

# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 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

**AGENCY:** 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:** Interim final rule with request for public comment.

**SUMMARY:** Treasury, SSA, VA, RRB and OPM (Agencies) are issuing an interim final rule to implement statutory restrictions on the garnishment of Federal benefit payments. 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 interim final rule is effective May 1, 2011. Comments must be received on or before May 24, 2011.

**ADDRESSES:** The Agencies invite comments on all aspects of this interim final rule. In accordance with the U.S. government's eRulemaking Initiative, the Agencies publish rulemaking information on <http://www.regulations.gov>. Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

The Agencies will jointly review all of the comments submitted. Comments on this rule must only be submitted using the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

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

*Instructions:* All submissions received must include the Agencies' names and RIN numbers 3206-AM17, 3220-AB63, 0960-AH18, 1505-AC20, and 2900-AN67 for this rulemaking. In general, comments received will be published on Regulations.gov without change, including any business or personal information provided. Treasury will also make such comments available for public inspection and copying in Treasury's Library, Room 1428, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622-0990. Comments received, including attachments and other supporting materials, are part of the public record

and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**FOR FURTHER INFORMATION CONTACT:** Gary Grippo, Deputy Assistant Secretary, Fiscal Operations and Policy, U.S. Department of the Treasury, at (202) 622-6222.

### SUPPLEMENTARY INFORMATION:

#### I. Background and Summary of Proposed Rule

##### *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) benefits, VA benefits, Federal Railroad retirement benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits and Federal Employee Retirement System benefits. See 75 FR 20299. The Agencies received 586 comments on the proposed rule, including comments from individuals, consumer advocacy organizations, legal services organizations, financial institutions and their trade associations, State attorneys general and State child support enforcement agencies. As described in Parts II and III of this **SUPPLEMENTARY INFORMATION**, the interim final rule adopts the proposal with a number of changes.

Social Security benefits, SSI benefits, VA benefits, Federal Railroad retirement benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits and Federal Employee Retirement System benefits are protected under Federal law from garnishment and the claims of judgment creditors.<sup>1</sup> This legal protection continues after benefits are deposited to an individual's account at a financial institution. Nevertheless, creditors and debt collectors are often able to obtain court orders garnishing funds in an individual's account. To comply with court garnishment orders and preserve funds subject to the orders, financial

<sup>1</sup> See 42 U.S.C. 407(a); 42 U.S.C. 1383(d)(1); 38 U.S.C. 5301(a); 45 U.S.C. 231m(a); 45 U.S.C. 352(e); 5 U.S.C. 8346(a) and 5 U.S.C. 8470.

institutions often place a temporary freeze on an account upon receipt of a garnishment order and remit the garnished funds to the court or creditor. 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.

#### *Proposed Rule*

To address the foregoing problems, the Agencies published for comment a proposed rule to require financial institutions to follow certain procedures upon receipt of a garnishment order, as follows: Upon receipt of a garnishment order, a financial institution would first determine if the United States is the plaintiff that obtained the order. If not, the financial institution would review the account history during the 60-day period that precedes the receipt of the garnishment order. If, during this "lookback period," one or more exempt payments were directly deposited to the account, the financial institution would allow the account holder to have access to an amount equal to the lesser of the sum of such exempt payments or the balance of the account on the date of the account review (the "protected amount"). The financial institution would be required to notify the account holder of the protections from garnishment that apply to exempt funds. The notice, which would have to include certain information, would be required to be sent within two business days of the completion of the account review. Financial institutions could choose to use a model notice contained in the rule in order to be deemed to be in compliance with the notice content requirements. Financial institutions that complied with the proposed rule's requirements would be protected from liability.

For an account containing a protected amount, the financial institution would be permitted to collect a garnishment fee only against funds in the account in excess of the protected amount on the date of the account review, and only if the financial institution customarily charges its other account holders a garnishment fee of the same nature and in the same amount. In addition, for accounts containing a protected amount, a financial institution would not be permitted to charge or collect a garnishment fee after the date of account review. The proposed rule would not have required financial institutions to determine the purpose of a garnishment

order, including whether the order seeks to collect child support or alimony obligations.

#### **II. Comments and Analysis**

In general, individuals, consumer groups, legal aid organizations and State attorneys general were supportive of the proposed rule and urged that it be finalized, subject to a number of changes. Banks and banking industry trade groups generally acknowledged the need for the rule, but were critical of various aspects of the rule and commented that a number of changes should be made to the proposed rule in order to facilitate banks' ability to comply with the requirements of the rule. Many credit unions and several credit union trade associations opposed the proposed rule, and objected to various provisions as time-intensive and burdensome, particularly for smaller credit unions. Several State child support enforcement agencies commented that the proposed rule would harm custodial parents and children receiving child support, and opposed the adoption of the rule unless protection from garnishment for child support obligations is removed.

#### *Effective Date*

Many banks and banking industry associations commented that the rule should not become effective until one year following the implementation of the garnishment exemption identifiers that the Treasury will encode in Automated Clearinghouse (ACH) Batch Header Records. The commenters stated that systems programming and testing would be required to automate the detection of the identifiers. The Agencies are not delaying the effective date of the rule until a year after garnishment exemption identifiers have been included in the ACH Records. Although the Agencies understand that many financial institutions will make systems changes to help automate compliance, the Agencies do not consider such changes to be necessary for compliance and do not believe they should be established as a pre-condition to protecting Federal benefits exempt from garnishment by law. However, to provide financial institutions with additional time for staff training and procedural changes, as well as for potential systems changes, we are delaying the effective date until May 1, 2011. Before this date, the Treasury will include the garnishment exemption identifiers in benefit payments and will provide additional information on the identifiers in an update to the Green Book, *A Guide to Federal Government ACH Payments and Collections*.

#### *Scope (Proposed § 212.2)*

Some commenters, primarily individuals, noted that the proposed rule did not include within its scope various Federal payments that are protected from garnishment by statute. These commenters urged that the final rule cover all such payments, which include 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 Agencies are aware that some other Federal payments are also protected from garnishment and have structured the rule so as to create a framework in which such payments can be included in the future. Federal agencies that issue such payments could, 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 this rule.

#### *Definition of "Account" (Proposed § 212.3)*

Some banks and bank trade groups expressed concerns with the broad definition of "account" in the proposed rule, which defined an "account" as "an account at a financial institution to which benefit payments can be delivered by direct deposit." Banks observed that this definition does not distinguish between personal and business accounts, both of which could receive direct deposits of Federal benefits. Banks indicated that the definition raises operational issues, because if an account, such as a business account, is not held in the name of the personal customer or debtor it is not likely to be found during the search of accounts. They therefore recommended that the definition of the term "account" should be expressly limited to "a personal consumer account at a financial institution to which benefit payments can be delivered by direct deposit," a definition that would more closely align with bank record keeping and research systems.

The Agencies are not limiting the definition of account in the rule to an account held for personal, family or household purposes. Although the delivery of a benefit payment to a business account may be relatively uncommon, the Agencies see no reason why the protection afforded to a benefit payment should be contingent on its delivery to a personal account, as opposed to a business account. The

Agencies have refined the definition of account to include any account, whether classified as a master account or a sub account, to which an electronic payment may be directly routed. This clarifies, for example, how the definition would apply to credit union accounting structures where there is a main member number under which there are individual transactional accounts. It also makes the definition more consistent with the provisions of the rule that require financial institutions to conduct a separate account review for each account that may receive a benefit payment.

*Definition of "Benefit Payment" and Use of a Garnishment Exemption Identifier (Proposed § 212.3)*

Some banks and bank trade groups requested that the definition of "benefit payment" be revised to avoid confusion in circumstances where an individual's benefit payments have been directly deposited to an account held by a representative payee. These commenters suggested that the term benefit payment be defined to mean "a direct deposit payment made by a benefit agency to a natural person, or to a representative payee receiving payments on behalf of a natural person 'whose name appears in the bank's records as account owner,' under a federal program listed in § 212.2(b)." Other banks specifically urged the Agencies to revise the definition of benefit payment in proposed § 212.3 to exclude payments made to organizational representative payees.

Many banks and payment organizations urged that the definition of "benefit payment" be revised to make it clear that a payment constitutes a "benefit payment" only if the ACH Batch Header record contains the unique garnishment exemption identifiers discussed in the proposed rule. These commenters stated that an institution should be able to rely on these unique identifiers, and that this ability be codified in the regulation itself, by amending the definition of "benefit payment" and/or the provisions in § 212.5(a) regarding the account review to be performed by the financial institution. With respect to the proposal to encode an "X" in position 20 of the "Company Name" Field of the Batch Header Record for each exempt benefit ACH payment, many financial institutions noted that encoding an "X" in position 20 can result in the "X" not being readily readable because it is the last character position of that field. They recommended that, instead, an "X" be encoded in the first two positions of the "Company Name" Field—positions 5

and 6—which would make the identifier easier to recognize and would reduce the potential for false positives where a non-Federal agency company name begins with a single letter "X."

One consumer advocacy organization urged that deposits made by check be protected under the same procedures applicable to a "benefit payment," which was defined in the proposed rule to include only a directly deposited payment. The organization argued that a financial institution that has a particular type of account designated for recipients of exempt funds or that notes the exempt source at the time of the deposit should be encouraged not to freeze those exempt funds and should be provided the safe harbor protections under this rule.

The Agencies are revising the definition of "benefit payment," as recommended by the commenters, to make it clear that a payment constitutes a "benefit payment" only if the ACH Batch Header Record contains a specified unique garnishment exemption identifier. The rule provides that a payment constitutes a benefit payment if it contains the characters "XX" encoded in positions 54 and 55 of the "Company Entry Description" Field of the Batch Header Record of the direct deposit entry. While the proposed rule indicated that the garnishment exemption identifier should be in the "Company Name" Field of the Batch Header Record, the interim final rule provides that the identifier will be in the "Company Entry Description" Field to ensure that the identifier can be used with all types of ACH transactions. For example, placing the identifier in the "Company Name" Field would preclude its use with the International ACH Transaction (IAT) Standard Entry Class code, which does not contain the "Company Name" Field. As with the "Company Name" Field, the "Company Entry Description" Field is typically captured and included in an account statement, allowing both the financial institution and the account holder to readily identify Federal benefit payments exempt from garnishment.

With the garnishment exemption identifier in the "Company Entry Description," a Social Security payment that currently contains "SOC SEC" in this field will now be encoded as "XXSOC SEC." A Federal retirement payment currently encoded as "FED ANNU" will now appear as "XXFED ANN." All benefit payments subject to the interim final rule will be similarly encoded. The encoding of payments will be in place by May 1, 2011.

The comments regarding benefit payments delivered to representative

payees have been addressed by changes to the definition of "benefit payment" and the addition of a new defined term, "account holder." The reference to representative payees has been deleted from the definition of "benefit payment," and the new term "account holder" is defined to mean "a natural person against whom a garnishment order is issued and whose name appears in a financial institutions records as direct or beneficial owner of an account." These changes clarify that the protections in the rule apply whenever a person's name appears in the financial institution's records with an ownership interest in an account, either as the directly named owner or as the beneficial owner on an individual or organizational representative payee account, or on another type of fiduciary account.

The scope of the interim final rule does not extend to check payments. Checks do not raise the same concerns raised by the direct deposit of exempt funds because a benefit recipient who receives a Treasury check representing exempt funds can choose to cash the check rather than to deposit the check and take on the risk that the funds will be garnished. In addition, financial institutions cannot readily identify whether a Treasury check that was deposited to an account represents exempt funds. Whereas ACH record formats and systems facilitate both the encoding and recognition of a garnishment exemption identifier with directly deposited payments, the systems and processes used to produce and receive Treasury checks do not facilitate an equivalent approach that would make it possible for financial institutions to determine whether a Treasury check represents an exempt payment. Even if the Agencies could develop a feasible way for an identifier to be included on a Treasury check, a financial institution would need to manually retrieve images or copies of recent items to find Treasury checks and visually inspect them. The fact that the rule does not address Treasury checks in no way affects an individual's right to assert or receive an exemption from garnishment by following the procedures specified under the applicable law.

*Definition of "Garnishment" and "Garnishment Order" (Proposed § 212.3)*

Several commenters requested clarification on whether pre-judgment garnishments and similar extraordinary legal process are excluded from the scope of the definition of garnishment and the requirements of the rule, stating that the policy considerations behind

emergency and extraordinary legal process are different from those relevant to civil debt collection. One commenter, however, expressed concern that the definition of garnishment order in the proposed rule was too narrow and that it should be revised to include: Any order to freeze an account in anticipation of a further order to enforce a money judgment; any legal process issued as part of a civil proceeding but prior to entry of a money judgment; and any order of a State or local government or agency to freeze or pay funds in connection with an obligation owed to or collected by the State or local government or agency.

The definition of "garnish or garnishment" has been revised to make it clear that pre-judgment garnishments are included within the definition. The proposed definition, which was "execution, levy, attachment, garnishment, or other legal process to enforce a money judgment," has been revised by deleting the phrase "to enforce a money judgment." With the deletion, the definition used in the rule is identical to the definition used in some of the Agencies anti-garnishment statutes.

