

THE UPDATED FEDERAL GARNISHMENT FINAL RULE

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I. Background.

The Interim Final Rule. On February 23, 2011, five federal agencies, the Fiscal Service, Department of the Treasury, (“Treasury”), the Social Security Administration (“SSA”), the Department of Veteran Affairs (“VA”), the Railroad Retirement Board (“RRB”), and the Office of Personnel Management (“OPM,” and collectively, the “Agencies”), jointly issued an interim final rule¹ (the “Interim Rule”) to implement statutory restrictions on the garnishment of federal benefit payments originated by SSA, VA, RRB, and OPM.²

Originally, the Agencies had jointly published a proposed rule³ to address concerns associated with the garnishment of certain exempt federal benefit payments, including Social Security benefits, Supplemental Income Benefits, VA benefits, Federal Railroad retirement benefits, Federal Railroad retirement benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits, and Federal Employee Retirement System benefits.

Effective May 1, 2011, the Interim Rule established procedures that financial institutions must follow when they receive a covered garnishment order against an account holder receiving certain types of federal benefit payments by direct deposit through the Automated Clearing House (“ACH”).⁴ The Interim Rule requires financial institutions served with a garnishment order to identify the sum of such federal benefit payments deposited electronically through ACH to the account during a two month lookback period, and to ensure that the account holder has unencumbered access to an amount equaling that sum or to the current balance of the account, whichever is lower.

¹ 76 Fed.Reg. 9939 (February 23, 2011): <http://edocket.access.gpo.gov/2011/pdf/2011-3782.pdf> The Interim Rule adopts 21 C.F.R. Part 212 as a new Treasury rule. SSA adopts the Treasury rule by reference at 20 C.F.R. Parts 404 and 416; VA adopts the Treasury rule by reference at 38 C.F.R. Part 1; RRB adopts the Treasury rule by reference at 20 C.F.R. Parts 350, 404, and 416; and OPM adopts the Treasury rule by reference at 5 C.F.R. Parts 831 and 841.

² See 42 U.S.C. 407(a) and 42 U.S.C. 1383(d)(1), protecting SSA benefit payments; 38 U.S.C. 5301(a), protecting VA benefit payments; and 45 U.S.C. 231m(a) and 45 U.S.C. 352(e), protecting RRB benefit payments; 5 U.S.C. 8346(a) and 5 U.S.C. 8470, protecting civil service benefit payments.

³ 75 Fed.Reg. 20299 (April 19, 2010).

⁴ The Rule is particularly timely in light of the interim final rule issued by the Treasury, Fiscal Service, dealing with an amendment to its regulations to permit the delivery through ACH payments of federal payments to prepaid cards satisfying certain criteria. 75 Fed.Reg. 80335 (December 22, 2010).

As explored in more detail below, because the Interim Rule specifically isolates a state child support enforcement agency for special treatment, this analysis will also discuss an order to withhold issued by the California Department of Child Support Services (“DCSS”). DCSS collects delinquent child support debt pursuant to California Family Code §§ 17453⁵ and 17522.5⁶ by issuing an order to withhold (“Order”). Two populations of Orders are employed by DCSS: a “Child Support Collections Order to Withhold”⁷ and “Child Support Collections Order to Withhold-\$3,500 Exemption.”⁸ Family Code § 17453(j)(2)⁹ provides that the assets of an obligor owing child support

⁵ Family Code § 17453 authorizes the Financial Institution Data Match Program to match delinquent support obligors with a financial institution’s account holders to identify delinquent support obligor account holders.

⁶ Family Code § 17522.5 provides a means to levy against a financial asset and its proceeds through liquidation. The reference to Family Code § 17522.5 should perhaps also include a reference to Family Code § 17522(a), the generally provision in the Family Code dealing with DCSS’s levy rights to claim past due child support payments from an obligor:

(a) Notwithstanding any other law, if any support obligor is delinquent in the payment of support for at least 30 days and the local child support agency is enforcing the support obligation pursuant to Section 17400, the local child support agency may collect the delinquency or enforce any lien by levy served on all persons having in their possession, or who will have in their possession or under their control, any credits or personal property belonging to the delinquent support obligor, or who owe any debt to the obligor at the time they receive the notice of levy.

⁷ DCSS form number 0653 (01/13/09).

⁸ DCSS form number 0654 (01/13/09).

⁹ Family Code § 17453(j) provides, with emphasis:

(j) (1) Each county shall notify the department upon the occurrence of the circumstances described in the following subparagraphs with respect to an obligor of past-due support: (A) A court has ordered an obligor to make scheduled payments on a child support arrearages obligation and the obligor is in compliance with that order. (B) An earnings assignment order or an order/notice to withhold income that includes an amount for past-due support has been served on the obligated parent's employer and earnings are being withheld pursuant to the earnings assignment order or an order/notice to withhold income. (C) At least 50 percent of the obligated parent's earnings are being withheld for support.

(2) Notwithstanding Section 704.070 of the Code of Civil Procedure, if any of the conditions set forth in paragraph (1) exist, the assets of an obligor held by a financial institution are subject to levy as provided by paragraph (2) of subdivision (d). However, the first three thousand five hundred dollars (\$3,500) of an obligor's assets are exempt from collection under this subdivision without the obligor having to file a claim of exemption. (3) If any of the conditions set forth in paragraph (1) exist, an obligor may apply for a claim of exemption pursuant to Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure for an amount that is less than or equal to the total amount levied. The sole basis for a claim of exemption under this subdivision shall be the financial hardship for the obligor and the obligor's dependents. (4) For the purposes of a claim of exemption made pursuant to paragraph (3), Section 688.030 of the Code of Civil Procedure shall not apply. (5) For claims of exemption made pursuant to paragraph (3), the local child support agency responsible for enforcement of the obligor's child support order shall be the levying officer for the purpose of compliance with the provisions set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure except for the release of property required by subdivision (e) of Section 703.580 of the Code of Civil Procedure. (6) The local child support agency shall notify the department within two business days of the receipt of a claim of exemption from an obligor. The department shall direct the financial institution subject to the order to withhold to hold any funds subject to the order pending notification by the department to remit or release the amounts held. (7) The superior court in the county in which the local child support agency enforcing the support obligation is located shall have jurisdiction to determine the amount

arrearage, even though in compliance with scheduled payments on the arrearage, is subject to levy under an Order, but the first \$3,500.00 of the obligor's assets are exempt. In the event an obligor is not in compliance with scheduled payments on the arrearage, the obligor is not afforded this \$3,500.00 exemption under the Order.

