

COMMENTS

to the

Office of Personnel Management

5 CFR Parts 831, 841

RIN 3206-AM17

Railroad Retirement Board

20 CFR Part 350

RIN 3220-AB63

Social Security Administration

20 CFR Parts 404, 416

RIN 0960-AH18

Department of the Treasury

Fiscal Service

31 CFR Part 212

RIN 1505-AC20

Department of Veterans Affairs

38 CFR Part 1

RIN 2900-AN67

regarding

the Interim Final Rule on

Garnishment of Accounts Containing Federal Benefit Payments

76 Fed. Reg. 9939 (Feb. 23, 2011)

by the **National Consumer Law Center**

on behalf of its low-income clients

and for the following national, state and local

advocates for low and moderate income recipients of federal benefits

Center for Responsible Lending

Consumer Federation of America

Consumer Action

National Association of Consumer Advocates

National Senior Citizens Law Center

Consumers Union

National Legal Aid and Defender Association

Legal Services of Alabama

Legal Aid Society of the District of Columbia

Bread for the City, Washington, D.C.

Jacksonville Area Legal Aid, Inc., Florida

Georgia Legal Services Program

Land of Lincoln Legal Services, IL

Legal Aid of the Bluegrass, Covington, KY

Michigan Poverty Law Program

Lakeshore Legal Aid of Michigan

Legal Services of Northwest Minnesota

Mississippi Center for Justice

Neighborhood Economic Development

Advocacy Project, New York, NY

MFY Legal Services, Inc., New York, NY

Legal Services of New Jersey

Ohio Poverty Law Center

Legal Aid of Western Ohio, Inc., Toledo, OH

Advocates for Basic Equality, Dayton, OH

Ohio Association for Justice

Community Legal Services, Philadelphia, PA

MidPenn Legal Services, Lebanon, PA

South Carolina Appleseed Legal Justice
Center
Legal Aid Justice Center, Charlottesville, VA

Legal Aid Society of Roanoke Valley, VA
Virginia Poverty Law Center
Mountain State Justice, Charleston, WV

The **National Consumer Law Center**¹ ("NCLC") submits the following comments on behalf of its low-income clients, as well as on behalf of the many legal services, consumer, and advocacy organizations listed in the heading. Our primary message is to congratulate and thank the Treasury Department and the other federal agencies for promulgating this Interim Final rule. It will prevent significant harm to many people. These agencies have worked hard and accomplished a great deal. On behalf of our many low income clients who have been suffering from the illegal seizures of their exempt federal benefits in bank accounts, we thank all those individuals engaged in the process of making this rule a reality.

We have four suggestions for improving the Interim Rule:

1. The Interim Final rule's exception for child support orders issued by the State child support agency would illegally and inappropriately permit SSI benefits to be seized from bank accounts to pay child support debts and should be revised.
2. There are explicit limits in federal law against the seizure of all Social Security and other benefits for past-due child support. The Interim Final rule permits the entire amount in the accounts to be seized – leaving recipients temporarily destitute and facing all of the problems this rule was designed to prevent. The rule should only permit amounts over the offset amount to be seized.
3. The Interim Final rule needs to be tightened to ensure that tax levies, attachment orders and other seizures of funds out of bank accounts are fully covered by the protections of the rule.
4. The agencies should move expeditiously to expand the Interim Rule to cover all exempt federal payments, including military retirement payments.

¹ The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Banking and Payments Law* (4d ed. 2009), which has several chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers, and *Collection Actions* (1st ed. 2008), which includes detailed analysis of the ways in which essential income and property are exempt from execution. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with the electronic delivery of government benefits, protection of exempt benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s. NCLC's attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments are written by NCLC attorneys Margot Saunders and Carolyn Carter.

Introduction

The Interim Final rule on garnishment of accounts containing federal benefits is a watershed rule. It provides momentous and important regulatory instructions to the nation's financial institutions on how to protect exempt federal benefits deposited into bank accounts. The rule will significantly limit creditors' ability to garnish bank accounts that contain Social Security, Supplemental Security Income (SSI), VA benefits, Federal Railroad benefits, and Federal Employee Retirement System benefits. The rule is a detailed, comprehensive and fair mechanism to protect federal benefits in bank accounts from garnishment, while not over-burdening the banks.

We estimate that as the result of this rule, over a million low-income recipients of Social Security, Supplemental Security Income ("SSI"), and other federal payments whose benefits are entirely exempt from claims of judgment creditors *will no longer be* left temporarily destitute because banks have frozen bank accounts following attachments and garnishments.² Thanks to a few added pages of federal regulations, tremendous harm and suffering to the nation's elderly and disabled will be avoided.