*Definition of Lookback Period (Proposed § 212.3)*

Many comments were received regarding the length of the lookback period. Individual benefit recipients and consumer groups generally commented that the 60 day lookback period should be extended, with most commenters suggesting a 65 day period in order to ensure that two months worth of payments are protected in all cases. Several consumer groups and individuals commented that the rule would not protect funds in an account that originated from a large back-payment of benefits, as could occur if a back-payment were credited to an account more than 60 days prior to the receipt of a garnishment order. One consumer advocacy organization urged that the rule require banks to have an informal process in place to evaluate a claim by the debtor that the funds in excess of the two months are also protected under Federal garnishment rules in cases where a judgment creditor seeks more than two months of value of the debtor's protected income. The purpose of this informal process would be to protect beneficiaries with more than two months worth of Federal benefits in their financial institution and alleviate the burden of forcing them to go to court to protect exempt funds.

Credit unions generally commented that, as creditors and potential garnishors, they felt it was inappropriate

to shield 60 days of payments from garnishment, and that 30 days protection would be more appropriate. Some banks and credit unions stated that due to the way account history is archived, they could not easily comply with a 60 day lookback requirement and requested that the lookback period be limited to 45 days or one month. Most banks commented that they could comply with a 60 day lookback period, but some banks and bank trade groups commented that a two month lookback period would be easier to administer and less prone to potential errors. Using this two month definition, the lookback period would be measured not by counting back 60 days, but rather by measuring a date-to-date period from a start date, for example September 15, and ending with the corresponding date of the month two months earlier, in this example July 15. In light of the comments, the Agencies have revised the lookback period. The interim final rule defines the lookback period as a two month period beginning on the date preceding the date of the account review. The two month lookback period will ensure that in almost all cases, the protected amount will include two benefit payments, as urged by consumers and consumer advocacy groups. The Agencies conducted research on Federal benefit payments covered by this rule over a 7 year period that showed that a 60 day lookback period will capture at least two payments in 95% of cases, whereas a two month lookback period measured date-to-date will capture at least two payments in 99% of cases. In addition, the two-month lookback period addresses financial institutions' request for a lookback period that is easier to administer and less error-prone.

Moreover, in the proposed rule the lookback period began on the date preceding the date on which a financial institution is served a garnishment order. In the interim final rule, the lookback period begins on the date preceding the date of account review. This change reflects that the interim final rule allows two business days, and potentially additional time, to perform the account review after receipt of a garnishment order. By linking the lookback period to the date of account review and not the date an order is served, the rule ensures that the account review will better reflect the current state of an account and capture the most recent benefit payments that may be deposited on or after the day an order is served but before the account review is performed.

*Definition of "Protected Amount" (Proposed § 212.3)*

One bank questioned whether the "balance on the day of the account review" used in defining the protected amount refers to the beginning balance or ending balance on that day, and recommended that the rule be clarified by stating that financial institutions are to look at the beginning account balance. Another commenter asked whether items presented for payment against the debtor's account that arrive the same day as the garnishment are included in the protected amount and asked that the rule provide explicit guidance on whether the protected amount is calculated based on the account balance prior to or after posting of the debits or credits received on the same day as the garnishment.

Some commenters urged the Agencies to define the protected amount as an aggregate across accounts, rather than applying a protected amount to each account separately. Under this proposed definition, the protected amount would be the lesser of (i) the sum of all benefit payments deposited "into all accounts owned by the account holder" during the lookback period or (ii) the "aggregate balance in these accounts" on the date of account review.

Some commenters, including financial institutions, trade groups, and consumer advocacy groups, stated that protecting a flat dollar amount would promote certainty, clarity and administrative simplicity.

The interim final rule refers specifically to beginning and ending balances in the definition of protected amount. Under the revised definition, items presented for payment against the account that arrive on the same day as the date of account review would not be included in the protected amount. The Agencies are not defining a flat dollar amount as the protected amount because the use of a flat dollar amount will invariably result in underprotecting some individuals and overprotecting others.

The Agencies are not defining the protected amount based on the aggregate deposits and balances across all accounts, for several reasons. First, the Agencies believe the protection should be specific to the account(s) to which benefit payments are directly deposited, ensuring that a direct, verifiable connection exists between the protected amount and the evidence of an exempt Federal benefit payment. Second, defining the protected amount as an aggregate across all accounts assumes that amounts transferred between accounts must be exempt. As discussed

more fully in this preamble under the heading "Protection for funds transferred to another account (§ 212.5)," however, the Agencies do not believe the account review and the establishment of the protected amount can apply to funds transferred from one account to another. Third, an aggregated protected amount would introduce additional accounting complexities in different deposit and balance scenarios. For example, if the sum of benefit payments is less than the combined balance across accounts, but more than the balance in any individual account, the protected amount could cover only partial amounts in one or more accounts and would require a rule for allocating the protected amount across accounts.

The interim final rule retains the subsection in the proposed rule that makes clear that a protected amount must be established separately for each account held in the name of the account holder.

#### *U.S. Garnishment Orders (Proposed § 212.4)*

Many commenters objected to excluding garnishment orders obtained by the United States from the protections of the rule. Legal aid organizations, consumer advocacy groups and individuals stated that these orders should not be excluded because doing so contradicts the goal of ensuring that beneficiaries retain their exempt benefits, and that no specific creditor should be treated differently from others. Financial institutions stated that the requirement in the proposed rule to treat garnishment orders where the United States is the garnisher differently from other garnishment orders adds an undesirable level of complexity to the garnishment process and raises compliance concerns. Some financial institutions expressed concerns that it may be difficult to determine whether the United States is the creditor in some cases.

Financial institutions and financial institution trade groups requested that if the requirement to exclude orders obtained by the United States is retained, the final rule require that each order issued by the United States state on its face—preferably on the first page—that it is exempt from the requirements of 31 CFR 212.5 and 212.6. Financial institutions argued that such a statement would provide certainty and allow for rapid decision-making and handling by the financial institution. Alternatively, financial institutions requested that each order issued by the United States be accompanied by a Notice of Garnishment as set forth in Appendix B of the rule so as to ensure

that the initial examination is handled quickly and accurately.

Financial institutions also requested confirmation that non-garnishment forms of legal seizure issued by the United States are also excluded from the review/protection process. They explained that the term "garnishment" typically encompasses the orders used in the judicial collection of a civil money judgment, and indicated that they handle many non-garnishment legal orders that freeze customer funds on a continuing basis, such as temporary restraining orders, injunctions and seizure warrants. They recommended that all legal process issued by the United States be treated the same way, and be specifically excluded from the requirements of proposed §§ 212.5 and 212.6.

One commenter suggested that the rule be modified to require a financial institution receiving a garnishment order from the Federal government to screen the account for any of the types of benefits that are not exempt from collection by the Federal government. This commenter recommended the creation and use of a separate code for those Federal benefits that are not exempt from collection when the creditor is the Federal government, and that financial institutions be required to screen for this factor.

The Agencies are retaining in the rule an exclusion for garnishment orders obtained by the United States. There are several Federal statutes that expressly permit the United States to garnish Federal benefit payments. See 18 U.S.C. 3613(a), 26 U.S.C. 6334(c), 31 U.S.C. 3716(c)(3)(A)(i), and 42 U.S.C. 1320a–8(e)(1)(C). Absent a carve-out for all garnishment orders obtained by the United States, financial institutions would face uncertainty and the burden of determining on a case-by-case basis whether a particular order obtained by the United States was subject to the rule or not. Moreover, garnishments orders obtained by the United States are already governed by a comprehensive Federal statute, the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. 3001 *et seq.*, which establishes a uniform framework with exclusive civil procedures for the collection of all judgments due the United States, including cases where the United States is prohibited from garnishing Federal benefit payments as well as cases where it is expressly allowed to garnish such payments. While the rule is needed to address the problems of garnishing exempt funds, it would both overlap and conflict with the framework of the FDCPA unless garnishment orders

obtained by the United States are excluded.

In order to allow financial institutions to quickly identify whether a garnishment order was obtained by the United States, the rule requires that such orders have attached or included with them a standard Notice of Right to Garnish Federal Benefits.

#### *Child Support Orders (Proposed § 212.4)*

Several State child support enforcement agencies argued that garnishment orders for purposes of child support should be treated in § 212.4 in the same way as orders obtained by the United States. These agencies expressed concerns regarding the legality and equity of protecting benefit payments from garnishment for child support. State child support agencies pointed out that Federal law and administrative regulation not only allow but encourage child support enforcement programs to take enforcement action against most funds identified as "protected" in the proposed rule in order to satisfy court ordered support requirements. They noted that an obligation to support children and family is not characteristically similar to other debts and that child support obligations are not treated like other debts in contexts of many Federal statutes, such as the Bankruptcy Code, the Fair Debt Collections Practices Act, and the Consumer Credit Protection Act.

State child support enforcement agencies also pointed out that while SSA benefit programs participate with the Federal Office of Child Support Enforcement (OCSE) in data matching programs that allow child support programs to collect child support from Social Security Title II benefits, this is not the case for VA programs. There is no proactive matching that provides viable useful information on VA benefits, and there is not an effective program that efficiently allows for collection of child support from any VA benefits.

Child support enforcement agencies argued that the proposed rule would diminish their powers in direct contravention of the rights and responsibilities assigned to the child support enforcement program by Federal law and regulation. In view of these concerns, commenters requested that a provision be added to the rule to require a financial institution to make a determination if an order was issued by a Child Support program under Title IV–D of the Social Security Act, in the same way that financial institutions are required to make as to whether a garnishment order was obtained by the United States. These agencies argued

that an exemption for child support orders would be consistent with the clear Congressional intent to require all persons to support their families. Commenters argued that such an exemption would not be burdensome for financial institutions to comply with because child support garnishment orders are distinctive and easily identifiable by financial institutions.

The interim final rule contains an exclusion for garnishment orders issued by a State child support enforcement agency that administers a child support program under Title IV-D of the Social Security Act. These orders are treated in the same way as orders obtained by the United States. Under the rule, a financial institution must determine whether an order was obtained by the United States or issued by a State child support enforcement agency. In making this determination, a financial institution may rely on the presence of a Notice of Right to Garnish Federal Benefits, which must be attached or included with the order. If the notice is present, a financial institution is not required to perform an account review or take actions otherwise required by the rule. Rather, the financial institution follows its customary procedures for garnishment orders and treats the relevant account(s) as if no Federal benefit payment were present. However, the Agencies note that this exclusion does not alter an individual's right to assert any protections for benefit funds that may exist under applicable Federal law.

#### *Deadline for Account Review (Proposed § 212.5(a))*

Most of the banks and bank trade groups that commented on the proposed rule stated that the requirement to perform an account review within one business day of receipt of a garnishment order is unrealistic. Commenters stated that garnishment orders can be delivered to any bank location and may not reach the designated processing department until after one day from "receipt." They also pointed out that sometimes States bundle together large numbers of garnishment orders and deliver them in a batch. Financial institutions requested that the final rule recognize the delivery of bundled/batches of large numbers of garnishments delivered in one shipment and permit financial institutions to commence the account review (and accordingly, the lookback period) as permitted by the creditor. Financial institutions argued that they should be allowed leeway in this regard as it may be impossible to meet the one day review requirement.

Some commenters, primarily credit unions, asked that the deadline be increased to a period ranging from two to five business days following receipt of the order. Other commenters, primarily banks, asked that the obligation to commence review begin only after the institution receives the information necessary to identify the property of the benefit recipient. Some commenters asked for a combination: the longer of two business days or the receipt of the information necessary to identify the property of the benefit recipient.

A number of commenters suggested that the phrase "a garnishment order issued against an account" in proposed § 212.5(a) be rewritten to refer to "a garnishment order against a natural person." These commenters pointed out that a garnishment order must be directed against an individual rather than a deposit account, as a garnishment order is directed against a judgment debtor and his or her property, and rarely against a deposit account. Commenters indicated that this definition would be more accurate and also avoid capturing garnishment orders directed against organizations.

The Agencies have extended the account review deadline from one business day to two business days. To address situations in which a financial institution receives a garnishment order that does not include sufficient information to identify whether the debtor is an account holder, the rule provides that in such a case the two business day deadline commences when the financial institution receives sufficient information to determine whether the debtor is an account holder. Based on comments submitted by a variety of financial institutions, the Agencies understand that when a financial institution receives a garnishment order with insufficient information to identify the debtor, it notifies the creditor or court that additional information is needed and can take no action on the order until it receives such information. The rule does not affect this status quo process, and recognizes that action on an order, including the account review, can't begin until the debtor is identified as an account holder.

In cases where a financial institution is served a batch of a large number of orders at the same time, the interim final rule extends the account review deadline to a date that may be permitted by the creditor that initiated the orders.

Finally, the language in the interim final rule has been revised to reflect that garnishment orders are issued against debtors rather than accounts.

#### *Protection for Funds Transferred to Another Account (Proposed § 212.5)*

Financial institutions broadly supported the proposal to exclude funds transferred to another account from the rule's protection, and requested that § 212.5 explicitly state that transferred funds are not subject to protection.