The Final Rule. The Agencies are adopting as a final rule ("Final Rule") the Interim Rule issued on February 23, 2011, which Final Rule becomes effective June 28, 2013,¹⁰ subject to the following key changes thereto summarized below:

- The definition of "benefit payment" is revised to refer an ACH entry in which there is both an "XX" in positions 54 and 55 of the Company Entry Description field and a "2" in the Originator Status Code field;
- The definition of "garnishment order" is expanded to include orders or levies issued by a state or a state agency or a municipality, as well as orders to freeze assets in an account;
- The definition of "protected amount" has been revised to clarify that the applicable balance that should be considered is the balance at the time the account review is performed (in other words, intraday items and transactions should be taken into account);
- The provision prohibiting a financial institution from collecting a garnishment fee against protected funds has been revised by permitting the collection of such a fee up to five business days after the account review, if funds (other than benefit payments) are deposited into the account during that period, provided the fee does not exceed the amount deposited; and
- The notice provision has been revised so that notice is only required when there are funds in the account in excess of the protected amount.

The supplementary information to the Final Rule also provides certain clarifications to the Final Rule, including:

- An order issued by a clerk of court or an attorney acting in his or her capacity as an officer of the court constitutes an order issued by the court;¹¹
- The kinds of garnishments covered by the rule are not limited civil money judgments but would also include seizures in criminal actions;

of exemption to be allowed. The court shall consider the needs of the obligor, the obligee, and all persons the obligor is required to support, and all other relevant circumstances in determining whether to allow any exemption pursuant to this subdivision. The court shall give effect to its determination by an order specifying the extent to which the amount levied is exempt. (8) Within two business days of receipt of an endorsed copy of a court order issued pursuant to subdivision (e) of Section 703.580 of the Code of Civil Procedure, the local child support agency shall provide the department with a copy of the order. The department shall instruct the financial institution to remit or release the obligor's funds in accordance with the court's order.

¹⁰ 78 Fed.Reg. 32099 (May 29, 2013): <http://www.gpo.gov/fdsys/pkg/FR-2013-05-29/pdf/2013-12567.pdf>

¹¹ The Agencies recognize that an attorney may issue a garnishment order in some states, such as New York. New York CPLR5230.

- Financial institutions should not use Regulation CC available funds balances for purposes of the account review in establishing the protected amount;
- If a financial institution has determined that it will not take action on a garnishment order, then no account review is required by the rule;
- Notices may be sent to an address of record and may (but are not required to) be sent to all account holders of a joint account; and
- Notices may provide information regarding the attorney of record rather than the creditor when a garnishment order contains limited information about a creditor.

This article will explore in more detail below the changes adopted to the Interim Rule under the Final Rule.

II. The Final Rule. The changes to the Interim Rule adopted under the Final Rule may be outlined as follows. In this regard, detailed below is an analysis of the Interim Rule, with highlights of the changes thereto through the Final Rule.

In order to understand the Final Rule, we start with the definitions in the Interim Rule, as updated under the Final Rule.

Account. “Account” means an account, including a master account or subaccount, at a financial institution and to which electronic payment may be directly routed.¹² The reference to subaccounts would likely capture certain prepaid cards maintained by a financial institution within subaccounts under a master account arrangement. An account need not be held for personal, family, or household purposes. Thus, business accounts are captured under the Final Rule. An account holder may have a beneficial ownership interest in and to a business account holding benefit payments. (See definition of “account holder” below.)

In the supplementary information to the Final Rule, the Agencies note that some credit unions typically assign an individual member (or “primary”) number to each member. The member may thereafter open one or more accounts using that member number as a “prefix,” with each account designated by a different “subaccount” or “suffixes.” This member number or prefix does not denote an account number as such, but rather serves as a convenient prefix for all individual subaccounts of the member, to or from which deposits and withdrawals may be made. The requirement to perform an account review under the Final Rule applies to the deposit account to which a federal payment is routed and credited. In the case of a credit union using the numbering system discussed above, the account review should be undertaken against these subaccounts.¹³

¹² 31 C.F.R. § 212.3, as adopted under the Interim Rule.

¹³ 78 Fed.Reg. at 32100.

Account holder. “Account holder” means a natural person against whom a garnishment order is issued and whose name appears in a financial institution’s record as the direct or beneficial owner of an account.¹⁴

Account review. “Account review” means the process of examining deposits in an account to determine if a benefit agency has deposited a benefit payment into the account during the lookback period.¹⁵

Benefit agency. “Benefit agency” means SSA, VA, RRB, and OPM.¹⁶ Presently, under the Final Rule only the Treasury, SSA, VA, RRB, and OPM are federal agencies covered by the Final Rule.¹⁷ The following programs administered by the Agencies are covered under the Final Rule:

- Social Security and Supplemental Security Income benefits administered by the Social Security Administration;
- Veterans benefits administered by the Department of Veterans Affairs;
- Federal Railroad retirement unemployment and sickness benefits administered by the Railroad Retirement Board; and
- Civil Service Retirement System and Federal Employee Retirement System benefits administered by the Office of Personnel Management.

Benefit payment. “Benefit payment” means a federal benefit payment paid by direct deposit through ACH 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 Originator Status Code field of the Batch Header Record (Position 79) of the direct deposit entry.¹⁸ Typically, the Company Entry Description field is captured and included in an account statement transaction descriptors. The Agencies implemented the encoding in the Company Entry Descriptor field by May 1, 2011, as previously promised by the Agencies.¹⁹ If a benefit payment is transferred from one account to another, the funds are not protected under the Final Rule, and tracing of funds is unnecessary.²⁰

In the *Guidelines for Garnishment of Accounts Containing Federal Benefit Payments* (March 2011, the “Guidelines”),²¹ at page 5, the following appears:

E. Identifying Federal Benefit Payments

¹⁴ 31 C.F.R. § 212.3, as adopted under the Interim Rule.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* While the federal garnishment statutes cover all federal benefit payments, including military retirement payments, as well as certain payments made by the Army, Navy, Air Force, Marines, Coast Guard, National Oceanographic and Atmospheric Administration, and the Public Health Service, the federal agencies issuing such payments must through rule making amend their regulations to provide that their exempt payments are covered by the Final Rule. 78 Fed.Reg.at 32100.

¹⁸ 78 Fed.Reg. at 32109; 31 C.F.R. § 212.3, as updated under the Final Rule.

¹⁹ 76 Fed.Reg. at 9941.

²⁰ 31.C.F.R. § 212.5(f).