In our comments on the Proposed Rule we documented the need for this rule, as well as the legal underpinnings supporting the rule's basic structure.³ Legal aid lawyers throughout the nation have provided horror stories about the harsh effects of the garnishment of government benefits from bank accounts. Dozens of these stories from all over the country have been described to Congress⁴ and in the press.⁵ The rule was designed to prevent these serious and pervasive problems, and it largely addresses and will prevent these problems from continuing.

² We believe this number to be a conservative estimate of the number of recipients who suffered each year from illegal seizures of the exempt federal benefits in bank accounts. First, we derive a number for how many Social Security and SSI recipients have judgments for defaulted credit card debt taken against them each year. In recent years, credit card default rates have risen and fallen again. The figures from 2008 are a safe middle basis (higher than some years, but not as high as in the depths of the recent economic downturn) to begin the analysis. Information from Moody's Investors Service, a bond-rating service, reported the charge-off rate for credit card debt at 5.7% in May 2008, up from 4.5% the previous year. *Sector Snap: Credit card companies fall on outlook*, MSN MONEY, May 20, 2008, at <http://news.moneycentral.msn.com/provider/providerarticle.aspx?feed=AP&date=20080520&id=8671348>. If we assume that Social Security and SSI recipients carry and default on credit cards at the same rate as the general population, this would mean that about 3.31 million of the country's 58 million Social Security and SSI recipients would have judgments taken against them for credit card debts each year. Even if we take the conservative approach of reducing this number by 50% because it is an extrapolation, there are still well over 1.65 million recipients of Social Security and SSI who have credit card judgments taken against them each year. That translates to **over 137,000 Social Security and SSI recipients that have judgments against them each month**. And this figure represents only judgments on credit card debt. If we count the additional tens of thousands of judgments taken against these same recipients for medical debt and deficiency judgments for repossessed vehicles and foreclosed homes, the numbers of recipients with unpaid judgments each month would be even higher.

³ Comments to Treasury Proposed Rule on Garnishment of Federal Benefit Payments, June 18, 2010, http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/comments-treasury-june2010.pdf.

⁴ The stories of these problems have been documented extensively in the press and in Congressional testimony. Personal stories from clients of legal services attorneys from Alabama, Georgia, Illinois, Michigan, Mississippi, Montana, Nevada, New Jersey, New York, Pennsylvania, and Virginia were included in testimony presented to a subcommittee of the House Ways and Means Committee in June 2008. See *Protecting Social Security Benefits from Predatory Lending and Other Harmful Financial Institution Practices: Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 110th Cong. (2008), available at http://www.consumerlaw.org/issues/debt_collection/content/June08HouseTestimony.pdf (testimony of Margot Saunders, National Consumer Law Center). See also Ellen Schultz, *Closing the Benefits Loophole*, Wall Street Journal, May 30, 2009.

Between the Proposed rule and the Interim Final rule, Treasury⁶ adopted many of the suggestions that we and other commenters made. In particular, we commend Treasury for:

1. Changing the lookback period from 60 days to two months.
2. Clarifying that the "protected amount" cannot be challenged by creditors as non-exempt and that financial institutions must provide full and customary access to the protected amount.
3. The addition of important information to the Notice sent by the bank to the recipient after a garnishment.

However, between the Proposed rule and the Interim Final rule, the exception from the protections of the rule for debts owed the federal government was significantly and dangerously expanded to include debts owed State child support enforcement agencies. This exception, which allows exempt funds to be seized to satisfy orders from State child support enforcement agencies, raises serious issues of legality and would permit garnishments that would cause great harm to impoverished elderly and disabled SSI recipients.

Our primary message in these comments is to emphasize to Treasury and the other federal agencies that *this rule should not provide the basis for garnishment of exempt federal funds from bank accounts that cannot be legally be offset directly from the federal paying agency*. While this Interim Final rule does so much good, it also threatens to legalize the temporary impoverishment of low income federal recipients through garnishment of exempt federal funds from their bank accounts for child support.

Even the temporary seizure of exempt funds triggers significant loss to these low income recipients. When exempt funds are seized by the bank, elderly or disabled recipients have no money for food, housing, and medicine. These injuries are more than temporary, they are costly as well: bank imposed garnishment fees and often numerous overdraft fees deplete the exempt funds by significant amounts.

We strongly recommend that Treasury recognize the limits on offset for child support established by Congress, and ensure that these limits are applied to the garnishment of federal funds from bank accounts. In other words, when Congress articulated that child support arrearages can be collected by offset directly from the federal payor agencies,⁷ it ensured a) that at least \$9,000 a year would always be available for the basic support of the recipient,⁸ and b) that means tested programs,

⁵ See, e.g. Ellen E. Schultz, *The Debt Collector vs. The Widow: Viola Sue Kell thought her Social Security benefits were safe in the bank. She was Wrong*. WALL ST. J., April 28, 2007, at A1; see also *As Federal Agencies Push for Recipients to Use Direct Deposit, Consumer Advocates Warn of Risks*, CHRISTIAN SCI. MON., March 14, 2007; Ellen Schultz, "Closing the Benefits Loophole," WALL ST. J., May 30, 2009.