One consumer advocacy organization commented that exempt money that is transferred from one account to another should be protected under the rule. This organization commented that to preserve economic security, elders and younger adults living with disabilities are generally counseled to transfer incoming income into a safe savings account. The organization argued that transferring exempt money into a secondary account should not be seen as forfeiting the protection available for exempt funds and that, at the very least, beneficiaries should be notified by the financial institution before transferred funds are released under the garnishment order and allowed the opportunity to show the institution that the transferred funds are exempt Federal funds and therefore protected under the rule.

The Agencies have revised § 212.5 to state explicitly 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 savings or other secondary account following the initial deposit, it is not clear that transferred funds necessarily retain their exempt character in all cases, and, unlike a direct deposit payment, that transfer transactions will be readily identifiable as containing exempt funds.

If the source account from which funds are transferred contains other deposits of non-exempt funds or withdrawals of exempt funds, or if the receiving account contains other credits or debits following the transfer of funds, there is no clear way to distinguish balances transferred into the receiving account as exempt. While the Agencies might develop a standard accounting convention to label and trace originally exempt funds transferred over time, doing so would likely generate inaccurate or inappropriate results given the uniqueness of transactions in a given case, and given the attenuated connection that may exist between the original deposit and subsequent transfer. Moreover, 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.

While the interim final rule states that financial institutions should not attempt to trace the movement of funds between accounts in establishing a protected amount, the Agencies recognize that exempt funds may be transferred and note that nothing in the rule limits an individual's right to assert a further exemption for additional funds or to alter the exempt status of transferred funds that may be identifiable and traceable when the facts of a given case are reviewed.

#### *Access to Protected Amount by Account Holder (Proposed § 212.6(a))*

Consumer groups commented that the rule should make it clear that an account holder has "full, unfettered and customary" access to the protected amount, to prevent banks from improperly providing only limited access to account holders. One commenter urged that language be added to preclude any attempts by creditors to subsequently litigate whether the "protected amount" actually consists of exempt funds.

The rule has been revised to state that a financial institution must ensure that the account holder has "full and customary" access to the protected amount. The Agencies intend by this language 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. Additional language also has been added to make it clear that a financial institution's calculation of the protected amount is not subject to a legal action by a creditor challenging that determination.

#### *One-Time Account Review (Proposed § 212.6(d))*

One bank requested clarification on the requirement in proposed § 212.6(d) to determine whether a garnishment order that is received was previously served on the bank. The bank commented that financial institutions often receive multiple orders from the same creditor for the same account holder, and that it is difficult to determine whether the receipt of a second order would be considered the same order, which would not require another account review; or a new or different order, which would require a new account review. The Agencies are not addressing in the final rule what process financial institutions should use

to determine whether a garnishment order is a new order or an order that was previously received, as this is necessarily a fact-specific determination.

#### *Continuing Garnishment Responsibilities (Proposed § 212.6(e))*

One commenter requested that the language of proposed § 212.6(e) be revised. That section provides that a financial institution "shall have no continuing obligation to garnish" amounts deposited or credited to the account following the account review. The commenter observed that this wording would allow a financial institution to decide whether to comply with the terms of a continuing garnishment order, rather than prohibiting a financial institution from complying with the terms of a continuing garnishment order. The interim final rule has been revised to make it clear that a financial institution is not permitted to give effect to a continuing garnishment order affecting an account containing a protected amount.

#### *Deduction of Garnishment Fees (Proposed § 212.6(f), (g))*

Many comments were received on the provisions in the proposed rule regarding the imposition of garnishment fees by financial institutions. Consumer advocacy groups opposed the language in the proposed rule at § 212.6(f) that affirms the ability of a financial institution to charge a customary garnishment fee if the account contains an unprotected amount. They argued that if a garnishment fee is prohibited on exempt amounts, it should be prohibited regardless of whether the exempt funds fall into the artificially narrow scope of the protected amount. They commented that proposed § 212.6(f) should be deleted because it may provide support for the imposition of excessive fees. Consumer advocacy groups further urged that the definition of "garnishment fee" be amended to include not only a fee for imposing the garnishment, but rather any fee that arises as a result of a garnishment.

Financial institutions, on the other hand, strongly objected to restricting the collection of a garnishment fee to cases in which there are funds in the account in excess of the protected amount. They challenged the legality of the restriction and argued that it is unfair both to the financial institution and to other account holders, to whom the costs for administering these accounts will be transferred. Some financial institutions commented that this restriction may lead them to close accounts that contain

benefit payments if a garnishment order is received.

Some financial institutions argued that the provisions of the rule on garnishment fees exceed the Agencies' statutory authority, stating that none of the statutes cited as authority for the regulation allow the Agencies to limit or prohibit any fee a financial institution charges for any service based on the source of funds in the account. One financial institution argued that the prohibition may amount to an unlawful taking, running afoul of the Fifth Amendment to the United States Constitution. Another financial institution commented that the proposed rule contravenes a bank's legal right to take a security interest in its deposit accounts and its common law right of offset. Many financial institutions argued that the imposition of garnishment fees is a matter of contract between financial institutions and their customer, and that customers agree to pay for fees and charges with the maintenance of their deposit accounts.

Banks also opposed the garnishment fee restrictions as a matter of policy and equity. Some banks commented that they did not understand the distinction drawn by the Agencies between a garnishment fee and other fees and charges incurred by a customer. Many financial institutions commented that they incur significant costs in processing garnishment orders, and that garnishment fees should be permitted whether or not an account has excess funds beyond any protected amounts. Financial institutions also argued that there is no principled reason why benefit recipients should be allowed to contract or pay for needed banking services but be legally shielded from a garnishment fee. Some financial institutions went further and argued that in fairness to customers who do not receive Federal benefit payments, a separate garnishment fee should be allowable for those accounts with Federal benefit payments to help defray the extra costs to the bank imposed by this regulation and to recognize benefit received by the customer from the protections of this rule.

Financial institutions also opposed the proposed restriction to permit assessing the fee only on the date of account review. One bank indicated that it saw no purpose in mandating the date on which the fee may be assessed and that if banks are afforded only a single, specific date to assess the garnishment processing fee, they may automatically elect to assess this fee without regard to whether the fee may be waived in certain instances.

Other financial institutions indicated that if they could not recoup their costs for processing garnishment orders, there would be little incentive to allow the account to remain open. Rather than incur the risk of future garnishment expenses, some financial institutions indicated that they might choose to close accounts for this population. Commenters noted that Federal benefit payment accounts are often small-balance, labor intensive accounts that can be unprofitable for banks to maintain, and that limitations in the proposed rules on the ability of banks to recover their costs for handling garnishments exacerbate this situation.

Some legal aid organizations and consumer advocacy groups appeared to anticipate that financial institutions might respond to the rule by closing accounts held by benefit recipients if the accounts are garnished. These organizations indicated that this practice already occurs in some instances. Specifically, in some cases banks that receive a garnishment order for an account containing only exempt funds send the account holder a check for the exempt funds and close the account. Legal aid organizations requested that the final rule prohibit this practice, which causes hardship for benefit recipients.

The interim final rule prohibits financial institutions from charging a garnishment fee against a protected amount, and also prohibits the charging of a garnishment fee after the date of the account review. The Agencies believe that the anti-garnishment statutes support a prohibition against the imposition of a garnishment fee if the account contains only a protected amount. Some cases have held that financial institutions may charge account-related fees against protected funds in an account, and that the charging of the fees does not constitute garnishment or other legal process. For example, courts have upheld a bank's right to charge overdraft fees from Social Security and Supplemental Security Income funds deposited to a bank account. See *Lopez v. Washington Mutual Bank*, 2002 U.S. App. LEXIS 24344; see also *Wilson v. Harris*, 2007 U.S. Dist. LEXIS 65345. The Agencies view garnishment processing fees as distinct from other account-related fees. If funds in an account are protected from garnishment, the Agencies find it unreasonable to conclude that those same funds can be subjected to a fee for handling a garnishment order—an order that itself cannot legally be processed against the funds.

The rule prohibits a financial institution from charging a garnishment

fee after the date of account review 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. The Agencies believe that such an approach would be complex, confusing for account holders and at odds with the one-time review process established under the rule. Accordingly, the rule restricts the timing of garnishment fees.

The Agencies do not believe that the anti-garnishment statutes support a general prohibition on imposing a garnishment fee against non-protected funds. In addition, the Agencies are not expanding the prohibition on garnishment fees to apply to “any fee that arises as a result of a garnishment,” because such a definition would be overly broad. The Agencies are not in this rulemaking addressing a financial institution's right to take a security interest in its deposit accounts or to exercise a contractual right to deduct fees or a common law right of offset against funds that are exempt from garnishment, except in the very narrow context of deducting a garnishment processing fee from an account containing a protected amount following receipt of a garnishment order.

The interim final rule requires financial institutions to ensure that account holders have full and customary access to protected amounts. The rule does not address the conditions under which financial institutions may close accounts, which the Agencies believe is beyond the ambit of this rule.

#### *No Actions After the Date of Account Review (Proposed § 212.6)*

The proposed rule was based on the principle that a financial institution's response to a garnishment order must be a one-time event, based on the status of an account on the date of account review, and it prohibited financial institutions from taking any action on the account in response to the garnishment order after the date of account review. The interim final rule adopts this principle, which applies to all actions that a financial institution may perform on an account, including examining deposits, freezing funds, protecting funds, and collecting garnishment fees. Accordingly, § 212.6(f) of the interim final rule provides that a financial institution must perform the account review only one time and may not repeat the review

subsequently, including in cases where the same garnishment order is served again on the financial institution. Similarly, § 212.6(g) preempts State laws requiring continuing garnishments and prohibits a financial institution from freezing funds deposited after the one-time account review. Likewise, § 212.6(h) provides that a financial institution may not collect a garnishment fee from unprotected funds after the date of account review.

The Agencies have necessarily established these provisions to give proper effect to the anti-garnishment statutes, since it is not feasible to implement both a protected amount and to permit continuing actions related to the garnishment order. Because the status of an account will change with every transaction following the account review, requiring both protection for exempt funds and permitting other subsequent actions would necessitate the monitoring of transactions in real time to continually re-assess the account balance and determine which funds are exempt and which are not exempt from garnishment. As was discussed in the supplementary information to the proposed rule, the Agencies believe that any policies that would necessitate the on-going monitoring of transactions would be neither operationally nor economically feasible. Therefore, the rule does not permit actions related to a garnishment order after the date of account review, and requires all permissible actions to be based on the balance in the account derived from transactions occurring at or before the open of business on the date of account review.

#### *Financial Institution Right of Offset (Proposed § 212.8)*

Consumer advocacy groups urged the Agencies to delete the language in § 212.8(b) of the proposed rule stating that nothing in the rule shall be construed to invalidate any term or condition of an account agreement that is not inconsistent with the rule, on the basis that this provision tacitly supports setoffs from exempt funds. Consumer groups noted that the proposed rule is silent as to overdraft charges and other setoffs against exempt funds. These commenters supported prohibiting setoffs against exempt funds for all types of fees, arguing that there are some cases that have held it is not legal for financial institutions to seize exempt funds. Alternatively, they requested that the Agencies clarify that this provision should not be construed to validate account agreements that permit the seizure of exempt funds through setoff or any other means.

In contrast, some financial institutions commented that it is important that their existing rights of setoff be protected. Credit unions commented that currently there are two different mechanisms credit unions can employ in order to use members' funds on deposit to satisfy outstanding debts to the credit union. First, credit unions may create a contractual lien during the account opening and lending process that provides the credit union the right to use shares on deposit in the event an account holder becomes delinquent on a loan issued by the credit union. Additionally, the Federal Credit Union Act (FCUA) provides credit unions the statutory right to enforce a lien against a member's shares if the member is delinquent on a loan issued by the credit union. See 12 U.S.C. 1757(11). In order to take advantage of the statutory lien, a credit union must comply with 12 CFR 701.39 of the National Credit Union Administration's (NCUA) rules and regulations.

The proposed rule did not address, nor did the Agencies intend to address, the right of financial institutions to set off obligations of an account holder against an account to which Federal benefit payments have been deposited. The rule is intended to protect account holders who receive directly deposited benefit payments from difficulties that may arise when a garnishment order against an account holder is served on a financial institution. Accordingly, the issue of setoff by financial institutions is outside the scope of the interim final rule.

*Notice (Proposed § 212.6(c), § 212.7, Appendix A)*

Comments on the required notice to account holders were received from a broad array of commenters. The most frequent comment, which was received from all types of commenters, was that the model notice needs to be rewritten to be more easily understandable, and that the Agencies should have the notice revised by a literacy expert and tested. In addition, financial institutions commented broadly on a wide range of other issues relating to the notice. Many financial institutions objected to the requirement to send any notice, observing that this is outside the scope of a financial institution's responsibilities with respect to its customers, imposes considerable costs burdens on financial institutions, and likely will result in follow-up telephone calls which add to customer service burdens. Commenters argued that debtors who have protected Federal benefits deposited to their accounts will receive two notices from two different

sources which is likely to generate additional confusion. Some commenters suggested that the rule provide, at least in the jurisdictions in which the creditor is required to send garnishment information to the debtor, that the creditor be required also to send a notice regarding Federal benefit payments to the debtor. Two State child support enforcement agencies objected to the requirement that any notice be sent, on the basis that the notice would lead to the withdrawal of funds and create the false impression that funds are protected from child support enforcement action.