²¹ The Guidelines is available at: http://www.fms.treas.gov/greenbook/guidelines_garnish0311.pdf.

Treasury/FMS will encode an “XX” in Positions 54 and 55 of the “Company Entry Description” Field of the Batch Header Record for ACH/PPD and ACH/CCD payments that are designated as benefit payments. **To determine whether a payment constitutes a benefit payment, financial institutions may rely on the presence of an “XX” encoded in Positions 54 and 55 of the “Company Entry Description” Field of the Batch Header Record of a direct deposit entry.**

EXAMPLES:

Benefit Payment Type	Company Entry Description (Positions 54-63) –Prior to the Garnishment Rule	Company Entry Description (Positions 54-63) –With the Garnishment Rule
Social Security	SOC SEC	XXSOC SEC
Supplemental Security Income	SUPP SEC	XXSUPP SEC
Railroad Retirement	RR RET	XXRR RET

This encoding, along with the current practice of encoding a “2” in the Originator Status Code” Field in the Batch Header Record (Position 79), to designate payments originated from the Federal government, will allow financial institutions to identify benefit payments through either automated or manual inspection.

In sum, the Guidelines suggest using “XX” in positions 54 and 55 of the Company Entry Description field of the Batch Header Record *and* “2” in Position 79 in the Originator Status Code field in the Batch Header Record to identify a benefit payment under the Final Rule, as the “2” designates that the ACH payment originated from the federal government. If a financial institution were merely by automated means to scan for “XX” in the Company Entry Description field, it may detect other ACH payments inadvertently, as many originators populate these positions with an “X.” The “2” in Position 79 denotes a federal ACH payment; a “1” in Position 79 denotes a payment originated by an originator other than the federal government. Thus, due to this reference, positions 54, 55, and 79 in the Batch Header Record should merit review to confirm the deposit of a benefit payment. The Final Rule’s definition of “benefit payment” has been updated to reflect the Guidelines.

These unique identifiers in positions 54, 55, and 79 apparently are in the Batch Header Record, effective on or about March 12, 2011.

Financial institution. “Financial institution” means a bank, savings association, credit union, or other entity chartered under Federal or State law to engage in the business

of banking.²² This definition is intended to be broad in order to capture any financial institution that might hold an account to which federal benefits may be directly deposited.²³

Freeze or account freeze. “Freeze” or “account freeze” means an action by a financial institution to seize, withhold, or preserve funds, or to otherwise prevent an accountholder from drawing on or transacting against funds in an account, in response to a garnishment order.²⁴

Garnish or garnishment. “Garnish” or “garnishment” means execution, levy, attachment, garnishment, or other legal process.²⁵

Garnishment order or order. “Garnishment order” or “order” means a writ, order, notice, summons, judgment, levy, or similar written instruction issued by a court, a State, 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.²⁶

Originally, under the Interim Rule, only a court issued order in connection with a judicial proceeding was covered (in addition to an order issued by a state child support agency). A state agency, such as the Employment Development Department, State Board of Equalization or the Franchise Tax Board, was not covered by the Interim Rule.²⁷ However, under changes adopted under the Final Rule, such state agencies are now covered.²⁸ Further, restraining orders and seizures in a criminal action are now clearly covered under the Final Rule.²⁹ Other legal process, such as preliminary injunctions and other prejudgment legal process may also be covered in addition to temporary restraining orders.

Lookback period. “Lookback period” means the two month period that begins on the date preceding the date of account review and ends on the corresponding date of the month two months earlier, or on the last date of the month two months earlier if the corresponding date does not exist.³⁰

Protected amount. “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

²² 31 C.F.R. § 212.3, as adopted under the Interim Rule.

²³ 76 Fed.Reg. at 9950.

²⁴ 31 C.F.R. § 212.3, as adopted under the Interim Rule.

²⁵ *Id.*

²⁶ 31 C.F.R. § 212.3, as adopted under the Final Rule.

²⁷ 31 C.F.R. § 212.3, as adopted under the Interim Rule.

²⁸ 31 C.F.R. § 212.3, as adopted under the Final Rule.

²⁹ 78 Fed.Reg. at 32101.

³⁰ 31 C.F.R. § 212.3, as adopted under the Interim Rule.

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.³¹

Some financial institutions commented on the Interim Rule’s definition of “protected account,” observing that the phrase “the balance in an account at the open of business on the date of the account review” is unclear. This phrase could mean ledger balance; the memo ledger balance; the available funds balance under Regulation CC;³² or the memo available funds balance.³³ Further, other commenters maintained that the procedure for calculating the protected amount does not take into account intraday postings of credits and debits.³⁴ To address these concerns, the Agencies amended the Interim Rule to provide that the relevant account balance is the account balance when the account review is performed, so that the balance will include intraday transactions, such as ATM or other cash withdrawals. In this regard, note the following with regard to Regulation CC:

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.³⁵

This sentence in the supplementary information means that during account review a financial institution should not use an available balance established under Regulation CC to identify a protected amount.

State child support enforcement agency. “State child support enforcement agency” means the single and separate organizational unit in a state that has the responsibility for administering or supervising the state’s plan for child and spousal support pursuant to Title IV, Part D, of the Social Security Act, 42 U.S.C. 654.³⁶

Employing these definitions, we now explore the Final Rule and the interplay between the Final Rule and covered garnishment orders.

Step One: Determine if a garnishment order in favor of the United States or a state child support enforcement agency is accompanied by a Notice of Right to

³¹ 78 Fed.Reg. at 32101; 31 C.F.R. § 212.3, as adopted under the Final Rule.

³² 12 C.F.R. part 229.

³³ 78 Fed.Reg. at 32101.

³⁴ *Id.*

³⁵ 78 Fed.Reg. at 32101-32102. Under CCP § 700.140(b), as to an execution lien created thereunder, such lien applies to funds under collection, with emphasis:

(a) Subject to Sections 684.115 and 700.160, to levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained.

(b) The execution lien that arises upon service of a writ of execution and notice of levy reaches only amounts in a deposit account at the time of service on the financial institution, including the amount of any deposit not yet finally collected unless the deposit is returned unpaid to the financial institution.

³⁶ 31 C.F.R. § 212.3, as adopted under the Interim Rule.

Garnish Federal Benefits. In response to a garnishment order served against a financial institution, prior to taking any other action within two business days a financial institution must examine the order to determine if the United States or a state child support enforcement agency (such as DCSS) has attached or included a Notice of Right to Garnish Federal Benefits.³⁷ If a Notice of Right to Garnish Federal Benefits accompanies the order, then the financial institution must process the order following its customary procedures for handling the order.³⁸ The process for addressing exempt federal benefit payments under the Final Rule does not otherwise apply.