⁶ In the balance of these comments, we use the shorthand "Treasury" to refer to the promulgators of the proposed rule, rather than list out each of the responsible agencies: the Office of Personnel Management, the Railroad Retirement Board, the Social Security Administration, and the Department of Veterans Affairs.

⁷ See 31 U.S.C. §3701(b)(2) allowing debts for *past due* child support to be offset from federal payments.

⁸ 31 U.S.C. § 3716(b)(3)(A)(ii): "An amount of \$9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12 month period shall be exempt from offset under this subsection. ..."

such as SSI, could be declared completely exempt from offset.⁹ In fact, SSI was specifically exempted from the list of allowable federal funds which can be used for offset.¹⁰ *This garnishment rule -- designed to protect recipients from the destitution caused by seizure of the entire bank account -- should not permit more funds to be taken from the bank account than can be taken by direct offset. The rule should not attempt to legalize what Congress has determined to be illegal.*

I. SSI Benefits Must Be Protected from Child Support Orders

There is a critical flaw in this Interim Final rule: it permits seizure of SSI benefits to pay child support. This is illegal and it is poor policy. Considerable harm to the poorest of America's elderly or disabled will result if this part of the Interim Final rule is not changed.

Increasing the collection of child support is indeed an important goal. But as Congress and the courts have already recognized, it is not good policy to take money from the most destitute of citizens to accomplish this goal. SSI benefits cannot legally be garnished for child support. Treasury should amend the Rule to ensure that SSI benefits are protected as against child support orders from state child support enforcement agencies.

A. SSI Benefits Cannot Legally Be Seized for Child Support.

Unlike other exempt federal payments, there is no law that permits the seizure of SSI benefits for child support. The analysis begins with the express protection for SSI benefits against any garnishment or seizure in 42 U.S.C. §§ 407(a) and 1383(d)(1):

§ 407. Assignment; amendment of section

- (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
- (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Social Security disability and retirement benefits are expressly protected from “execution, levy, attachment, garnishment, or other legal process” by this section. 42 U.S. § 1383(d)(1) expressly applies these protections to SSI benefits. Without any other enactment, these benefits would also be protected from child-support orders. However, Congress created a limited exception to the

⁹ 31 U.S.C. § 3716(b)(3)(B): “The Secretary of the Treasury shall exempt from administrative offset under this subsection payments under means-tested programs when requested by the head of the respective agency. . . .”

¹⁰ 31 CFR § 285.4(b): “. . . Covered benefit payment means a Federal benefit payment payable to an individual under the Social Security Act (other than SSI payments), part B of the Black Lung Benefits Act, or any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits). . . . (Emphasis added).”

protections of this statute (and other statutes protecting federal payments from seizure for debts) in 42 U.S.C. § 659.

42 U.S.C. § 659 carves out an exception to these protections of federal payments for child-support collection purposes. In this statute, Congress consented to income withholding, garnishment, and similar proceedings for enforcement of child-support and alimony obligations, but only from federal moneys payable based on “remuneration from employment.”

§ 659. Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations

(a) Consent to support enforcement

Notwithstanding any other provision of law (including section 407 of this title and section 5301 of Title 38), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 666 of this title and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony. (Emphasis added.)

Thus, this exception allows garnishment of otherwise exempt benefits only if the entitlement to those benefits “is based upon remuneration for employment.” SSI benefits are not remuneration for any past or present employment. SSI is federal welfare for the poorest of the nation's citizens. *As Congress did not waive sovereign immunity for the garnishment of SSI benefits directly from the federal government, there is no authority for attachment of SSI for child support.*

The federal Office of Child Support Enforcement has unequivocally adopted this very conclusion:

Question: Are Supplemental Security Income benefits attachable for child support purposes? **Answer:** No. The provisions of section 207(a) of the Act (42 U.S.C. 407(a)), prohibiting attachment of benefits, are specifically made applicable to Supplemental Security Income (SSI) benefits pursuant to section 1631(d)(1) of the Act (42 U.S.C. 1383(d)). Federal regulations at 5 CFR 581.104(j) also specify that SSI benefits are not subject to garnishment. In addition, section 459 of the Act (42 U.S.C. 659), which overrides section 207 of the Act, provides that only benefits which are based upon remuneration for employment are subject to legal process for child support enforcement. Supplemental Security Income (SSI) payments are not based upon remuneration for employment; rather, they are provided based on need. Some courts have held that SSI is a form of public assistance, intended to protect the individual recipient from poverty. See, *Becker County Human Servs. Re Becker County Foster Care v. Peppel*, 493 N.W.2d 573 (Minn. App. 1992), *Tennessee Dept.*

of Human Servs ex rel Young v. Young, 802 S.W.2d 594 (Tenn. 1990). SSI payments are not included as moneys subject to process in section 459(h) of the Act. ...¹¹