Many financial institutions also commented on specific aspects of the notice and notice requirement. Some financial institutions asked for longer periods of time ranging from 3 to 7 days to send the notice in light of the burden it imposes. One commenter noted that § 212.7 of the proposed rule does not indicate who is to receive the notice in cases where the account in question is held in the names of two or more persons, and recommended that in the case of multiple account holders, notice to any of the account holders should be sufficient, regardless of who is ultimately required to receive the notice. Some banks commented that if a customer has more than one account at a bank, the bank should have the option of sending one notice for all accounts or separate notices for each account. They stated that this would provide flexibility to design bank processes in the manner the bank deems most efficient while ensuring that the customer receives the information he or she needs.

Financial institution trade groups recommended that the notice requirement not apply in situations where a financial institution finds when it conducts the account review that the account reflects an overdraft or zero balance, or where there are no funds in the customer's account that exceed the protected amount. They expressed substantial concerns that the requirement to provide notice in these cases would unnecessarily confuse the account holder, and that customers receiving this notice are likely to call the bank for an explanation, requiring additional resources to handle calls. They also indicated that requiring notice in these cases would be a significant burden for financial institutions. One bank estimated that approximately 60% of the orders it receives would involve accounts where no funds were frozen, either because there are no funds in the account or because the funds that are present are fully exempt.

Some financial institutions commented that the list of benefits required under § 212.7(a)(7) of the proposed rule to be included in the notice is confusing and misleading, both because account holders may construe it to mean that the funds should not have been held and because in many States these funds are not exempt once deposited in a bank account. Commenters requested that this requirement be amended to state simply that Federal or State law may provide additional exemptions and that comparable changes be made to the model form.

A number of financial institutions requested the removal or revision of the requirement at § 212.7(a)(8) of the proposed rule that the notice explain the account holder's right to assert a further garnishment exemption for amounts above the protected amount by completing exemption claims forms. They argued that this requirement imposes a considerable burden on the financial institution to keep apprised of the process for claiming exemptions in each jurisdiction and to provide a description of the process in the notice to the account holder, particularly for an institution with a presence in a large number of States. Some financial institutions argued that this provision goes beyond the stated purpose of the regulation, because in most cases the relevant exemptions would be under State law, which is not within the scope of the Federal garnishment laws. One large bank expressed concern that by providing guidance on the statutory processes, a bank risks creating the perception that it is providing legal advice. Some commenters urged that the notice simply state that the account holder may have a right to assert a further garnishment exemption for amounts above the protected amount by complying with the processes provided by State law. Other commenters recommended that this provision clarify that such claims are not against a bank that has complied with the proposed rules, so as to avoid potential customer confusion regarding available remedies and next steps he or she should take. Several commenters suggested that the Agencies urge the States to incorporate into State garnishment forms model language on the protection of Federal benefits, stating that uniform adoption of standard language on Federal benefit payments would reduce the potential confusion to account holders.

Some financial institutions requested that § 212.7(a)(9) and (10) of the proposed rule be revised to state that the notice include the means of contacting the judgment creditor and court only if

that information is contained in the garnishment order served on the financial institution.

In contrast to financial institutions, consumer advocacy and legal aid organizations commented that the notice is important in ensuring that account holders are informed of the receipt of a garnishment order and aware of their rights in relation to it. One consumer advocacy group proposed that for those consumers that do in fact have their accounts garnished, notice be required to be given by either registered mail or personally served to ensure that the consumer actually receives notice of the garnishment. Several legal services organizations commented that the model notice should advise the debtor of his right to consult an attorney and include information on the availability of free legal aid attorneys.

Consumer advocacy groups recommended that the notice specify exactly how much money the bank has frozen and the name and number of the account in which these funds are found. They also recommended that the notice specify the amount of any garnishment fee the bank has assessed against the recipient's account. Other recommendations included (1) the notice should state that future funds deposited in the account will not be subject to seizure as the result of this garnishment order; (2) the notice needs to include information about local, free legal programs; and (3) the regulation itself should reference and specifically recommend the use of the model notice with blanks to be filled in for State-specific information.

As indicated above, both consumer advocacy organizations and financial institution trade groups criticized the complexity of the wording of the proposed model notice, noting that it uses complex language, compound sentences, and long paragraphs. Many commenters submitted proposed revisions to the wording to improve its readability. In general, commenters encouraged the Agencies to consider testing provisional form(s) with consumer focus groups directly or through voluntary financial institutions; to strike references to creditor and court contact information; and to rewrite the notice at more basic literacy standards, not to exceed an 8th grade reading level.

An organization representing collection attorneys requested that the final rule require financial institutions to provide notice not only to the account holder but also to the judgment creditor. They argued that since the rule does not require notice to the judgment creditor/garnishor, it violates the

creditor's constitutional rights to notice that its State law rights are preempted. They contended that such a result is patently unfair to judgment creditors/garnishors that have a right to know the particulars as to why a financial institution did not freeze certain funds otherwise subject to collection under State law.

The interim final rule contains a number of changes to the notice provisions and to the model notice itself, reflecting the comments received. The amount of time required to issue the notice has been increased from two business days to three business days from the date of account review. The Agencies believe that the notice should be sent to the account holder named in the garnishment order, and not to a co-owner of an affected account, and have revised the rule accordingly. The Agencies agree with comments made by consumer advocacy organizations that the notice should identify the account affected by the order and specify exactly how much money the financial institution has frozen, if any, as well as the amount of any garnishment fee assessed. The Agencies do not believe that notice should be required to be sent by registered mail or personally served on the account holder. The Agencies do not believe it serves a useful purpose, and agree that it may be confusing to an account holder, for a notice to be sent in situations where a financial institution finds when it conducts the account review that the account reflects an overdraft or zero balance. In contrast, however, the Agencies do not agree that a notice should not be required where there are no funds in the customer's account that exceed the protected amount. Therefore, the interim final rule requires notice to the account holder if the financial institution's account review results in the establishment of a protected amount.

In the interim final rule, the Agencies have attempted to strike a balance between ensuring that account holders receive useful, relevant information and avoiding the complexity and confusion that a lengthy notice could create. The Agencies are also cognizant of the concerns expressed by financial institutions that the provision of certain information may be unduly burdensome and could create the impression that the financial institution is providing legal advice or acting as an intermediary between the debtor and the court or creditor. Accordingly, the interim final rule allows, but does not require, financial institutions to include: Additional information regarding State or local rules; the availability of legal resources that account holders might

wish to consult; and a statement that by issuing the notice, the financial institution is not providing legal advice. In addition, the rule has been revised to state that in providing the notice, a financial institution shall not be deemed to be providing legal advice to the account holder. The requirement that financial institutions provide the means of contacting the creditor and court has been qualified to make it clear those requirements apply only if the order includes that information. Lastly, the Agencies are not including a requirement in the rule to send a copy of the notice to the creditor. The Agencies believe it is inappropriate for the financial institution to bear the cost of notification to a creditor since the financial institution has no relationship with the creditor, in contrast to the account holder.

Finally, the Agencies have revised the model notice in the interim final rule to improve its readability based on input from financial education and literacy professionals. The organization of the model notice has been changed to a question-and-answer format with a chart showing the status of the benefit recipient's account, and the language has been re-written to reflect more basic literary standards and comprehension levels.

#### *Preemption of State law (Proposed § 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. These commenters urged the Agencies not to preempt greater protections that States provide with respect to garnishment of bank accounts and asked that the final rule explicitly state that it does not preempt State laws that are at least as protective to account holders as Federal law.

The interim final rule preempts any State or local government law that is inconsistent with any provision of the rule. Such a preemption occurs only to the extent that an inconsistency between the rule and State law would prevent a financial institution from complying with the requirements of the rule. Some State laws, for example, may protect from garnishment funds in a bank account in an amount that exceeds the protected amount. The interim final rule does not displace or supersede such a State law requirement, provided that the financial institution has complied with all of the requirements of the interim final rule.

### *Safe Harbor (Proposed § 212.10)*

Some commenters stated that proposed § 212.10(c)(3), which allows for the account holder to provide express written instructions to use an otherwise protected amount to satisfy the garnishment holder, raises concerns. These commenters recommended that proposed § 212.10(c)(3) be removed from the regulation because, although the instructions need to be received by the bank after the date of the garnishment, there is nothing to prevent a creditor from forcing a recipient to sign such instructions in advance. If this section remains in the rule, these commenters recommended that language be added that such instructions cannot be a result of a prior agreement.

Many banks commented that the Agencies should expressly extend the safe harbor provisions to instances where financial institutions are unable to comply with the requirement to perform an account review within one business day due to the need to obtain additional information or to handle the exceptional circumstances. Some financial institutions asked that the safe harbor be pushed back to the point where the financial institution relies on the ACH record to identify a benefit payment, stating that the safe harbor should clarify that when the institution relies on such record, the payment should be deemed to be a benefit payment. Some commenters urged the Agencies to strike the requirement of good faith compliance from proposed § 212.10 as a condition to the safe harbor because this creates a triable issue of fact before the safe harbor is available. Other commenters suggested that the safe harbor be expanded to protect a financial institution from liability in cases where the financial institution, after a review of its own records, releases to the account holder benefit payments as defined by the rule.

The Agencies have revised the language of the proposed rule to make it clear that an account holder may not instruct a financial institution in advance or in a standing agreement to use exempt funds to satisfy a garnishment order. Apart from this change and other minor technical revisions, the Agencies do not believe any change to the safe harbor language is necessary. Changes to the deadline for performing the account review adequately address the concern that the safe harbor should cover financial institutions that are unable to comply with the requirement to perform an account review within one business day due to the need to obtain additional

information or to handle the exceptional circumstances. Similarly, because the definition of “benefit payment” has been revised to refer to payments in which the ACH identifier is present, it is clear that a financial institution that relies on the ACH record would be covered by the safe harbor. The Agencies are retaining the good faith requirement as a condition for the availability of the safe harbor. In addition, the Agencies do not believe it is appropriate to protect from liability a financial institution that voluntarily releases funds that fall within the rule’s definition of “benefit payments.” This could result in the release of months’ or years’ worth of benefit payments, without regard to withdrawals, account activity or the extent to which funds in the account retain the characterization of exempt payments.

### *Enforcement and Record Retention (Proposed § 212.11)*

Some consumer groups commented that they had significant concerns regarding lack of enforcement of the proposed rule. These commenters noted that while the Federal banking agencies have the right to enforce the proposed rule, they are often overwhelmed and lack the resources to address all of the abuses in the banking system. They recommended that the rule include a private right of action so consumers themselves can force financial institutions to comply with the new rules.

Many banks noted that although the proposed rule required that records be maintained to demonstrate compliance with the rule, the proposed rule did not specify a time period for the requirement to maintain records. Most banks that commented on this issue recommended that a time period of one year following the account review be stipulated.

Congress did not provide a private right of action in the statutes prohibiting garnishment of Federal benefits and therefore the interim final rule does not include such a provision. The Agencies have specified a two-year record retention period in the rule.

### **III. Summary of Interim Final Rule**

Under the 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 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.

### **IV. Section-by-Section Analysis for 31 CFR Part 212**

The provisions of the rule are set forth in a new part 212 to 31 CFR. SSA, VA, RRB and OPM are each amending their existing regulations to include a cross-reference to 31 CFR part 212.

#### *Section 212.1*

Section 212.1 sets forth the purposes of the rule.

#### *Section 212.2*

The rule applies to every entity defined as a financial institution, if the financial institution holds accounts to which benefit payments are directly deposited by one or more of the Agencies.

#### *Section 212.3*

Various terms used in the regulation are defined in section 212.3. “Account holder” means a natural person against whom a garnishment order is issued and whose name appears in a financial institution’s records as the direct or

beneficial owner of an account. "Account" is defined to mean any account, whether a master account or sub account, at a financial institution and to which an electronic payment may be directly routed. The definition includes master and sub accounts to reflect account structures used by credit unions. As defined, "account" does not include an account to which a benefit payment is subsequently transferred following its initial delivery by direct deposit to another account.

The definition of "benefit payment" is limited to direct deposit payments that include an "XX" in positions 54 and 55 of the Company Entry Description field in the Batch Header Record of the direct deposit entry. Because benefit recipients can cash checks rather than deposit them and take the risk that funds will be garnished, financial institutions do not need to examine accounts to identify benefit checks for purposes of complying with the rule. 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.

"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.

The definition of "garnish" and "garnishment" are taken directly from the wording of Agency statutes establishing the exemption of certain Federal benefit payments from garnishment. "Garnishment fee" is defined to mean any kind of a fee that a financial institution charges to an account holder related to the receipt or processing of a garnishment order. "Garnishment order" and "order" are defined to mean a writ, order notice, summons, or similar written instruction issued by a court to effect a garnishment, as well as an order issued by a State child support enforcement agency.