With regard to DCSS, that state agency has indicated that it is not having its Orders accompanied with a Notice of Right to Garnish Federal Benefits. Further, I understand that DCSS is of the view that as a matter of policy, having financial institutions apply the Final Rule to Orders is sound policy. Indeed, DCSS contends that even prior to May 1, 2011, financial institutions should automatically have been invoking protections to obligors set forth in California Code of Civil Procedure (“CCP”) § 704.080 as to certain defined Social Security and public benefit payments, as detailed below.³⁹ Additionally, in the event a financial institution is served with an Order granting the \$3,500.00 exemption, if the obligor thereunder also is the recipient of directly deposited social security or public benefit payments covered under § 704.080, a question may remain whether the obligor is entitled to *both* the \$3,500.00 exemption and the additional protection afforded under § 704.080.⁴⁰

The Final Rule does not preempt state law that may be more protective of benefit payments.⁴¹ Therefore, under the Final Rule (in the event no Notice of Right to Garnish Federal Benefits does not accompany an Order), a financial institution would be required to identify a protected amount as to an obligor’s deposit account. Upon identification of that protected amount, the financial institution would determine if CCP § 704.080 affords greater protection to an obligor’s account. That greater amount would be protected.

³⁷ 31 C.F.R. § 212.4(a). This Notice of Right to Garnish Federal Benefits is set forth in Appendix B to the Final Rule.

³⁸ 31 C.F.R. § 212.4(b).

³⁹ Under CCP § 689.030(a)(1), set forth below, an obligor of a support obligation enjoys an exemption against an Order similarly to other levies. However, the reference in the Order to Family Code § 17522.5 rather than § 17522 (referenced in CCP § 689.030(a)) raises uncertainty about this analysis. CCP § 689.030(a)(1) provides, with emphasis:

(a) Whenever the local child support agency, pursuant to Section 17522 of the Family Code, levies upon property pursuant to a warrant or notice of levy for the collection of a support obligation:

(1) If the debtor is a natural person, the debtor is entitled to the same exemptions to which a judgment debtor is entitled. Except as provided in subdivisions (b) and (c), the claim of exemption shall be made, heard, and determined as provided in Chapter 4 (commencing with Section 703.010) of Division 2 in the same manner as if the property were levied upon under a writ of execution.

⁴⁰ Furthermore, note that an obligor enjoys under Family Code § 17450(c)(2) an exemption from levy upon an obligor’s proof of receipt of Social Security disability insurance (“SSDI”) benefits. *In re Marriage of Danny C. and Shannon Hopkins* (2009) 173 Cal.App.4th 281. This right is likely reflected regardless in CCP § 704.080, as SSDI benefit payments may be covered under CCP § 704.080 through its reference to “disability insurance benefits” at § 704.080(a)(2) and may enjoy an automatic exemption thereunder.

⁴¹ 31 C.F.R. § 212.9(b).

Then, again, the financial institution must determine if a stacking of federal and state protections, including the \$3,500.00 exemption, would govern.

DCSS does not agree with the practice of stacking multiple exemptions available under both federal and state law. DCSS contends that against an Order granting a \$3,500.00 exemption a financial institution must automatically grant the following exemptions to a support obligor:

- The greater of the protected amount under the Final Rule *or* the exemption under CCP § 704.080 as to Social Security benefit payments and
- The \$3,500.00 exemption *but in no event greater than \$3,500.00 in total, unless the protected amount under the Final Rule or CCP § 704.080 exceeds this \$3,500.00.*

In terms of a risk analysis, if a financial institution were to conform to DCSS's position by not stacking multiple exemptions, the funds subject to an Order may be increased as a support obligor would have a cap on the total available exemptions of \$3,500.00, unless the protected amount under the Final Rule exceeds this \$3,500.00. However, the support obligor may press a claim against the financial institution for failing to stack exemptions in the event the total exemptions, upon stacking, exceeds \$3,500.00 (except as to a protected amount under the Final Rule). Further, in the event the financial institution dishonors checks and other items by virtue of the reduction in an account's balance resulting from honoring the Order, the support obligor may have a claim against the financial institution for wrongful dishonor.⁴² The financial institution may be able to defend this claim, contending that the support obligor did not suffer an injury, as the financial institution discharged a support obligation of the obligor.

On the other hand, in terms of a risk analysis, if a financial institution were to not conform to DCSS's position by stacking multiple exemptions, the funds subject to an Order may be decreased as a support obligor may have multiple exemptions available, exceeding the \$3,500.00 cap. While the support obligor may be pleased with this result, DCSS may press a claim against the financial institution for failing to subject all available funds to the Order. If DCSS's position is correct as a matter of law, the financial institution may have direct liability to DCSS. While the financial institution may cross claim against the support obligor in this action, seeking to be indemnified, the support obligor may be unable to respond in damages.

We encourage financial institutions to confer with their legal counsel as to (i) whether the \$3,500.00 exemption is available in addition to the greater of the protected amount under the Final Rule or the exemption granted under CCP § 704.080 as to Social Security benefit payments; or (ii) whether the total exemption protection granted under the Final Rule, CCP § 704.080 as to Social Security benefit payments, and Family Code § 17453(j) may not exceed the total amount of \$3,500.00, unless the protected amount under the Final Rule exceeds this sum. If a financial institution is uncertain of the path to

⁴² California Uniform Commercial Code § 4402.

pursue, it may interplead the funds at issue as between the support obligor and DCSS.⁴³ Based on the analysis above, it would appear that complying with DCSS's position may present less risks to a financial institution than stacking exemptions. Nevertheless, because each Order may turn on unique and specific facts, we urge financial institutions to confer immediately with counsel upon service of these Orders involving a \$3,500.00 exemption.⁴⁴

Step Two: In the event the garnishment order is not accompanied with a Notice of Right to Garnish Federal Benefits. If (a) a Notice of Right to Garnish Federal Benefits does not accompany the garnishment order issued on behalf of the United States or a state child support enforcement agency or if (b) a garnishment order issued by a court on behalf of any other party is served on a financial institution, then the Final Rule's process for addressing exempt federal benefit payments applies. Again, as DCSS is not expected to accompany an Order with a Notice of Right to Garnish Federal Benefits, handle the Order as a garnishment order covered under the Final Rule.