Moreover, the federal regulations governing the processing of orders for child support or alimony, in 5 C.F.R. Part 581, explicitly state that SSI funds are not available for garnishment:

5 C.F.R. § 581.104 Moneys which are not subject to garnishment.

...

(j) Supplemental Security Income (SSI) payments made pursuant to sections 1381 et seq., of title 42 of the United States Code (title XVI of the Social Security Act).

There is likewise no authority for seizure of SSI funds in a bank account to pay a child support obligation. Indeed, the U.S. Child Support Enforcement Agency has specifically articulated that SSI funds in a bank account are not available for garnishment:

Question: When SSI benefits are paid into a bank account, do they retain their character as protected benefits?

Answer: Yes. The U.S. Supreme Court has held that Social Security funds deposited into a bank account "retained the quality of moneys' within the purview of section 407[.]" *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973). Courts have also held that the funds remain exempt from legal process even if they are commingled in a bank account with other funds, so long as they are reasonably traceable to Social Security. *NCNB Fin. Servs. v. Shumate*, 829 F.Supp. 178 (W.D. Va. 1993), *aff'd*, 45 F.3d 427, *cert. denied* 115 S.Ct. 2616. Since the prohibition on the attachment of SSI payments is based on the same statutory provisions as apply to Social Security, i.e. section 207 of the Act (42 U.S.C. 407), the reasoning in these cases would apply equally to SSI payments.¹²

State courts have generally recognized this analysis as the basis for disallowing the garnishment of SSI benefits to pay child support orders.¹³ Indeed the majority of courts to analyze

¹¹ Office of Child Support Enforcement, DCL-00-103 OCT 6, 2000, Letter to State IV-D Directors, re: Attachment of Social Security Benefits. Available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-103.htm> (last visited May 20, 2011).

¹² See Office of Child Support Enforcement, DCL-00-103 OCT 6, 2000, Letter to State IV-D Directors, re.: Attachment of Social Security Benefits, available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-103.htm> (last visited May 20, 2011). See also Office of Child Support Enforcement, DCL-00-103 OCT 6, 2000, Letter to State IV-D Directors, re: Attachment of Social Security Benefits (SSI benefits are not subject to garnishment for support arrearages), available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-103.htm> (last visited May 20, 2011); Office of Child Support Enforcement, *Essentials for Attorneys in Child Support Enforcement*, Chapter 10 - Enforcement of Support Obligations: "Supplemental Security Income (SSI) benefits are not attachable for child support purposes. Both Federal law and regulations specifically prohibit withholding of this income. This prohibition continues even after the benefits are deposited into the recipient's bank account. The basis for this conclusion is that SSI benefits are not based on remuneration for employment; rather, they are based on need. Some courts have held that SSI is a form of public assistance, intended to protect the recipient from poverty." (Citations omitted), available at <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c10.html>.

¹³ See, e.g. *H.C.P. v. G.A.B.*, 2008 WL 2898419 (Apr. 24, 2008); *Burns v. Edwards*, 367 N.J.Super. 29, 842 A.2d 186, (N.J.Super. 2004) (finding that 20 C.F.R. § 581.104 specifically exempts SSI from garnishment for child support or alimony).

the question of whether SSI benefits may be garnished once in a bank account have found unequivocally that SSI funds are not available for garnishment.¹⁴ The relatively few court decisions to have erroneously found that SSI funds in bank accounts can be subject to garnishment, were wrongly decided.¹⁵ But Treasury need not look at the interpretations of the courts of this mélange of federal statutes and regulations to determine this issue, because so many of these decisions have failed to recognize all of the various statutes and regulations which are relevant. There is a difference of opinion among the courts regarding whether SSI can be counted as income for the purpose of calculating the child support obligation,¹⁶ but that is not relevant to this discussion.