"Lookback period" is defined to mean the two month period that (i) begins on the date preceding the date of account review and (ii) 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. For example, under this definition, the lookback period that begins on November 15 would end on September 15. On the other hand, the lookback

period that begins on April 30 would end on February 28 (or 29 in a leap year), to reflect the fact that there are not 30 days in February.

"Protected amount" is defined 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, or (ii) the balance in an account at the open of business on the date of account review.

"State" is defined to mean a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

"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 42 U.S.C. 654, Title IV, Part D of the Social Security Act.

#### *Section 212.4*

Section 212.4 of the rule sets forth the first action that a financial institution must take when it receives a garnishment order, which is to determine whether the order was obtained by the United States or a State child support enforcement agency. To make this determination, financial institutions may rely on the inclusion of a Notice of Right to Garnish Federal Benefits, as set forth in Appendix B. For orders obtained by the United States or a State child support enforcement agency, the financial institution is to follow its otherwise customary procedures for handling the order. For all other orders, the financial institution is required to follow the procedures in sections 212.5 and 212.6.

#### *Section 212.5*

Section 212.5 outlines the account review a financial institution must conduct if it has determined, pursuant to section 212.4, that a garnishment order was not obtained by the United States or a State child support enforcement agency. In such cases, a financial institution must review the history of the account being garnished to determine if a benefit payment was deposited into the account during the lookback period. Generally, the account review must be completed within two business days following receipt of the order. If there is insufficient information included in the order to determine whether the debtor is an account holder, the deadline for completing the account

review is extended until the financial institution is able to obtain such information. In addition, in cases where the financial institution is served a batch of a large number of orders, the deadline is extended to whatever date is permitted under the terms of the garnishment orders. This provision is intended to address situations in which a single batch containing multiple garnishment orders is received. This provision does not mean that a financial institution may extend the deadline simply because a large number of separate orders are received at one time.

If the account review shows that no benefit payments were deposited to the account during the lookback period, then the financial institution would follow its otherwise customary procedures for handling the order. If a benefit payment was deposited into the account during the lookback period, then the financial institution must follow the procedures set forth in section 212.6.

Section 212.5(d) lists factors that are not relevant to a financial institution's account review. The commingling of exempt and nonexempt funds in the account is not relevant to the account review, and neither is the existence of a co-owner on the account. Similarly, the fact that benefit payments to multiple beneficiaries may have been deposited to an account during the lookback period is not relevant, as could occur if an individual receives payments on behalf of several beneficiaries. Finally, any instructions or information in a garnishment order are not relevant, including information about the nature of the debt or obligation underlying the order.

Section 212.5(e) makes it clear that financial institutions must perform the account review before taking any action related to the garnishment order that may affect funds in an account. Section 212.5(f) requires a separate account review for each account owned by an individual against whom a garnishment order has been issued, even if an individual holds more than one account at a financial institution. For example, if an individual maintains two accounts at the same financial institution, and payments issued under two different benefit programs are directly deposited to each account, both accounts must be separately reviewed and a separate protected amount must be calculated and applied for each account. Under section 212.5(f), a benefit payment that is directly deposited to an account and then subsequently transferred to another account is not treated as a benefit payment for purposes of the second account. For example, if a benefit

payment is directly deposited to an individual's checking account, and then subsequently transferred to the individual's savings account, the financial institution, in performing the account reviews, would treat the payment as a benefit payment for purposes of the checking account, but not for purposes of the savings account.

#### Section 212.6

Section 212.6 contains the provisions that apply if a financial institution determines that one or more benefit payments were deposited to an account during the lookback period. In such a case, the financial institution must calculate the protected amount, as defined in section 212.3. A financial institution may not freeze, or otherwise restrict the account holder's access to, the protected amount. The financial institution must provide the account holder with "full and customary access" to the protected amount. The Agencies intend by this language 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 protection against freezing triggered by the depositing of exempt funds during the lookback period is automatic. A financial institution may not require an account holder to assert any right to a garnishment exemption or take any other action prior to accessing the protected amount.

Section 212.6(b) requires the financial institution to calculate and establish a protected amount for each account it holds in the name of an account holder. Under section 212.6(c), a protected amount calculated and established by a financial institution is conclusively considered to be exempt from garnishment under law.

Section 212.6(e) requires the financial institution to send a notice to the account holder. The content and timing required for the notice are set forth in section 212.7.

Section 212.6(f) addresses the situation in which a financial institution receives service of the same garnishment order more than once. The financial institution must execute the account review one time upon the first service of a given garnishment order. If the same garnishment order is subsequently served again upon the financial institution, the financial institution is not required to perform another account review and is restricted from taking any action on the account. If the financial institution is subsequently served a new or different garnishment order against the same

account, the financial institution must execute a new account review.

Section 212.6(g) provides that a financial institution shall not continually garnish amounts deposited or credited to the account following the date of account review, and may not take any action to freeze any amounts subsequently deposited or credited unless served a new or different garnishment order. A small number of States authorize the issuance of a "continuing" garnishment order, i.e., an order requiring the garnishee to monitor, preserve and remit funds coming into the garnishee's custody on an ongoing basis. The rule operates to prohibit a financial institution that is served with a continuing garnishment from complying with the order's ongoing requirements.

Section 212.6(h) prohibits a financial institution from charging a garnishment fee against a protected amount, and further prohibits a financial institution from charging or collecting such a fee after the date of account review, i.e., retroactively.

#### Section 212.7

Section 212.7(a) requires the financial institution to send the notice required under section 212.6(e) if a benefit payment was deposited into an account during the lookback period and the balance in the account on the date of account review was above zero dollars. There is no requirement to send a notice if the balance in the account is zero or negative on the date of account review. Section 212.7(b) sets forth the content of the notice that financial institutions are required to send to account holders. The financial institution must notify the account holder that the financial institution has received a garnishment order and must briefly explain what a garnishment is. The notice must also include other information regarding the account holder's rights. Financial institutions may choose to use the model notice in Appendix A to the rule, in which case they will be deemed to be in compliance with the requirements of section 212.7(b). However, use of the model notice is optional.

Section 212.7(c) permits, but does not require, a financial institution to include the following additional information in the notice: Means of contacting a local free attorney or legal aid service; means of contacting the financial institution; and a statement that the financial institution is not providing legal advice by issuing the notice. Also, under section 212.7(d), the financial institution may modify the content of the notice to integrate information about a State's garnishment

rules and protections, to avoid confusion regarding the interplay of the rule with State requirements, or to provide more complete information about an account.

The financial institution must deliver the notice directly to the account holder, and only information and documents pertaining to the garnishment order may be included in the communication. The notice must be sent within three business days from the date of account review. If the account holder has multiple accounts, the financial institution may send one notice with information related to all the accounts. Section 212.7(h) makes it clear that by issuing a notice, a financial institution shall not be deemed to be providing legal advice or creating any obligation to provide legal advice.

#### Section 212.8

Section 212.8 makes it clear that the rule is not to be interpreted as limiting any rights an individual may have under Federal law to assert an exemption from garnishment, or as altering the exempt status of funds in the account. For example, although the rule does not require a financial institution to review and identify Federal benefits deposited by check to an account, those funds are protected under Federal law and the account holder may assert a claim for that protection in accordance with the procedures specified under the applicable law. In addition, it is possible that an account holder could have exempt funds on deposit in excess of the protected amount. In that case, the account holder could assert the protection available under Federal law for those funds. The rule does not limit or change the protected status of those funds.

Section 212.8 provides that the rule is not to be construed to invalidate any term or condition of an account agreement between a financial institution and an account holder, as long as the term or condition is not inconsistent with the rule. The requirements of the rule may not be changed by agreement, except in the narrow circumstance permitted under section 212.10(d)(3), i.e., where an account holder instructs a financial institution, in written instructions dated after the date of service of the garnishment order, to use exempt funds to satisfy the order. Thus, a financial institution may not require an account holder to waive any protection available under the rule, nor may it include in an account agreement terms inconsistent with the requirements of the rule. However, the section 212.6(b)

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,<sup>2</sup> or a limitation on withdrawal applicable to a time deposit, the proposed rule would not override or affect those limitations.

#### *Section 212.9*

Section 212.9 preempts any State or local government law or regulation that is inconsistent with any provision of the rule, but only to the extent of the inconsistency. If a State law would prevent a financial institution from complying with the requirements of the rule, the State law is preempted. However, the rule does not preempt requirements under State law that are in addition to the rule's requirements. For example, some State laws may protect from garnishment funds other than benefit payments, or may protect a higher amount of benefit payments. Other State laws may require protection of a flat amount without regard to the types of funds that are deposited to an account. In such cases, the financial institution will need to satisfy the rule's requirements and then determine what, if any, additional obligations exist under State law. The rule does not displace or supersede such State law requirements, provided that the financial institution has complied with all the requirements of the rule.

#### *Section 212.10*

Section 212.10 provides a safe harbor for financial institutions that comply in good faith with the rule. Thus, for example, if a financial institution made available the protected amount to an account holder in accordance with the rule, the financial institution would not be liable even if a judgment creditor were able to establish in court that funds in the account at the time the garnishment order was served were attributable to nonexempt deposits. In addition, if a financial institution performed an account review within the two business day deadline, and funds were withdrawn from the account during this time, the financial institution would not be liable to a creditor or court for failure to preserve the funds in the account, even if there was no protected amount for the account. This protection exists for a financial institution despite the

occurrence of a bona fide error or a settlement adjustment.

Section 212.10(c) provides a safe harbor specifically to a financial institution that provides in good faith any optional information in the notice to the account holder, as permitted in section 212.7(c) and (d). Section 212.10(d)(3) allows a financial institution to follow an account holder's express instruction to use an otherwise protected amount to satisfy the garnishment order. The instruction must be in writing and must be delivered after the date on which the financial institution received the garnishment order. This provision does not permit an account holder to instruct a financial institution, in advance or in a standing agreement, to use exempt funds to satisfy a garnishment order.

#### *Section 212.11*

Under section 212.11, compliance with the rule will be enforced by the Federal banking agencies. Financial institutions must maintain records of account activity and actions taken in handling garnishment orders sufficient to demonstrate compliance with the rule for a period of not less than two years from the date on which the financial institution receives the garnishment order.

#### *Section 212.12*

Section 212.12 provides that the rule may be amended only by a joint rulemaking issued by Treasury and all of the agencies defined as a "benefit agency" in 31 CFR 212.3.

#### *Appendix A to Part 212*

Appendix A sets forth proposed model language that would satisfy the notice requirements of section 212.7(b). Financial institutions are not required to use this model language. However, financial institutions that use the model notice will be deemed to be in compliance with the requirements of section 212.7(b).

#### *Appendix B to Part 212*

Appendix B contains the form of Notice of Right to Garnish Federal Benefits which is referred to in section 212.4(a).

#### *Appendix C to Part 212*

Appendix C contains examples demonstrating how the Lookback Period and Protected Amount are calculated.

### **V. Regulatory Analysis**

#### *A. Executive Order 12866*

It has been determined that this interim final rule is a significant regulatory action as defined in E.O.

12866. The Office of Management and Budget has reviewed this regulation.

#### *B. Regulatory Flexibility Acts*

In the Regulatory Analysis to the proposed rule, the Agencies did not certify that the proposed rule would not have a significant economic impact on a substantial number of small entities, in particular small financial institutions. While the Agencies believed the proposed rule likely would not have a significant impact on small financial institutions, the Agencies indicated they did not have complete data to make a conclusive determination. Accordingly, the Agencies prepared a joint Initial Regulatory Flexibility Analysis (IRFA) in accordance with 5 U.S.C. 603 and specifically requested comment on the proposed rule's impact on small entities, including costs, compliance burden, and changes in operating procedures. The Agencies stated an interest in knowing whether particular aspects of the proposed rule would be especially costly or burdensome.

For purposes of the IRFA, a "small entity" was a national bank, savings association, State member bank, or State or Federal credit union with assets of \$175 million or less, based on regulations promulgated by the Small Business Administration (SBA). Using information provided by the commenter or information available to the Agencies regarding the asset size of a financial institution commenting, the Agencies identified comment letters from seven credit unions that qualified as a "small entity" under the SBA regulations. The Agencies also received comment letters from several financial institution industry associations whose membership could include small entities.

No small entity submitted comments specifically quantifying its projected costs. Neither did any small entity provide information on the number of court ordered garnishments it received. All comments from entities of all sizes on the burden of the proposed rule were qualitative or subjective, in that no commenter offered empirical data or statistical evidence to quantify the economic impact. The following is a summary of comments and issues raised by the small entities and industry associations that may represent small entities.

Bank trade associations, while critical of various aspects of the proposed rule, generally acknowledged the need for a Federal regulation and indicated they could comply with it, even as they offered numerous suggestions for streamlining and simplifying its requirements. The small credit unions,

<sup>2</sup>Regulation CC, 12 CFR part 229, is the Federal Reserve's regulation establishing rules covering the collection and return of checks by banks.

and several but not all credit union trade associations, opposed the proposed rule and objected to various provisions as time-intensive and manual, and unreasonable given the required processing deadlines.