When served a garnishment order, a financial institution must perform an account review⁴⁵ no later than *two* business days following the receipt of (a) the garnishment order and (b) sufficient information from the creditor that initiated the order to determine whether the debtor is an account holder, if such information is not already included in the order. Thus, a financial institution is afforded additional time to confer with a creditor to assist in identifying an account holder subject to the order. In cases where the financial institution is served a batch of a large number of orders, the account review may be performed by a later date that may be permitted by the creditor that initiated the orders, consistent with the terms of the order.⁴⁶ Neither the Final Rule nor the supplementary information accompanying the issuance of the Final Rule provides guidance on the meaning of "a batch of a large number of orders." Commonly, DCSS will serve a large number of Orders by mail.

Step Three: Undertake an account review. This account review involves an investigation by the financial institution to determine if any benefit payment was directly credited to an account subject to the garnishment order by ACH during the lookback period for the purpose of ascertaining a protected amount. In this regard, in the event multiple owners of an account are involved, this account review to identify a protected amount applies to each and every owner, even if the garnishment order is not directed against an owner. The protected amount is identified and established in the aggregate for all owners, even owners not affected by, or covered under, the garnishment order.⁴⁷

Even if an account receiving a benefit payment is involved, an account review is not required in all instances. For example, if an account holder has more than one

⁴³ CCP § 386, *et seq.*

⁴⁴ DCSS has submitted a request to the California Attorney General, seeking her opinion on this matter. No response has been forthcoming from her as of this date.

⁴⁵ 31 C.F.R. § 212.5(a).

⁴⁶ 31 C.F.R. § 212.5(a)(2).

⁴⁷ Appendix C to Part 212, example 5, 78 Fed.Reg. at 32110.

account with a financial institution and the first account review reveals (a) no protected amount and (b) sufficient funds to satisfy the judgment, no further account reviews are necessary as to the other accounts by the financial institution. In such situations, the financial institution's obligation to garnish ends when it tenders over an amount from the first account to the levying creditor. This same result follows in instances where a garnishment order is directed against a beneficiary of a pay-on-death or Totten trust. Because such beneficiary merely has a contingent interest in the account (absent death of the account owner or trustor), an account review is unnecessary.⁴⁸

Step Four: In the event the account review shows that a benefit agency did not deposit a benefit payment. If the account review shows that a benefit agency did not deposit a benefit payment into the account during the lookback period, then the financial institution must follow its customary procedures for handling orders.⁴⁹ Of course, as discussed below, funds may be protected under applicable state law.

Step Five: In the event the account review shows that a benefit agency deposited a benefit payment. If the account review shows that a benefit agency deposited a benefit payment into the account during the lookback period, then the financial institution must follow the Final Rule to determine a protected amount, if any.⁵⁰

Appendix C to Part 212⁵¹ provides detailed examples to determine the lookback period.

If a debtor has more than one account, this account review must be undertaken for each account covered by a garnishment order.⁵² The determination of the protected amount applies to each and every individual account subject to the garnishment order. However, in the event a demand under a garnishment order is satisfied after identifying a protected amount, if any, an account review is not necessary as to other accounts in the event an account holder has multiple accounts.⁵³

Step Six: Assess the garnishment fee. The financial institution may not charge or collect a garnishment fee against a protected amount if a garnishment order is covered by the Final Rule. The financial institution may, however, charge or collect a garnishment fee up to five business days after the date of 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.⁵⁴ In the event an account review shows that the account holder did not receive a benefit payment during the lookback period, the financial institution may assess a garnishment fee during processing a garnishment order under its customary procedures, within or without the

⁴⁸ 78 Fed.Reg. at 32102.

⁴⁹ 31 C.F.R. § 212.5(b).

⁵⁰ 31 C.F.R. § 212.5(c).

⁵¹ 76 Fed.Reg. at 9960.

⁵² 31 C.F.R. § 212.5(f); 31 C.F.R. § 212.6(b).

⁵³ 78 Fed.Reg. at 32102.

⁵⁴ 31 C.F.R. § 212.6(h).

account review.⁵⁵ Further, in the event an account holder has other accounts that do not contain a protected amount, a financial institution may assess an agreed upon garnishment fee against such other accounts.⁵⁶

Step Seven: Notice to account holder. Upon a financial institution establishing that an account contains a benefit payment deposited during the lookback period by a benefit agency during the course of an account review, the financial institution is required to send a written notice to the account holder.⁵⁷ This notice is only required when (a) a benefit agency has deposited a benefit payment into an account during the lookback period; (b) the balance in the account on the date of the account review is above zero and the financial institution establishes a protected amount; and (c) there are funds in the account in excess of the protected amount.⁵⁸ If the account is overdrawn or if the account does not contain a protected amount, the notice is not required under the Final Rule.⁵⁹ The financial institution is required to notify the account holder of the following facts and events in readily understandable language: (a) the financial institution's receipt of a garnishment order against the account holder; (b) the date on which the order was served; (c) a succinct explanation of garnishment; (d) the financial institution's obligation to ensure that account balances up to the protected amount are protected and made available to the account holder; (e) the account subject to the order and the protected amount; (f) the financial institution's obligation to freeze other unprotected funds to satisfy the order; (g) the amount of any garnishment fee; (h) a list of federal benefit payments subject to the Rule; (i) the right of the account holder to assert against the creditor a further garnishment exemption; (j) the account holder's right to consult an attorney such further exemption; and (k) the name of the creditor.⁶⁰

The financial institution may provide additional, optional facts and events in the notice: (a) means to contact legal aid; (b) means to contact the financial institution; and (c) by issuing the notice, the financial institution is not providing legal advice.⁶¹ A financial institution providing in good faith this optional information enjoys a safe harbor from liability.⁶²

A financial institution may amend the content of this notice to integrate information about a state's garnishment rules and protections, for purposes of avoiding confusion or harmonizing the notice with state requirements, or providing more complete

⁵⁵ 31 C.F.R. §§ 212.5(b) and 212.6(h). Section 212.5(b) provides that if an account holder did not receive a benefit payment during the lookback period, a financial institution may handle a garnishment order under its customary procedures, without having to look to the restrictions on the assessment of garnishment fees.

⁵⁶ 78 Fed.Reg. at 32105.

⁵⁷ 31 C.F.R. §§ 212.6(e) and 212.7.

⁵⁸ 31 C.F.R. § 212.7(a).

⁵⁹ However, notice may be required as a matter of California common law. See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652.