Most importantly, it is not good policy to allow an entire bank account, containing SSI benefits, to be garnished for child support. The Supreme Court has explained the purpose of SSI benefits:

The SSI program provides a subsistence allowance, under federal standards, to the Nation's needy aged, blind, and disabled. Included within the category of "disabled" under the program are all those "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be

¹⁴ *Davis v. Office of Child Support Enforcement*, 20 S.W.3d 273 (Ark. 2000); *H.C.P. v. G.A.B.*, 2008 WL 2898419 (Del. Fam. Ct. Apr. 24, 2008) (SSI benefits cannot be reached for child support; § 659 exception is inapplicable to SSI benefits); *Dep't of Pub. Aid ex rel. Lozada v. Rivera*, 755 N.E.2d 548 (Ill. App. Ct. 2001) (federal law shelters SSI benefits from going to child support); *Becker County Human Services v. Peppel*, 493 N.W.2d 573 (Minn. Ct. App. 1992) (§ 659 is inapplicable to SSI benefits, and they cannot be attached for child support); *Crespo v. Crespo*, 928 A.2d 833 (N.J. Super. Ct. App. Div. 2007) (reversing order requiring payment of child support arrearages by obligor whose only source of income was SSI); *Green v. Redd*, 2006 WL 2237700 (N.J. Super. Ct. App. Div. Aug. 7, 2006) (SSI income may not be considered in setting child support; when SSI is obligor's only source of income, collection of arrearage must be suspended until he has other income); *Burns v. Edwards*, 842 A.2d 186 (N.J. Super. Ct. App. Div. 2004) (SSI cannot be garnished or attached for child support or alimony); *Tennessee Dep't of Human Services v. Young*, 802 S.W.2d 594 (Tenn. 1990) (federal law precludes issuance of legal process of any sort to reach SSI funds, whether paid or payable, for child support); *see also Metz v. Metz*, 101 P.3d 779 (Nev. 2004) (§ 659 is inapplicable to SSI, so SSI benefits may not be counted in calculating child support).

¹⁵ *See, e.g., State of Ohio ex rel. Heather Miller, v. Comer*, 2000 Ohio App. LEXIS 666, 2000 WL 217796 (Feb. 24, 2000) (ignoring the limitation in 42 U.S.C. § 659 to remuneration for employment in including SSI benefits as covered by that section); *In re Bemis v. Griggs*, 435 So. 2d 103 (Ala. Civ. App. 1983) (failing to cite the exemption for remuneration not based on employment in 42 U.S.C. § 659, and erroneously finding that SSI benefits can be source of income for child support, but reversing contempt order because nonpayment resulted from inability to pay.).

¹⁶ *Office of Child Support Enforcement, Essentials for Attorneys in Child Support Enforcement*, Chapter 9 (stating that SSI benefits are not available as an income source for child support), Chapter 10 (acknowledging that some courts have used SSI as a source of income for child support), available at http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c9.html#foot_32. *Davis v. Office of Child Support Enforcement*, 20 S.W.3d 273 (Ark. 2000) (SSI benefits not considered in determining child support); *Metz v. Metz*, 101 P.3d 779 (Nev. 2004) (SSI benefits may not be counted in calculating child support); *Crespo v. Crespo*, 928 A.2d 833 (N.J. Super. Ct. App. Div. 2007) (reversing order requiring payment of child support arrearages by obligor whose only source of income was SSI); *Green v. Redd*, 2006 WL 2237700 (N.J. Super. Ct. App. Div. Aug. 7, 2006) (SSI income may not be considered in setting child support; when SSI is obligor's only source of income, collection of arrearage must be suspended until he has other income); *Burns v. Edwards*, 842 A.2d 186 (N.J. Super. Ct. App. Div. 2004) (child support may not be ordered if obligor's only source of income is SSI). *But see In re Bemis v. Griggs*, 435 So. 2d 103 (Ala. Civ. App. 1983) (SSI benefits can be source of income for child support, but then ordering dismissal of order requiring respondent to pay because SSI benefits were not sufficient to provide support from both him while paying child support). *But cf. Whitmore v. Kenney*, 626 A.2d 1180 (Pa. Super. 2004) (proper to enter child support order against parent who agreed that she had ability to pay child support, even though her only income was SSI).

expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 1382c(a)(3)(A).¹⁷ (Emphasis added).

Allowing SSI payments to be seized to pay state court child-support orders would significantly undermine the essential purposes of the SSI benefit program. The SSI program provides recipients with a minimum amount necessary for subsistence. The program does not supply enough funds to the individual to support more than the recipient. As the Nevada Supreme Court articulated –

SSI provides a person with a minimum income and is designed to help poor, needy people.¹⁸

The special purpose of SSI benefits – exclusively to help the nation’s poorest disabled and elderly citizens – can be contrasted with other benefits that can legally be seized to satisfy child support orders. While allowing VA benefits to be garnished for child support, the U.S. Supreme Court pointed out that “the legislative history [of the Veteran’s benefits program] establishes that disability benefits are intended to provide compensation for disabled veterans and their families.”¹⁹ (Emphasis added).