Two credit union trade associations indicated that many credit unions would not have the data processing capability to conduct a 60 day account review and would have to conduct the review manually, and suggested the length of the lookback period be reduced. One small credit union objected to the 60 day lookback period indicating that it would pose an undue operational burden requiring time, expense, and manpower not readily available. (Several small credit unions also objected to the 60 day lookback period on the policy grounds that, for those who truly subsist on Federal benefits, 30 days was long enough and sufficient to fund a dispute over other exempt benefits.) Several credit union associations proposed allowing financial institutions to use a uniform flat amount as the protected amount asserting that this option negates the need to conduct an account review and becomes a much more manageable process for credit unions with limited resources. One credit union trade association indicated that 90% of its members felt that requiring an account review within one business day of receipt of a garnishment order was unreasonable, but that two days struck the right balance between timeliness and flexibility. Many of the small credit unions expressed concern that the proposed rule would not apply to garnishment orders obtained by the United States. Commenters also raised concerns about the requirement to issue a notice to the account holder and the time allowed to produce the notice. One small credit union commented on the \$175 million threshold used in the SBA definition for a small credit union, indicating that a credit union with \$55 million in assets had little in common with a credit union with three times the assets, and that capabilities in staffing, operations, and cost tolerance varied greatly across the range of institutions under \$175 million in assets.

Based on a thorough analysis of comments on the proposed rule, and based on a survey of small Federal credit unions conducted by the Treasury following the comment period,<sup>3</sup> the Agencies certify that this interim 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).

The Agencies' certification that the interim final rule will not have a significant economic impact on a substantial number of small financial institutions is based on three factual findings.

First, the Treasury surveyed a representative sample of the 3,457 active Federal credit unions with assets of \$50 million or less, which represents the three smallest asset strata tracked by the National Credit Union Administration (NCUA): Assets of less than \$2 million, assets of at least \$2 million but less than \$10 million, and assets of at least \$10 million but less than \$50 million. The survey sought information about the number of garnishment orders served on these small credit unions, their administrative procedures for handling garnishment orders, and amount of time it took to process a typical order. The survey sample was a statistically valid representation of the entire population, reflecting the variations in asset size and geographic location of all Federal credit unions with assets of \$50 million or less.

The survey indicated that the mean number of garnishment orders received annually by these small credit unions was five, and that both the median and mode number of garnishment orders received annually was less than one. The survey revealed that 97 percent of these smallest credit unions received fewer than six garnishment orders per year, and that the rate at which garnishment orders were served was at most a function of one order per year per \$5 million in assets. The Agencies conclude from this empirical data that the interim final rule does not represent a significant burden on these small entities. Even if a small credit union with assets under \$50 million processed a garnishment order entirely manually and took an additional 2 hours to handle a garnishment order by following the new procedures in the interim final rule—including conducting an account review, establishing a protected amount, and mailing a notice—the actual processing time would on average represent marginal work on the order of 10 hours per year.

If the results of the survey are extrapolated to other financial institutions with up to \$175 million in assets, given a stable function of one order per year per \$5 million in assets, the burden of entirely manual compliance for the average small entity would represent only marginal workload for one employee, or

approximately 70 hours or 3.4 percent of one annual full time equivalent. Therefore, even if a financial institution must use entirely manual processes to comply with the rule, the facts on the volume of garnishment orders typically served on small credit unions demonstrate that the regulation will not have a significant economic impact on a substantial number of small entities.

Second, information provided by the NCUA indicates that only 2% of small Federal credit unions with assets of \$20 million or less (fewer than 40 credit unions out of 1,924) use a manual accounting system to maintain share accounts and loan transactions and would not be able to perform an account review by accessing a system. Thus, nearly all credit unions large and small would have a capability to search an account history using an account processing system with stored data or stored account statements to help identify exempt Federal benefit payments. Therefore, the Agencies conclude that there are not many credit unions that would not have the data processing capability to conduct a two month account review and would have to conduct the review entirely manually. In addition, based on inquiries made of the vendors providing core processing systems to small credit unions, the Agencies note that there are no significant problems to enhancing the systems to include specific functionality for fully automating the measurement of the lookback period and the conduct of the account review.

Third, as more fully discussed in the supplementary information above, the Agencies carefully considered the comments on the proposed rule and have made a number of specific changes in the interim final rule based directly on comments designed to lessen the administrative burden. These changes include among others:

- Increasing the amount of time permitted to conduct an account review from one business day to two business days following the receipt of a garnishment order, and allowing further time to conduct the account review if the financial institution has difficulty in determining whether a debtor is an account holder at the institution.
- Eliminating the requirement to issue a notice to the account holder in cases where the balance in an account is zero or negative on the date of account review, which based on comments from financial institutions is a substantial proportion of cases.
- Increasing the amount of time required to issue the notice from two business days to three business days from the date of account review.

<sup>3</sup> Survey, *Information on Processing Garnishment Orders*, OMB Control Number 1505-0225, expiration date 2/28/2011.

- Eliminating the requirement that the notice must contain a means of contacting the financial institution, thereby reducing the incidence of customer service calls related to debt disputes to which the financial institution is not a party.

- Eliminating the requirement to examine a garnishment order to ascertain whether the plaintiff named in the caption of the order is the United States, and allowing financial institutions to determine if a garnishment order is excluded from the rule's administrative requirements by relying solely on the presence of a garnishment certification attached or included with the order.

- Limiting record retention to 2 years, in lieu of an open ended requirement to retain records to demonstrate compliance with the regulation.

- Revising the definition of the lookback period from 60 days to a two month "date-to-date" methodology, making the account review easier to administer and less prone to errors.

- Allowing financial institutions to rely solely and conclusively on the exemption identifiers encoded in Federal ACH header records to determine if a Federal benefit payment has been deposited to an account. The Agencies again note that the garnishment exemption identifiers in the Federal ACH header records will be included in a field that is captured and appears on account statements, which will facilitate both automated and visual searches for exempt Federal benefit payments. Hence, even the smallest financial institutions that do not maintain an automated processing system, but receive paper reports from the organization that processes their ACH transactions, will be able to perform the account review straightforwardly.

Thus, the administrative requirements of the rulemaking have been substantively reduced based on comments from financial institutions.

For the foregoing reasons, the Agencies conclude the interim final rule will not have a significant economic impact on a substantial number of small entities.

### 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, 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) where the Agencies establish 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 rising 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 rising 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 Employee 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 this rulemaking. Specifically, the Agencies sought perspective on those matters where Federalism implications could potentially conflict with State garnishment laws. The rule establishes certain processes that provide a financial institution protection from liability when a Federal benefit payment exempt from garnishment is directly deposited into an account and the financial institution provides a certain amount of lifeline funds to the benefit recipient.

### 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 one 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.

#### E. Plain Language

In 1998, the President issued a memorandum directing each agency in the Executive branch to use plain language for all new proposed and final rulemaking documents issued on or after January 1, 1999. The Agencies specifically invite your comments on how to make this interim final rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Does the rule contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the rule easier to understand?

#### F. Paperwork Reduction Act

The information collections contained in this interim final rule have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35) and assigned OMB control number 1510–0230. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to [insert contact information], Department of the Treasury, Washington, DC 20220. Comments on the collection of information must be received by May 24, 2011. Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these regulations are found in §§ 212.6 and 212.11 and Appendices A and B.

*Estimated total annual reporting burden:* 125,000 hours.

*Estimated average annual burden per respondent:* 8 hours.

*Estimated number of respondents:* 15,771.

*Estimated frequency of responses:* As needed.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

#### G. Authority To Issue Interim Final Rule

The Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) generally requires public notice before promulgation of regulations. See 5 U.S.C. 553(b). The Agencies published a notice of proposed rulemaking requesting comment on the proposed garnishment rule on April 19, 2010 (75 FR 20299). The Agencies have considered the comments received in developing this interim final rule but also wish to provide the public another opportunity to comment on it.

#### List of Subjects

##### 5 CFR Part 831

Administrative practice and procedure, alimony, benefit payments, claims, disability benefits, exempt payments, financial institutions, firefighters, garnishment, government employees, income taxes, intergovernmental relations, law enforcement officers, pensions, preemption, reporting and recordkeeping requirements, retirement.

##### 5 CFR Part 841

Administrative practice and procedure, air traffic controllers, benefit payments, claims, disability benefits, exempt payments, financial institutions, firefighters, garnishment, government employees, income taxes, intergovernmental relations, law enforcement officers, pensions, preemption, retirement.

##### 20 CFR Part 350

Alimony, benefit payments, child support, exempt payments, financial institutions, garnishment, preemption, railroad retirement, railroad unemployment insurance, recordkeeping.

##### 20 CFR Part 404

Administrative practice and procedure, aged, alimony, benefit payments, blind, disability benefits, exempt payments, financial institutions, garnishment, government employees, income taxes, insurance, investigations, old-age, preemption, Survivors and Disability Insurance, penalties, railroad retirement, reporting and recordkeeping requirements, Social Security, travel and transportation expenses, treaties, veterans, vocational rehabilitation.

##### 20 CFR Part 416

Administrative practice and procedure, alcoholism, benefit payments, drug abuse, exempt payments, financial institutions, garnishment, investigations, Medicaid, penalties, preemption, reporting and recordkeeping requirements, Supplemental Security Income (SSI), travel and transportation expenses, vocational rehabilitation.

##### 31 CFR Part 212

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

##### 38 CFR Part 1

Administrative practice and procedure, archives and records, benefit payments, cemeteries, claims, courts, crime, flags, exempt payments, financial institutions, freedom of information, garnishment, government contracts, government employees, government property, infants and children, inventions and patents, parking, penalties, preemption, privacy, reporting and recordkeeping requirements, seals and insignia, security measures, wages.

#### Department of the Treasury, Fiscal Service (Treasury)

##### Authority and Issuance

For the reasons set forth in the preamble, Treasury adds a new part 212 to Title 31 of the Code of Federal Regulations, to read as follows:

#### **PART 212—GARNISHMENT OF ACCOUNTS CONTAINING FEDERAL BENEFIT PAYMENTS**

- Sec.  
212.1 Purpose.  
212.2 Scope.

- 212.3 Definitions.  
 212.4 Initial action upon receipt of a garnishment order.  
 212.5 Account review.  
 212.6 Rules and procedures to protect benefits.  
 212.7 Notice to the account holder.  
 212.8 Other rights and authorities.  
 212.9 Preemption of State law.  
 212.10 Safe harbor.  
 212.11 Compliance and record retention.  
 212.12 Amendment of this part.

Appendix A to Part 212—Model Notice to Account Holder

Appendix B to Part 212—Form of Notice of Right to Garnish Federal Benefits

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

**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).

#### § 212.1 Purpose.

The purpose of this part is to implement statutory provisions that protect Federal benefits from garnishment by establishing procedures that a financial institution must follow when served a garnishment order against an account holder into whose account a Federal benefit payment has been directly deposited.

#### § 212.2 Scope.

This part applies to:

- (a) *Entities*. All financial institutions, as defined in § 212.3.  
 (b) *Funds*. Federal benefit payments protected from garnishment pursuant to the following authorities:  
 (1) SSA benefit payments protected under 42 U.S.C. 407 and 42 U.S.C. 1383(d)(1);  
 (2) VA benefit payments protected under 38 U.S.C. 5301(a);  
 (3) RRB benefit payments protected under 45 U.S.C. 231m(a) and 45 U.S.C. 352(e); and  
 (4) OPM benefit payments protected under 5 U.S.C. 8346 and 5 U.S.C. 8470.

#### § 212.3 Definitions.

For the purposes of this part, the following definitions apply.

*Account* means an account, including a master account or sub account, at a financial institution and to which an electronic payment may be directly routed.

*Account holder* means a natural person against whom a garnishment order is issued and whose name appears in a financial institution's records as the direct or beneficial owner of an account.

*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.

*Benefit agency* means the Social Security Administration (SSA), the Department of Veterans Affairs (VA), the Office of Personnel Management (OPM), or the Railroad Retirement Board (RRB).

*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 of the Batch Header Record of the direct deposit entry.

*Federal banking agency* means the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the National Credit Union Administration.

*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.

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

*Garnish or garnishment* means execution, levy, attachment, garnishment, or other legal process.

*Garnishment fee* means any service or legal processing fee, charged by a financial institution to an account holder, for processing a garnishment order or any associated withholding or release of funds.

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

*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. Examples illustrating the application of this definition are included in Appendix C to this part.

*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 at the open of business on the date of account review. Examples illustrating the application of this definition are included in Appendix C to this part.

*State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

*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.

*United States* means:

- (1) A Federal corporation,
- (2) An agency, department, commission, board, or other entity of the United States, or
- (3) An instrumentality of the United States, as set forth in 28 U.S.C. 3002(15).

#### § 212.4 Initial action upon receipt of a garnishment order.

(a) *Examination of order for Notice of Right to Garnish Federal Benefits*. Prior to taking any other action related to a garnishment order issued against a debtor, and no later than two business days following receipt of the order, a financial institution shall examine the 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, as set forth in Appendix B to this part.

(b) *Notice of Right to Garnish Federal Benefits is attached to or included with the order*. If a Notice of Right to Garnish Federal Benefits is attached to or included with the garnishment order, then the financial institution shall follow its otherwise customary procedures for handling the order and shall not follow the procedures in § 212.5 and § 212.6.