⁶⁰ 31 C.F.R. § 212.7(b). 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 financial institution may include, in lieu of the limited information on the creditor, the full information to contact the attorney of record for the creditor. 78 Fed.Reg. at 32106.

⁶¹ 31 C.F.R. § 212.7(c).

⁶² 31 C.F.R. § 212.10(c).

information about an account.⁶³ A financial institution providing in good faith this optional information enjoys a safe harbor from liability.⁶⁴ The financial institution must issue the notice directly to the account holder and only information and documents pertaining to the garnishment order, including other notices or forms that may be required under state or local law, may be included in the communication.⁶⁵ This mandated notice must be sent within *three* business days from the date of the account review.⁶⁶ Only one notice is required, even if the account holder has multiple accounts.⁶⁷ In Appendix A to the Final Rule, a model notice has been provided. Using this model notice properly is deemed in compliance with the content requirement under 31 C.F.R. § 212.7.

Step Eight: Preemption of state law. Under the Final Rule, inconsistent state law is preempted to the extent of that law's inconsistency and consistent state law is not preempted.⁶⁸ A requirement under California state law to protect certain benefit payments in an account at a higher protected amount than as required under the Final Rule is not inconsistent with the Final Rule.⁶⁹ This point is illustrated below.

When a garnishment order is served on a financial institution under a writ of execution issued under California's statutory process for the enforcement of money judgments,⁷⁰ in the event a deposit account having direct deposit of Social Security benefits or public benefits is subject to the order, the account generally enjoys an automatic, fixed exemption, without the account holder having affirmatively to seek a stay or release of the order,⁷¹ to the following extent (as updated on April 1, 2013, and every three years thereafter by the California Judicial Council).⁷²

⁶³ 31 C.F.R. § 212.7(d).

⁶⁴ 31 C.F.R. § 212.10(c).

⁶⁵ 31 C.F.R. § 212.7(e). Note that under *Valley Bank*, a financial institution may be under an obligation to take reasonable steps to locate its customer to notify the customer of legal process against the customer's account. 15 Cal.3d 652, 653.

⁶⁶ 31 C.F.R. § 212.7(f).

⁶⁷ 31 C.F.R. § 212.7(g).

⁶⁸ 31 C.F.R. § 212.9.

⁶⁹ 31 C.F.R. § 212.9(b).

⁷⁰ CCP § 699.510, *et seq.*

⁷¹ CCP § 704.080 in part provides, with emphasis:

§ 704.080. (a) For the purposes of this section:

(1) "Deposit account" means a deposit account in which payments of public benefits or social security benefits are directly deposited by the government or its agent.

(2) "Social security benefits" means payments authorized by the Social Security Administration for regular retirement and survivors' benefits, supplemental security income benefits, coal miners' health benefits, and disability insurance benefits. "Public benefits" means aid payments authorized pursuant to subdivision (a) of Section 11450 of the Welfare and Institutions Code, payments for supportive services as described in Section 11323.2 of the Welfare and Institutions Code, and general assistance payments made pursuant to Section 17000.5 of the Welfare and Institutions Code.

(b) A deposit account is exempt without making a claim in the following amount:

(1) One thousand two hundred twenty-five dollars (\$1,225) where one depositor is the designated payee of the directly deposited public benefits payments.

(2) Two thousand four hundred twenty-five dollars (\$2,425) where one depositor is the designated payee of directly deposited social security payments.

- \$1,525.00 where one depositor is the designated payee of a directly deposited public benefit payments.⁷³
- \$3,050.00 where one depositor is the designated payee of directly deposited Social Security benefit payments.⁷⁴
- \$2,275.00 where two or more depositors are the designated payees of directly deposited public benefit payments.⁷⁵
- \$4,575.00 where two or more depositors are the designated payees of directly deposited Social Security benefit payments.⁷⁶

Accordingly, upon service of a writ of execution and notice of levy on a financial institution, the financial institution would, effective May 1, 2011, comply with the Final Rule to identify a protected amount, if any. Upon identification of a protected amount, the financial institution would thereafter determine if additional funds (including Social Security benefit payments) are protected referencing the amounts detailed above.

Upon confirming that Social Security benefit payments (or public benefit payments) are additionally protected under California law, the financial institution would automatically asserts the exemptions granted under California law on behalf of its account holder up to the statutory amount through the memorandum of garnishee delivered to the levying officer within ten business days of the levy.⁷⁷ Note that even if the deposit account is funded from multiple sources (in addition to a benefit payment defined under the Final Rule),⁷⁸ a financial institution need not engage in the tracing of the directly deposited exempt payments to confirm that in fact the funds in the deposit account are the proceeds thereof; generally the financial institution is expected to grant automatically the exemption to the fullest extent, upon confirmation of the nature and extent of the exempted direct deposits, provided the deposit account has available funds. The account holder merely is required to be the designated payee of these Social Security (or public) benefit payments to enjoy coverage under the exemptions.

(3) One thousand eight hundred twenty-five dollars (\$1,825) where two or more depositors are the designated payees of the directly deposited public benefits payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (1) applies.

(4) Three thousand six hundred fifty dollars (\$3,650) where two or more depositors are the designated payees of directly deposited social security payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (2) applies.

⁷² CCP § 703.150(b).

⁷³ CCP § 704.080(b)(1), as updated by the Judicial Council, effective April 1, 2013, under CCP § 703.150(c).

⁷⁴ CCP § 704.080(b)(2), as updated by the Judicial Council, effective April 1, 2013, under CCP § 703.150(c).

⁷⁵ CCP § 704.080(b)(3), as updated by the Judicial Council, effective April 1, 2013, under CCP § 703.150(c).

⁷⁶ CCP § 704.080(b)(4), as updated by the Judicial Council, effective April 1, 2013, under CCP § 703.150(c).

⁷⁷ CCP § 701.030.

⁷⁸ 31 C.F.R. § 212.3.

For those financial institutions with multijurisdictional locations, the compliance challenge under the Final Rule may be substantial. While a complete survey has not been undertaken of all laws relating to automatic exemptions to federal benefit payments granted under state law, at least three other states, Pennsylvania,⁷⁹ New York⁸⁰ and

⁷⁹ Pennsylvania Rules of Civil Procedure § 3111.1 provides for a generous \$10,000.00 automatic exemption for all state and federally protected payments:

In the absence of a court order, service of the writ upon a bank or other financial institution as garnishee shall not attach

(1) the first \$10,000 of each account of the defendant containing any funds which are deposited electronically on a recurring basis and are identified as being funds that upon deposit are exempt from execution, levy or attachment under Pennsylvania or federal law,

(2) each account in which funds on deposit exceed \$10,000 at any time if all funds are deposited electronically on a recurring basis and are identified as being funds that upon deposit are exempt from execution, levy or attachment under Pennsylvania or federal law, and

(3) the funds on deposit, not including any otherwise exempt funds, that do not exceed the amount of the general monetary exemption under 42 Pa.C.S. § 8123. The plaintiff shall have the right to file an objection if the plaintiff believes that the defendant has exhausted the statutory exemption.