All of the reasons Treasury has propounded as the justification for this rule are especially applicable to SSI recipients. Even the temporary seizure of funds in a bank account will likely cause considerable harm to SSI recipients. No money will be available to pay for food, shelter, or medicine. Checks will bounce. The bank’s garnishment fee will be assessed from the SSI funds. Not only does the law not permit the garnishment of SSI funds, but it would also be inhumane and unwise to seize the relatively small funds available to otherwise destitute SSI recipients to assist with the needs of another.

SSI recipients live on the brink of destitution. The current maximum federal SSI benefit rate is \$674 per month for an individual without other income.²⁰ To receive SSI, financial resources (savings and owned assets) cannot exceed \$2,000 or, if married, \$3,000.²¹ Thus an SSI recipient is likely to have no other resources to fall back on if funds in a bank account are temporarily frozen as part of a child support collection action. The typical bank garnishment fee of \$125 represents almost 20% of the SSI recipient’s monthly check of \$674. If even one Non-Sufficient Funds charge of \$35 is deducted from SSI benefits, the temporary seizure of SSI benefits to satisfy a garnishment order for child support will eat almost a quarter of the entire monthly benefit.

¹⁷ See, e.g. Schweiker v. Wilson, 450 U.S. 221 at 223, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

¹⁸ Metz v. Metz, 101 P.3d 779, 783 (Nev. 2004).

¹⁹ Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029 at 2031 (1987).

²⁰ Social Security Administration, Annual Statistical Supplement 2010: Supplemental Security Income, Program Overview, February 2011, available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2010/ssi.pdf>.

²¹ Supplemental Security Income (SSI), What is Supplemental Security Income (SSI)? Frequently Asked Questions, available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/93/kw/garnishing%20SSI%20income.

The amendment to the Interim Final rule that we are proposing is important for hundreds of thousands of impoverished SSI recipients. As of March of 2011, 8,001,000 Americans were receiving SSI – all of them by definition very poor and either elderly or disabled.²² Of these, 5,258,000 only received SSI while 2,743,000 received SSI as a supplement to Social Security because they qualified for Social Security benefits in such a low amount that they were still eligible for SSI.²³ We estimate that approximately 700,000 of these SSI recipients also owe child support,²⁴ so will be vulnerable to temporary destitution under the Interim Final rule.

B. A Simple Solution – Check for SSI Benefits

To protect SSI benefits from seizure for child support garnishment, Treasury need only adopt a simple procedure for banks to follow when a garnishment order is issued by a State child support enforcement agency.

1. Special Identifier for SSI Benefits.

Treasury has provided special identifiers to enable banks to identify easily all federally exempt benefits during the account review in compliance with the Interim Final rule. Treasury should also provide a separate identifier applicable only for SSI benefits. This would make a procedure very easy for banks to follow once a child support order from the State child support agency has been served on the bank.

2. Separate but Equivalent Procedure.

The new procedure would work as follows:

- 1) Upon receipt of a garnishment order, the bank would determine whether it is from a State child support agency.
- 2) If the order is from a State child support agency, the bank should follow the procedures in § 212.5 and conduct an account review, but only to determine whether SSI benefits (not other exempt benefits) have been deposited during the lookback period. The deposit of other exempt benefits would be ignored, and subject to garnishment.
- 3) If SSI benefits are found to have been deposited during the lookback period, then the protections applicable to benefits under § 212.6 would be applied, but only to the SSI benefits.
- 4) If no SSI benefits have been deposited during the lookback period, the bank should honor the garnishment in a procedure parallel to § 212.5(b).

²² Social Security Administration, Monthly Statistical Snapshot—March 2011, Released April 2011, *available at* http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html.

²³ *Id.*

²⁴ According to a publication sponsored by the Office of Child Support Enforcement, in 2004, 6% of all child support debtors were receiving SSI benefits in 2004. Office of Child Support Enforcement, *The Story Behind the Numbers: Who Owes the Child Support Debt?*, August 13, 2004, *available at* <http://www.acf.hhs.gov/programs/cse/pol/IM/2004/im-04-04.htm>, p. 1. The most recent statistics that we can find are from 2007, which show 12,318,042 total child support cases. The Child Support Enforcement, FY 2007 Annual Report to Congress. http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/fy2007_annual_report/table_55.html. Six percent of the total child support cases is over 739,000.

II. A Minimum Amount Should Be Left in the Accounts When Child Support Orders Are Applied.

Our second concern regarding the Interim Final rule's exception for child support garnishments is that it would apparently allow a Social Security recipient's bank account to be completely cleaned out, even though other federal statutes and rules limit child support collection to just a portion of a recipient's Social Security benefits.²⁵ These rules recognize that even for as valuable a cause as collecting child support, some funds must be left to the federal recipient on which to subsist.

