to send a notice to the account holder

Example 5: Account co-owners with benefit payments

A financial institution receives a garnishment order against an account holder for \$3,800 on March 22. The date of account review is the same day, March 22, and the balance in the account is \$7,000. The lookback period begins on March 21, the date preceding the date of account review, and ends on January 21, the corresponding date two months earlier. The account review shows that four Federal benefit payments were deposited to the account during the lookback period totaling \$7,000. Two of these benefit payments, totaling \$3,000, were made to the account holder against whom the garnishment order was issued. The other two payments, totaling \$4,000, were made to a co-owner of the account. Since the financial institution must perform the account review based only on the presence of benefit payments, without regard to the existence of co-owners on the account or payments to multiple beneficiaries or under multiple programs, the financial institution establishes the protected amount at \$7,000, equal to the sum of the four benefit payments posted to the account during the lookback period. Since \$7,000 is also the balance in the account at the time of the account review, there are no additional funds in the account which can be frozen. The financial institution is not required to send a notice to the account holder

By the Department of the Treasury

Richard L. Gregg
Fiscal Assistant Secretary

Dated: May 9, 2013.

By the Social Security Administration

Carolyn W. Colvin
Acting Commissioner of Social Security

Dated: May 1, 2013.

By the Department of Veterans Affairs

Jose D. Riojas
Interim Chief of Staff

Dated: April 25, 2013.

By the Railroad Retirement Board

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By the Office of Personnel Management

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[FR Doc. 2013-12567 Filed 05/28/2013 at 8:45 am; Publication Date: 05/29/2013]