⁸⁰ McKinney's Consolidated Laws of New York, Civil Practice Laws and Rules. § 5205(l) provides:

(l) Exemption of banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit. 1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt payments were made to the judgment debtor's account in any banking institution during the forty-five day period preceding the date a restraining notice was served on the banking institution or an execution was served upon the banking institution by a marshal or sheriff, then two thousand five hundred dollars in the judgment debtor's account is exempt from application to the satisfaction of a money judgment. Nothing in this subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659 or 38 U.S.C. § 5301 or to enforce a child support, spousal support, alimony or maintenance obligation. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, pursuant to this section or under any other provision of state or federal law, or shall affect the right of a judgment debtor to claim such exemption.

2. For purposes of this article, "statutorily exempt payments" means any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. Such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.

3. (i) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this article in effect immediately before that date shall be adjusted as provided in subparagraph (ii) of this paragraph.

(ii) The superintendent of banks shall determine the amount of the adjustment based on the change in the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. Department of Labor, Bureau of Labor Statistics, for the most recent three-year period ending on December thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars.

(iii) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the superintendent of banks shall publish the current dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this chapter, together with the date of the next scheduled adjustment. The publication shall be substantially in the form set below:

CURRENT DOLLAR AMOUNT OF EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES Sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e)

Connecticut,⁸¹ appear to grant similar automatic exemptions to direct deposit Social Security and other statutorily identified benefits payments. Both New York and Connecticut appear to grant fixed exemption amounts to identified federal benefit payments (\$2,500.00 and \$1,000.00, respectively), including Social Security benefit payments.

Indeed, some state laws protect a specified amount, regardless of whether there is a “protected amount” as that term is defined in the Final Rule. For instance, the New York Civil Practice Law & Rules provide that, if a garnished account has less than or equal to a certain amount (currently \$1,740.00),⁸² 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 \$1,740.00. If the balance is at or below that figure, the garnishment order is deemed void and no further action is taken against the account.

A financial institution complying in good faith with the Final Rule enjoys an exemption from liability to a creditor initiating the garnishment order, or for any penalties from state law, contempt of court, civil procedure, or other state law for failing to honor a

The following is the current dollar amount of exemption from enforcement of money judgments under CPLR sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e), as required by CPLR section 5205(l)(3):

(Amount)

This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year).

(iv) Adjustments made under subparagraph (i) of this paragraph shall not apply with respect to restraining notices served or executions effected before the date of the adjustment. (Emphasis supplied.)

⁸¹ C.G.S.A. § 52-367b(c) provides as follows:

(c) *Removal of funds from judgment debtor's account.* If any such financial institution upon which such execution is served and upon which such demand is made is indebted to the judgment debtor, the financial institution shall remove from the judgment debtor's account the amount of such indebtedness not exceeding the amount due on such execution before its midnight deadline, as defined in section 42a-4-104. Notwithstanding the provisions of this subsection, if electronic direct deposits that are readily identifiable as exempt federal veterans' benefits, Social Security benefits, including, but not limited to, retirement, survivors' and disability benefits, supplemental security income benefits or child support payments processed and received pursuant to Title IV-D of the Social Security Act were made to the judgment debtor's account during the thirty-day period preceding the date that the execution was served on the financial institution, then the financial institution shall leave the lesser of the account balance or one thousand dollars in the judgment debtor's account, provided nothing in this subsection shall be construed to limit a financial institution's right or obligation to remove such funds from the judgment debtor's account if required by any other provision of law or by a court order. The judgment debtor shall have access to such funds left in the judgment debtor's account pursuant to this subsection. The financial institution may notify the judgment creditor that funds have been left in the judgment debtor's account pursuant to this subsection. Nothing in this subsection shall alter the exempt status of funds which are exempt from execution under subsection (a) of this section or under any other provision of state or federal law, or the right of a judgment debtor to claim such exemption. Nothing in this subsection shall be construed to affect any other rights or obligations of the financial institution with regard to the funds in the judgment debtor's account. (Emphasis supplied.)

⁸² 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.

garnishment, for account activity during the two business days following the financial institution's receipt of a garnishment order to determine if the United States or a state child support enforcement agency has attached or included a Notice of Right to Garnish Federal Benefits; or the time between the financial institution's receipt of the garnishment order and the date by which the financial institution must perform the account review under the Final Rule.⁸³ Note that these safe harbors require good faith on the part of the financial institution. A financial institution may consider reviewing its customary practice of blocking an account promptly in response to a garnishment order in light of this new safe harbor, as discussed below.

A financial institution complying in good faith with the Final Rule enjoys an exemption from liability to a creditor initiating the garnishment order for any protected amount, to an account holder for any frozen funds, or for any penalties under state law, contempt of court, civil procedure, or other state law for failing to honor a garnishment, in cases where a benefit agency has deposited a benefit payment into an account during the lookback period; or the financial institution has determined that the order was obtained by the United States or issued by a state child support enforcement agency by following procedures provided under 31 C.F.R. § 212.4.⁸⁴ Note that this safe harbor again requires good faith on the part of the financial institution. Further, this safe harbor may not be available in the event the account does not contain benefit payments.

A financial institution complying in good faith with the Final Rule is not liable for (a) bona fide errors occurring despite reasonable procedures maintained by the financial institution to prevent such errors in complying with the Final Rule; (b) customary clearing and settlement adjustments affecting the balance in an account; and (c) honoring an account holder's express written instruction to use a protected amount to satisfy an order.⁸⁵

A financial institution is required to maintain records of account activity and actions taken in response to a garnishment order, sufficient to demonstrate compliance with the Final Rule, for a period of not less than two years from the date on which the financial institution receives the garnishment order.⁸⁶

With regard to a financial institution operating in a jurisdiction affording continuing levies to creditors, in the event a benefit payment is deposited into an account during the lookback period, the financial institution is only obligated to a single account review. The financial institution is not permitted to continually garnish amounts deposited or credited to the account following the account review.⁸⁷ However, if the account review shows that a benefit agency did not deposit a benefit payment into the account during the lookback period, then the financial institution must follow its

⁸³ 31 C.F.R. § 212.10(a).