In particular, the maximum amount that can be withheld from any federal payment for child support is 65%.²⁶ The Interim Final rule would nullify this protection, because as soon as a Social Security benefit payment reached the recipient's bank account the protection would no longer apply and the entire payment could be frozen. With the expansion of direct deposit as a means of paying Social Security benefits, the 65% limit would become meaningless.

Additionally, pursuant to the federal offset rules, 31 U.S.C. § 3716, the first \$9,000 of all federal payments is protected from offset for federal debts, and for child support arrearages.²⁷

Yet, the Interim Final rule permits the entire amounts in the accounts to be seized – leaving recipients temporarily destitute and facing all of the problems this rule was designed to prevent. This is too much and too drastic, and will cause devastating and unnecessary consequences for recipients whose basic problem is that they are just too poor to pay their child support debt.

As Treasury and the

Mr. O'Brien is a 53 year old, former brick layer whose only income is \$787 a month in Social Security disability benefits. In the late 1990's, Mr. O'Brien fell behind on his child support when he lost his job. Before he could adjust his child support order to reflect his lost wages, he suffered a serious head injury when a hit and run driver struck him crossing a street. Consequently, his child support obligation arrears grew. By 2003, his children were grown, but he still owed tens of thousands in arrears. That same year, a family court judge ruled that Mr. O'Brien's lived in poverty and thus below New York's "self-support reserve." This finding prevented the Office of Child Support Enforcement ("OCSE") from directly garnishing 65% of Mr. O'Brien's Social Security payment. Nevertheless, in April 2008, an OCSE bank match program froze his bank account, depriving him of his entire Social Security check and leaving him penniless. During the 28 days his account remained frozen, Mr. O'Brien asked deli-owners for sandwiches on credit and begged patience from his landlord. Only with a lawyer was he able to get OCSE to lift the freeze. Six months later, the OCSE computer automatically matched and froze his account a second time. Mr. O'Brien has since given up on direct deposit.

Case History Supplied by Johnson Tyler, South Brooklyn Legal Services.

²⁵ Basic Guidelines for Federal Agencies on Child Support Withholding, U.S. Department of Health and Human Services, Administration for Children and Families, http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/opm_iw_guidance.htm#wc.

²⁶ Basic Guidelines for Federal Agencies on Child Support Withholding, U.S. Department of Health and Human Services, Administration for Children and Families, http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/opm_iw_guidance.htm#wc.

²⁷ 31 U.S.C. § 3716(b)(3)(A)(ii).

other federal agencies sponsoring this rule recognized in the Proposed rule²⁸ –

[T]he freezing of funds during the time it takes to file and adjudicate [an exemption] ... claim can cause significant hardship for account owners. This is especially true when, as is often the case, the recipient of Federal benefits depends on these funds as his or her primary or sole source of income. Recent statistics show that 32 percent of Social Security beneficiary married couples or nonmarried persons age 65 or older reported receiving 90 percent or more of their income from Social Security. In addition, Social Security benefits are the primary source of income (representing 50 percent or more of total income) for 64 percent of beneficiary married couples or nonmarried persons age 65 or older. If their accounts are frozen, these individuals may find themselves without access to the funds in their account unless and until they contest the garnishment order in court, a process that can be confusing, protracted and expensive.²⁹

The child support arrearages that state agencies seek to collect often involve child support that had been paid decades before.³⁰ Often these debts have grown to tens of thousands of dollars because of the application of punitive interest rates on the arrearages.³¹ These garnishment orders for child support are rarely for current support of a child.³² Recipients of TANF benefits are required to assign their right to child support to the state government,³³ and it has been estimated that 70% of the total child support debt is owed to the states, rather than to the custodial parent.³⁴ It is clear that the purposes of Social Security are not served if the entire benefit is seized to pay old orders of child support.

Indeed, the effect of such a policy will be exactly those harms that Treasury sought to avoid by promulgating this rule. Instead, Treasury and the other agencies should establish a minimum amount to be protected in *every* bank account, even from garnishment orders issuing from State child support enforcement agencies.

²⁸ Garnishment of Accounts Containing Federal Benefit Payments, Proposed Rule, 75 Fed. Reg 20299, April 19, 2010.

²⁹ Garnishment of Accounts Containing Federal Benefit Payments, Proposed Rule, 75 Fed. Reg 20300, April 19, 2010.

³⁰ See, e.g., Elaine Sorenson, Liliana Sousa and Simon Schaner, The Urban Institute, Assessing Child Support Arrears in Nine Large States and the Nation, July 11, 2007, available at http://www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf.

³¹ Elaine Sorenson, Liliana Sousa and Simon Schaner, The Urban Institute, Assessing Child Support Arrears in Nine Large States and the Nation, July 11, 2007, at 13, available at http://www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf.