(c) *No Notice of Right to Garnish Federal Benefits*. If a Notice of Right to Garnish Federal Benefits is not attached to or included with the garnishment order, then the financial institution shall follow the procedures in § 212.5 and § 212.6.

#### § 212.5 Account review.

(a) *Timing of account review*. When served a garnishment order issued against a debtor, a financial institution shall perform an account review:

- (1) No later than two business days following receipt of (A) the 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; or

(2) In cases where the financial institution is served a batch of a large number of orders, by a later date that may be permitted by the creditor that initiated the orders, consistent with the terms of the orders. The financial institution shall maintain records on such batches and creditor permissions, consistent with § 212.11(b),

(b) *No benefit payment deposited during lookback period.* 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 shall follow its otherwise customary procedures for handling the garnishment order and shall not follow the procedures in § 212.6.

(c) *Benefit payment deposited during lookback period.* If the account review shows that a benefit agency deposited a benefit payment into the account during the lookback period, then the financial institution shall follow the procedures in § 212.6.

(d) *Uniform application of account review.* The financial institution shall perform an account review without consideration for any other attributes of the account or the garnishment order, including but not limited to:

- (1) The presence of other funds, from whatever source, that may be commingled in the account with funds from a benefit payment;
- (2) The existence of a co-owner on the account;
- (3) The existence of benefit payments to multiple beneficiaries, and/or under multiple programs, deposited in the account;
- (4) The balance in the account, provided the balance is above zero dollars on the date of account review;
- (5) Instructions to the contrary in the order; or
- (6) The nature of the debt or obligation underlying the order.

(e) *Priority of account review.* The financial institution shall perform the account review prior to taking any other actions related to the garnishment order that may affect funds in the account.

(f) *Separate account reviews.* The financial institution shall perform the account review separately for each account in the name of an account holder against whom a garnishment order has been issued. In performing account reviews for multiple accounts in the name of one account holder, a financial institution shall not trace the movement of funds between accounts by attempting to associate funds from a benefit payment deposited into one

account with amounts subsequently transferred to another account.

#### **§ 212.6 Rules and procedures to protect benefits.**

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

(a) *Protected amount.* The financial institution shall immediately calculate and establish the protected amount for an account. The financial institution shall ensure that the account holder has full and customary access to the protected amount, which the financial institution shall not freeze in response to the garnishment order. An account holder shall have no requirement to assert any right of garnishment exemption prior to accessing the protected amount in the account.

(b) *Separate protected amounts.* The financial institution shall calculate and establish the protected amount separately for each account in the name of an account holder, consistent with the requirements in § 212.5(f) to conduct distinct account reviews.

(c) *No challenge of protection.* A protected amount calculated and established by a financial institution pursuant to this section shall be conclusively considered to be exempt from garnishment under law.

(d) *Funds in excess of the protected amount.* For any funds in an account in excess of the protected amount, the financial institution shall follow its otherwise customary procedures for handling garnishment orders, including the freezing of funds, but consistent with paragraphs (f) and (g) of this section.

(e) *Notice.* The financial institution shall issue a notice to the account holder named in the garnishment order, in accordance with § 212.7.

(f) *One-time account review process.* The financial institution shall perform the account review only one time upon the first service of a given garnishment order. The financial institution shall not repeat the account review or take any other action related to the order if the same order is subsequently served again upon the financial institution. If the financial institution is subsequently served a new or different garnishment order against the same account holder, the financial institution shall perform a separate and new account review.

(g) *No continuing or periodic garnishment responsibilities.* The financial institution shall not continually garnish amounts deposited or credited to the account following the date of account review, and shall take no action to freeze any funds

subsequently deposited or credited, unless the institution is served with a new or different garnishment order, consistent with the requirements of this part.

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

#### **§ 212.7 Notice to 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; and
- (2) The balance in the account on the date of account review was above zero dollars and the financial institution established a protected amount.

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

- (1) The financial institution's receipt of an order against the account holder.
- (2) The date on which the order was served.

(3) A succinct explanation of garnishment.

(4) The financial institution's requirement under Federal regulation to ensure that account balances up to the protected amount specified in § 212.3 are protected and made available to the account holder if a benefit agency deposited a benefit payment into the account in the last two months.

(5) The account subject to the order and the protected amount established by the financial institution.

(6) The financial institution's requirement pursuant to State law to freeze other funds in the account to satisfy the order and the amount frozen, if applicable.

(7) The amount of any garnishment fee charged to the account, consistent with § 212.6.

(8) A list of the Federal benefit payments subject to this part, as identified in § 212.2(b).

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

(10) The account holder's right to consult an attorney or legal aid service in asserting against the creditor that initiated the order a further garnishment exemption for amounts above the protected amount.

(11) The name of the creditor, and, if contact information is included in the order, means of contacting the creditor.

(c) *Optional notice content.* The financial institution may notify the account holder named in the garnishment order of the following facts and events in readily understandable language.

(1) Means of contacting a local free attorney or legal aid service.

(2) Means of contacting the financial institution,

(3) By issuing the notice required by this part, the financial institution is not providing legal advice.

(d) *Amending notice content.* The financial institution may amend the content of the notice to integrate information about a State's garnishment rules and protections, for the purposes of avoiding potential confusion or harmonizing the notice with State requirements, or providing more complete information about an account.

(e) *Notice delivery.* The financial institution shall issue the notice directly to the account holder, or to a fiduciary who administers the account and receives communications on behalf of the account holder, and only information and documents pertaining to the garnishment order, including other notices or forms that may be required under State or local government law, may be included in the communication.

(f) *Notice timing.* The financial institution shall send the notice to the account holder within 3 business days from the date of account review.

(g) *One notice for multiple accounts.* The financial institution may issue one notice with information related to multiple accounts of an account holder.

(h) *Not legal advice.* By issuing a notice required by this part, a financial institution creates no obligation to provide, and shall not be deemed to be offering, legal advice.

#### **§ 212.8 Other rights and authorities.**

(a) *Exempt status.* Nothing in this part shall be construed to limit an individual's right under Federal law to assert against a creditor a further exemption from garnishment for funds in excess of the protected amount, or to alter the exempt status of funds that may be protected from garnishment under Federal law.

(b) *Account agreements.* Nothing in this part shall be construed to invalidate

any term or condition of an account agreement between a financial institution and an account holder that is not inconsistent with this part.

#### **§ 212.9 Preemption of State law.**

(a) *Inconsistent law preempted.* Any State or local government law or regulation that is inconsistent with a provision of this part is preempted to the extent of the inconsistency. A State law or regulation is inconsistent with this part if it requires a financial institution to take actions or make disclosures that contradict or conflict with the requirements of this part or if a financial institution cannot comply with the State law or regulation without violating this part.

(b) *Consistent law not preempted.* This regulation does not annul, alter, affect, or exempt any financial institution from complying with the laws of any State with respect to garnishment practices, except to the extent of an inconsistency. A requirement under State law to protect benefit payments in an account from freezing or garnishment at a higher protected amount than is required under this part is not inconsistent with this part if the financial institution can comply with both this part and the State law requirement.

#### **§ 212.10 Safe harbor.**

(a) *Protection during examination and pending review.* A financial institution that complies in good faith with this part shall not be liable to a creditor that initiates 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:

(1) The two business days following the financial institution's receipt of a garnishment 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, as set forth in § 212.4; or

(2) 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, as set forth in § 212.5.

(b) *Protection when protecting or freezing funds.* A financial institution that complies in good faith with this part shall not be liable to a creditor that initiates a garnishment order for any protected amounts, to an account holder for any frozen amounts, 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:

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

(2) 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 the procedures in § 212.4.

(c) *Protection for providing additional information to account holder.* A financial institution shall not be liable for providing in good faith any optional information in the notice to the account holder, as set forth in § 212.7(c) and (d).

(d) *Protection for financial institutions from other potential liabilities.* A financial institution that complies in good faith with this part shall not be liable for:

(1) Bona fide errors that occur despite reasonable procedures maintained by the financial institution to prevent such errors in complying with the provisions of this part;

(2) Customary clearing and settlement adjustments that affect the balance in an account, including a protected amount, such as deposit reversals caused by the return of unpaid items, or debit card transactions settled for amounts higher than the amounts originally authorized; or

(3) Honoring an account holder's express written instruction, that is both dated and provided by the account holder to the financial institution following the date on which it has been served a particular garnishment order, to use an otherwise protected amount to satisfy the order.

#### **§ 212.11 Compliance and record retention.**

(a) *Enforcement.* Federal banking agencies will enforce compliance with this part.

(b) *Record retention.* A financial institution shall maintain records of account activity and actions taken in response to a garnishment order, sufficient to demonstrate compliance with this part, for a period of not less than two years from the date on which the financial institution receives the garnishment order.

#### **§ 212.12 Amendment of this part.**

This part may be amended only by a rulemaking issued jointly by Treasury and all of the benefit agencies as defined in § 212.3.

#### **Appendix A to Part 212—Model Notice to Account Holder**

A financial institution may use the following model notice to meet the requirements of § 212.7. Although use of the model notice is not required, a financial

institution using it properly is deemed to be in compliance with § 212.7.

Information in brackets should be completed by the financial institution. Where the bracketed information indicates a choice of words, as indicated by a slash, the financial institution should either select the appropriate words or provide substitute words suitable to the garnishment process in a given jurisdiction.

Parenthetical wording in italics represents instructions to the financial institution and should not be printed with the notice. In most cases, this wording indicates that the model language either is optional for the financial institution, or should only be included if some condition is met.

#### MODEL NOTICE:

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

#### IMPORTANT INFORMATION ABOUT YOUR ACCOUNT

Date:  
Notice to:  
Account Number:

#### Why am I receiving this notice?

On [date on which garnishment order was served], [Name of financial institution] received a garnishment order from a court to [freeze/remove] funds in your account. The amount of the garnishment order was for \$[amount of garnishment order]. We are sending you this notice to let you know what we have done in response to the garnishment order.

#### What is garnishment?

Garnishment is a legal process that allows a creditor to remove funds from your [bank]/[credit union] account to satisfy a debt that you have not paid. In other words, if you owe money to a person or company, they can obtain a court order directing your [bank]/[credit union] to take money out of your

account to pay off your debt. If this happens, you cannot use that money in your account.

#### What has happened to my account?

On [date of account review], we researched your account and identified one or more Federal benefit payments deposited in the last 2 months. In most cases, Federal benefit payments are protected from garnishment. As required by Federal regulations, therefore, we have established a “protected amount” of funds that will remain available to you and that will not be [frozen/removed] from your account in response to the garnishment order.

*(Conditional paragraph if funds have been frozen)* Your account contained additional money that may not be protected from garnishment. As required by law, we have [placed a hold on/removed] these funds in the amount of \$[amount frozen] and may have to turn these funds over to your creditor as directed by the garnishment order.

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

#### ACCOUNT SUMMARY AS OF [DATE OF ACCOUNT REVIEW]

| Account number | Amount in account | Amount protected | Amount subject to garnishment (now [frozen/removed]) | Garnishment fee charged |
|----------------|-------------------|------------------|--|-------------------------|
|                |                   |                  |  |                         |

*(If the account holder has multiple accounts, add a row for each account.)*

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

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

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

#### Who garnished my account?

The creditor who obtained a garnishment order against you is [name of creditor].

#### What types of Federal benefit payments are protected from garnishment?

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

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

*(Conditional section if funds have been frozen)* What should I do if I think that additional funds in my account are from Federal benefit payments?

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

*(Conditional sentence if applicable for the jurisdiction)* You can fill out a garnishment exemption form and submit it to the court.

You may contact the creditor that garnished your account and explain that additional funds are from Federal benefit payments and should be released back to you. *(Conditional sentence if contact information is in the garnishment order)* The creditor may be contacted at [contact information included in the garnishment order].

You may also consult an attorney (lawyer) to help you prove to the creditor who garnished your account that additional funds are from Federal benefit payments and cannot be taken. If you cannot afford an attorney, you can seek assistance from a free attorney or a legal aid society. *(Optional sentences)* [Name of State, local, or independent legal aid service] is an organization that provides free legal aid and can be reached at [contact information]. You can find information about other free legal aid programs at [insert “<http://www.lawhelp.org>” or other legal aid programs website].

*(Optional section)* How to contact [name of financial institution].

This notice contains all the information that we have about the garnishment order. However, if you have a question about your account, you may contact us at [contact number].

#### Appendix B to Part 212—Form of Notice of Right to Garnish Federal Benefits

The United States, or a State child support enforcement agency, certifying its right to

garnish Federal benefits shall attach or include with a garnishment order the following Notice, on official organizational letterhead.

Information in brackets should be completed by the United States or a State child support enforcement agency, as applicable. Where the bracketed information indicates a choice of words, as indicated by a slash, the appropriate words should be selected from the options.

#### Notice of Right to Garnish Federal Benefits

Date: \_\_\_\_\_  
[Garnishment Order Number]/[State Case ID]: \_\_\_\_\_

The attached garnishment order was [obtained by the United States, pursuant to the Federal Debt Collection Procedures Act, 28 U.S.C. § 3205, or the Mandatory Victims Restitution Act, 18 U.S.C. § 3613, or other Federal statute]/[issued by (name of the State child support enforcement agency), pursuant to authority to attach or seize assets of noncustodial parents in financial institutions in the State of (name of State), 42 U.S.C. § 666].