⁸⁴ 31 C.F.R. § 212.10(b).

⁸⁵ 31 C.F.R. § 212.10(d).

⁸⁶ 31 C.F.R. § 212.11(b).

⁸⁷ 31 C.F.R. § 212.6(g).

customary procedures for handling the garnishment order.⁸⁸ This requirement may result in a financial institution applying a continuing levy as to one account and not as to another, depending on whether an account receives direct deposit of benefit payments, as discussed in more detail below.

III. Questions and issues under the Final Rule. I have identified some questions and issues under the Final Rule. Some of these questions and issues are set forth below.

Safe harbors under the Final Rule. The Final Rule provides safe harbors, including the following:

Protection during examination and pending review. A financial institution that complies in good faith with the Final Rule shall not be liable to a creditor initiating a garnishment order, or for any penalties under state law, contempt of court, civil procedure, or other law for failing to honor a garnishment order, for *account activity* during: (a) the two business days following a receipt of an order during which the financial institution must determine if the United States or a state child support enforcement agency has attached or included a Notice of Right to Garnish Federal benefits;⁸⁹ or (b) the time between the financial institution's receipt of the garnishment order and the date by which the financial institution must perform the account review.⁹⁰

Given this protection, a financial institution may wish to review its customary practice of immediately blocking an account upon service of a garnishment order. While the Final Rule provides a safe harbor for account activity during the account review, no express safe harbor is granted for blocking an account. Indeed, the Final Rule provides that during the account review period, the financial institution may not take "...any other actions related to the garnishment order that may affect funds in the account."⁹¹ This requirement may mean that a financial institution must develop two processes for dealing with account activity during the initial stages of handling garnishment orders, subject to whether the order is covered by the Final Rule or not.

Alternatively, a financial institution may elect to not immediately block an account in the event the United States or a state child support enforcement agency serves a garnishment order, as clearly those two levying creditors come within the purview of the Final Rule. For other types of garnishment orders, a financial institution may consider continuing with its customary practice of blocking accounts suspected of coverage under a garnishment order in the event the garnishment order does not come within coverage under the Final Rule.

Protection when protecting or freezing funds. The Final Rule further provides that a financial institution that complies in good faith with the Final Rule shall not be

⁸⁸ 31 C.F.R. § 212.5(b).

⁸⁹ 31 C.F.R. § 212.4.

⁹⁰ 31 C.F.R. § 212.5.

⁹¹ 31 C.F.R. § 212.5(e).

liable to a creditor initiating a garnishment order for any protected amount, to any account holder for any frozen amount, or for any penalties under state law, contempt of court, civil procedure, or other law for failing to honor a garnishment order in cases where: (a) a benefit agency has deposited a benefit payment into an account during the lookback period; or (b) the financial institution has determined that the order was obtained by the United States or state child support enforcement agency.

In the event a financial institution blocks an account under a garnishment order, this safe harbor is only available against creditors if a protected amount is identified and against account holders only if the account holder received a benefit payment. These limited safe harbors would suggest again a review of a financial institution's practice of blocking an account upon service of a garnishment order as discussed above.

Continuing levy. The Final Rule preempts state law governing continuing levies only where a benefit payment is deposited to an account during the lookback period. The Final Rule does not preempt state law governing continuing levies where no benefit payment is deposited during the lookback period. Therefore, in the event an account holder has multiple accounts where one account receives a covered benefit payment and another account does not, the continuing levy does not apply to the account receiving a covered benefit payment, but the continuing levy applies to the account not receiving a benefit payment. States with continuing levies include the following fourteen states:

- Alabama
- Arizona
- Florida
- Georgia
- Illinois
- Iowa
- Kansas
- Maryland
- Missouri
- North Carolina
- New York
- Pennsylvania
- South Carolina
- Texas

Seizure orders. Under the Interim Rule, it was not entirely clear that seizure orders issued by a court were covered thereunder. However, the Final Rule makes it abundantly clear that such seizure orders or warrants under which law enforcement seizes funds in a deposit account are covered.⁹² A seizure order or warrant issued by a *federal* court in the name of the United States is covered under the Final Rule; the order or warrant should be accompanied with a Notice of Right to Garnish Federal Benefits to effect a levy against benefit payments. The process to seize covered benefit payments is

⁹² 78 Fed.Reg. at 32101.

not available to a seizure order or warrant issued by a state court, as only a state child support enforcement agency is afforded that right under a Notice of Right to Garnish Federal Benefits.⁹³

Clearing brokers. As noted above, “financial institution” means a bank, savings association, credit union, or other entity chartered under Federal or State law to engage in the business of banking.⁹⁴ In this regard, one question is whether a clearing broker may be captured by the Final Rule as a financial institution,⁹⁵ as a client of an introducing broker may be a recipient of a benefit payment protected under the Final Rule through a linked deposit account.

IV. Conclusion. The Final Rule is a new, national procedure applicable to financial institutions in all jurisdictions dealing with garnishment orders issued by a federal or state court. Upon service of a garnishment order, a financial institution is mandated to conduct an account review promptly, within a specified time period, under the Final Rule. In the event an account holder has multiple accounts, each account must be reviewed.⁹⁶ In the case of certain products, such as prepaid products, vendors may have account information. Thus, while financial institutions located in some states, including California, may have some familiarity in protecting certain federal or state initiated direct deposits, including Social Security benefits, the compliance and system challenges may be significant, particularly with financial institutions having a multijurisdictional presence with multiple garnishment procedures. Not only must a financial institution identify benefit payments and protected amounts under the Final Rule, the financial institution must also look to state law in the event that law affords more protection to certain benefit payments.

⁹³ 31 C.F.R. § 212.4.

⁹⁴ 31 C.F.R. § 212.3, as adopted under the Rule.

⁹⁵ At 76 Fed.Reg. page 9950, the following appears:

"Financial institution" is defined as a bank, savings association, credit union or other entity chartered under Federal or state law to engage in the business of banking. The definition is intended to be very broad, in order to capture any financial institution that might hold an account to which Federal benefits may be directly deposited.

However, the clearing broker is probably not arguably in the business of banking, despite the supplementary information to the Rule cited above (notwithstanding *Brooks v. Transamerica Financial Advisors*, 2011 WL 378843 (La.App.2 Cir.), holding that a clearing broker is a "bank" for purposes of UCC § 4406).

⁹⁶ 76 Fed.Reg. at 9942.