³² The resources available to locate assets of non-custodial parents are only available to collect delinquent child support, not for ongoing support orders. See Financial Institution Data Match (FIDM) requirements: applicable only for delinquent accounts. The Office of Child Support Enforcement, *Essentials for Attorneys in Child Support Enforcement*, Chapter 5, Location of Noncustodial Parents and their Assets. <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c5.html>.

³³ Susan Wilschke and Richard Balkus, *Child Support Payments and the SSI Program*, Social Security Administration Policy Brief No. 2004-02, February 2004.

³⁴ Kelley Weiss, California Watch, High interest rate driving state's child support debt, April 21, 2011 available at <http://californiawatch.org/dailyreport/high-interest-rate-driving-states-child-support-debt-9929>.

As a solution, we propose that Treasury amend the Garnishment Rule to provide that for garnishment pursuant to child support orders, the protected amount would include the *lesser* of the sum of two months' exempt deposits or \$750 (one twelfth of \$9,000). Such a rule would ensure that child support orders are being fully processed against exempt funds in bank accounts, without precipitating the terrible hardship caused by a seizure of the entire account.

III. Protect Against Levies and Garnishments Not Issued by Courts.

There appears to have been an error in the regulations which unintentionally will leave some seizures of recipients' assets unprotected by these regulations. The Interim Final regulation defines "garnish or garnishment" to include "execution, levy, attachment, garnishment or other legal process."³⁵ This broad definition, which tracks the language of the exemption statutes,³⁶ is the proper approach. However, the requirements on financial institutions to act to protect funds in bank accounts are only triggered under § 212.4 when the bank receives a "garnishment order." The Interim Final rule defines that term more narrowly, as "a writ, order, notice, summons, judgment, or similar written instruction *issued by a court or a State child support enforcement agency*, including a lien arising by operation of law for overdue child support, to effect a garnishment against a debtor."³⁷

The protections provided by the underlying federal statutes from collection of debts extend beyond garnishment orders issued by courts and state child support agencies to include levies, attachments and "other legal process." All levies by states and others, as well as attachments and other legal process, and even garnishment orders issued before a judgment, also need to be covered by these regulations. The federal funds in the bank accounts are protected under their underlying statutes from these seizures just as they are from garnishments,³⁸ and the damage to recipients is just as damaging.

We understand that some banks are reading the regulation by its exact terms and are permitting state tax levies, and even other attachment orders not issued by a court, to be processed without the application of the protections in the Interim Final regulation. This needs to be stopped immediately. The harm caused to the recipients by these illegal seizures is just as dangerous as it is from the garnishment orders. We therefore ask that the Interim Final rule be amended to define "garnishment order" as:

a writ, order, notice, summons, judgment, or similar written instruction *issued by a court, a State child support enforcement agency, or another entity with authority to institute garnishment, attachment, levy, or similar legal process*, including a lien arising by operation of law for overdue child support, to effect a garnishment against a debtor.

³⁵ 31 C.F.R. § 212.3 (definition of "garnish or garnishment").

³⁶ For example, the Social Security statute says: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a) (emphasis added).

³⁷ 31 C.F.R. § 212.3 (definition of "garnishment order") (emphasis added).

³⁸ *Id.*

IV. The Protections of the Interim Final Rule Should Be Extended to Other Exempt Federal Payments

The Interim Final rule protects the exempt Social Security, SSI, and VA benefits upon which tens of millions of Americans rely. However, other payments, such as military retirement payments, are also exempt, yet the rule does not protect them. We understand and appreciate that Treasury has structured the Interim Final rule so that it can be a framework for protecting those payments in the future.³⁹ We also appreciate the difficulties of coordinating a rule among an even greater number of federal agencies. However, there is a great need to protect these other payments. We urge Treasury, and the federal agencies that issue these other payments, to move expeditiously to establish similar protections for them.

Conclusion

Treasury and the other federal agencies involved in the passage of this watershed rule should make several small, but essential, changes before the Interim Final rule becomes the Final rule. First, SSI benefits need to be protected from seizure for child support. Without this change, the nation's poorest recipients of federal benefits will continue to suffer exactly those dangerous and harmful effects from the illegal seizure of benefits that Treasury has already identified and moved to prevent by promulgating this rule. Additionally, the last \$750 in each account should be protected from seizure to ensure that complete destitution does not result from garnishment for child support arrearages. Third, levies, attachments, and garnishments, whether or not issued by a court, should trigger the protections of the rule. Finally, Treasury should move expeditiously to extend the protections of the rule to other exempt federal payments.

³⁹ 76 Fed. Reg. 9939, 9940 (Feb. 23, 2011).