Accordingly, the garnishee is hereby notified that the procedures established under 31 CFR Part 212 for identifying and protecting Federal benefits deposited to accounts at financial institutions do not apply to this garnishment order.

The garnishee should comply with the terms of this order, including instructions for withholding and retaining any funds deposited to any account(s) covered by this order, pending further order of [name of the court]/[the name of the State child support enforcement agency].

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

The following examples illustrate this definition of *lookback period*.

*Example 1:* Account review performed same day garnishment order is served.

A financial institution receives garnishment order on Wednesday, March 17. The financial institution performs account review the same day on Wednesday, March 17. The lookback period begins on Tuesday, March 16, the date preceding the date of account review. The lookback period ends on Saturday, January 16, the corresponding date two months earlier.

*Example 2:* Account review performed the day after garnishment order is served.

A financial institution receives garnishment order on Wednesday, November 17. The financial institution performs account review next business day on Thursday, November 18. The lookback period begins on Wednesday, November 17, the date preceding the date of account review. The lookback period ends on Friday, September 17, the corresponding date two months earlier.

*Example 3:* No corresponding date two months earlier.

A financial institution receives garnishment order on Tuesday, August 30. The financial institution performs the account review two business days later on Thursday, September 1. The lookback period begins on Wednesday, August 31, the date preceding the date of account review. The lookback period ends on Wednesday, June 30, the last date of the month two months earlier, since June 31 does not exist to correspond with August 31.

*Example 4:* Weekend between receipt of garnishment order and account review.

A financial institution receives garnishment order on Friday, December 10. The financial institution performs the account review two business days later on Tuesday, December 14. The lookback period begins on Monday, December 13, the date preceding the date of account review. The lookback period ends on Wednesday, October 13, the corresponding date two months earlier.

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, when the opening balance in the account 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 at the open of business on the date of account review 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.

*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, when the opening balance in the account 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 at the open of business on the date of account review, the financial institution establishes the protected amount at \$4,500 and seizes the remaining \$500 in the account consistent with State law.

*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, and 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 \$6,000 balance in the account at the open of business on the date of account review, 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.

*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 at the open of business on the date of account review, notwithstanding the third Federal benefit payment posted on the date of account review, 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.

*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, when the opening 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 on the date of account review, there are no additional funds in the account which can be frozen.

## Social Security Administration

### 20 CFR Parts 404 and 416

#### Authority and Issuance

For the reasons set forth in the preamble, the Social Security Administration amends Parts 404 and 416 of Title 20 of the Code of Federal Regulations as follows:

## PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE

(1950— )

### Subpart S—Payment Procedures

■ 1. The authority citation for subpart S of Part 404 continues to read as follows:

**Authority:** Secs. 205(a) and (n), 207, 702(a)(5) and 708(a) of the Social Security Act (42 U.S.C. 405(a) and (n), 407, 902(a)(5) and 909(a)).

■ 2. Add § 404.1821 to read as follows:

#### § 404.1821 Garnishment of Payments After Disbursement.

(a) Payments that are covered by section 207 of the Social Security Act

and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of Treasury and the agencies defined as a "benefit agency" in 31 CFR 212.3.

## **PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED**

### **Subpart E—Payment of Benefits, Overpayments, and Underpayments**

■ 3. The authority citation for subpart E of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1147, 1601, 1602, 1611(c) and (e), and 1631(a)–(d) and (g) of the Social Security Act (42 U.S.C. 902(a)(5), 1320b–17, 1381, 1381a, 1382(c) and (e), and 1383(a)–(d) and (g)); 31 U.S.C. 3720A.

■ 4. Add § 416.534 to read as follows:

#### **§ 416.534 Garnishment of Payments After Disbursement.**

(a) Payments that are covered by section 1631(d)(1) of the Social Security Act and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of Treasury and the agencies defined as a "benefit agency" in 31 CFR 212.3.

### **Department of Veterans Affairs**

#### *Authority and Issuance*

For the reasons set forth in the preamble, the Department of Veterans Affairs amends Part 1 of Title 38 of the Code of Federal Regulations as follows:

## **PART 1—GENERAL PROVISIONS**

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

**Authority:** 38 U.S.C. 501(a), and as noted in specific sections.

■ 2. Add § 1.1000 and a new undesignated center heading preceding the section to read as follows:

### **Procedures for Financial Institutions Regarding Garnishment of Benefit Payments After Disbursement**

#### **§ 1.1000 Garnishment of payments after disbursement.**

(a) Payments of benefits due under any law administered by the Secretary that are protected by 38 U.S.C. 5301(a) and made by direct deposit to a financial institution are subject to 31

CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a "benefit agency" in 31 CFR 212.3.

### **Railroad Retirement Board**

#### *Authority and Issuance*

For the reasons set forth in the preamble, the Railroad Retirement Board amends Part 350 of Title 20 of the Code of Federal Regulations as follows:

## **PART 350—GARNISHMENT OF BENEFITS PAID UNDER THE RAILROAD RETIREMENT ACT, THE RAILROAD UNEMPLOYMENT INSURANCE ACT, AND UNDER ANY OTHER ACT ADMINISTERED BY THE BOARD**

■ 1. Revise the Authority citation to read as follows:

**Authority:** 15 U.S.C. 1673(b)(2); 42 U.S.C. 659; and 45 U.S.C. 231f(b)(5), 231m, 352(e), and 362(l).

■ 2. Add a new § 350.6 to read as follows:

#### **§ 350.6 Garnishment of payments after disbursement.**

Payments that are covered by 45 U.S.C. 231m or 45 U.S.C. 352(e) and that are made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments. This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a "benefit agency" in 31 CFR 212.3.

### **Office of Personnel Management**

#### *Authority and Issuance*

For the reasons set forth in the preamble, the Office of Personnel Management amends part 831 and part 841 of Title 5 of the Code of Federal Regulations 1 as follows:

## **PART 831— RETIREMENT**

■ 1. The authority citation for part 831 is revised to read as follows:

**Authority:** 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2), and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 831.115 and 831.116 also issued under 5 U.S.C. 8346(a); Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251;

Sec. 831.201(g) also issued under Secs. 7(b) and (e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under Sec. 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.206 also issued under Sec. 1622(b) of Pub. L. 104–106, 110 Stat. 515; Sec. 831.301 also issued under Sec. 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and Sec. 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337; Sec. 831.502 also issued under Sec. 1(3), E.O. 11228, 3 CFR 1965–1965 Comp. p. 317; Sec. 831.663 also issued under Secs. 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under Sec. 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under Sec. 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under Sec. 636 of Appendix C to Pub. L. 106–554, 114 Stat. 2763A–164; Subpart V also issued under 5 U.S.C. 8343a and Sec. 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

■ 2. Add a new § 831.115 to Subpart A to read as follows:

#### **§ 831.115 Garnishment of CSRS payments.**

CSRS payments are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

■ 3. Add a new § 831.116 to read as follows:

#### **§ 831.116 Garnishment of payments after disbursement.**

(a) Payments that are covered by 5 U.S.C. 8346(a) and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a "benefit agency" in 31 CFR 212.3.

## **PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION**

■ 1. The authority citation for part 841 is revised to read as follows:

**Authority:** 5 U.S.C. 8461; Sec. 841.108 also issued under 5 U.S.C. 552a; Secs. 841.110 and 841.111 also issued under 5 U.S.C. 8470(a); subpart D also issued under 5 U.S.C. 8423; Sec. 841.504 also issued under 5 U.S.C. 8422; Sec. 841.507 also issued under section 505 of Pub. L. 99–335; subpart J also issued under 5 U.S.C. 8469; Sec. 841.506 also issued under 5 U.S.C. 7701(b)(2); Sec. 841.508 also issued under section 505 of Pub. L. 99–335; Sec. 841.604 also issued under Title II, Pub. L. 106–265, 114 Stat. 780.

■ 2. Add new § 841.110 to read as follows:

**§ 841.110 Garnishment of FERS payments.**

FERS payments are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

■ 3. Add a new § 841.111 to read as follows:

**§ 841.111 Garnishment of payments after disbursement.**

(a) Payments that are covered by 5 U.S.C. 8470(a) and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a “benefit agency” in 31 CFR part 212.

By the Department of the Treasury.

Dated: February 3, 2011.

**Richard L. Gregg,**

*Fiscal Assistant Secretary.*

By the Social Security Administration.

**Michael J. Astrue,**

*Commissioner of Social Security.*

Dated: January 31, 2011.

By the Department of Veterans Affairs.

**John R. Gingrich,**

*Chief of Staff.*

By the Railroad Retirement Board.

**Beatrice Ezerski,**

*Secretary to the Board.*

By the Office of Personnel Management.

**John Berry,**

*Director.*

[FR Doc. 2011-3782 Filed 2-22-11; 8:45 am]

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**SMALL BUSINESS ADMINISTRATION**

**13 CFR Part 115**

**RIN 3245-AG14**

**Surety Bond Guarantee Program; Timber Sales**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The Small Business Administration (SBA) is issuing this final rule to amend its Surety Bond Guarantee Program rules to guarantee bid and performance bonds for timber sale contracts awarded by the Federal Government or other public and private landowners.

**DATES:** This rule is effective on March 25, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara J. Brannan, Office of Surety Guarantees, 202-205-6545, e-mail: *Barbara.brannan@sba.gov*.

**SUPPLEMENTARY INFORMATION:** SBA guarantees bonds for small contractors who cannot obtain surety bonds through the traditional commercial market. SBA's guarantee provides surety companies with the incentive to bond these contractors, enabling them to bid on and be awarded more contracts. The Surety Bond Guarantee (SBG) Program consists of the Prior Approval Program and the Preferred Surety Bond (PSB) Program. In the Prior Approval Program, each bond guarantee application must be submitted to SBA individually for approval, while PSB sureties have the delegated authority to issue, monitor, and service bonds without SBA's prior approval.

The Forest Service of the U.S. Department of Agriculture (USDA), and other public and private entities that manage forests, may permit the harvesting of timber in exchange for the payment of an agreed upon sum of money. To bid on these timber sale contracts, the USDA and these other public and private entities may require the bidder to obtain a bond to ensure satisfactory compliance with the contract terms and conditions associated with forest management, such as the protection of natural resources, soil, water, erosion control and road maintenance. Unlike the typical contract for supplies or services where the Obligee pays the Principal for providing supplies or rendering services, the Principal in the timber sale contract (the harvester of the timber) pays the Obligee (e.g. the Federal Government) for the right to cut the designated trees. However, under the current definition of “Contract” in 13 CFR 115.10, a contract for which SBA may issue a Surety Bond Guarantee cannot include a contract requiring any payment by the Principal to the Obligee. This final rule amends the definition of “Contract” to permit SBA to issue bid or performance bond guarantees for contracts that require the Principal to pay the Obligee for harvesting timber or other forest products, such as biomass. This change applies to contracts involving forests managed by the U.S. Forest Service as well as other public and private entities.

**Discussion of Public Comments**

On October 15, 2010, SBA published the notice of proposed rulemaking with request for comments on this change to

the SBG Program in the **Federal Register**. See 75 FR 63419. SBA received comments from four submitters before the comment period ended on November 15, 2010 and from two submitters after the comment period ended. SBA has considered all of the comments received.

Three submitters stated that small businesses have difficulty or are unable to obtain bonding to bid on timber sale contracts. They expressed support for the proposed rule because it will enable small contractors to obtain bonding more easily, making it possible for them to bid against larger companies and compete for timber sale contracts.

One submitter expressed concern that the fee assessed by SBA on the Principal for the bond may make it difficult or economically unfeasible for them to obtain timber sale contracts. SBA periodically reviews the program fees charged, which are established in the amounts SBA deems reasonable and necessary, in accordance with § 411(h) of the Small Business Investment Act of 1958.

One submitter suggested that SBA paperwork requirements, specifically the submission of SBA Form 990, Surety Bond Guarantee Agreement, with each bond could be cumbersome for timber sale bonds. However, SBA is not requiring any additional paperwork for timber sale bonds, and electronic application submission and processing is available in the Prior Approval Program. In addition, PSB sureties do not have to submit SBA Form 990 for any bond. The same submitter suggested that there is limited access to participating sureties in rural areas. SBA admitted six new sureties to the program in fiscal year 2010 and is working to expand access to the program.

Lastly, one submitter suggested that SBA clarify its intent to exclude payment bonds from eligibility by changing the definition of Payment Bond. SBA agrees that payment bonds in connection with timber sale contracts should be excluded, as the guarantee on payment bonds under the SBG Program was not intended to reimburse the Obligee for amounts owed the Obligee by the Principal, but to cover the claims caused by the Principal's failure to pay others furnishing supplies and materials for use in the performance of the Contract. SBA has added language to the rule to make it clear that the exception for timber sale contracts applies only to bid and performance bonds. Bid bonds are included because a small contractor may be required to submit a bid bond with its bid for the timber sale contract.