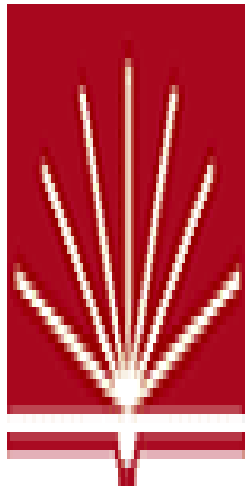


Next Frontier in Public Benefits



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Sargent Shriver National Center on Poverty Law

Karen Harris



Margot Saunders

THE NEXT FRONTIER IN PUBLIC BENEFITS

ELECTRONIC BENEFIT PAYMENTS
AND
PREPAID CARDS

KAREN HARRIS
THE SHRIVER CENTER



SHRIVER
CENTER

Sargent Shriver National Center on Poverty Law

Recipient of 2010 MacArthur Foundation Award for creative and effective institutions

Shriver Center

- **The Sargent Shriver National Center on Poverty Law**
 - A national law and policy center that provides national leadership in identifying, developing and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people.

- **Asset Opportunity Unit**
 - Takes action against poverty by advocating for policies that expand asset-building opportunities for all.

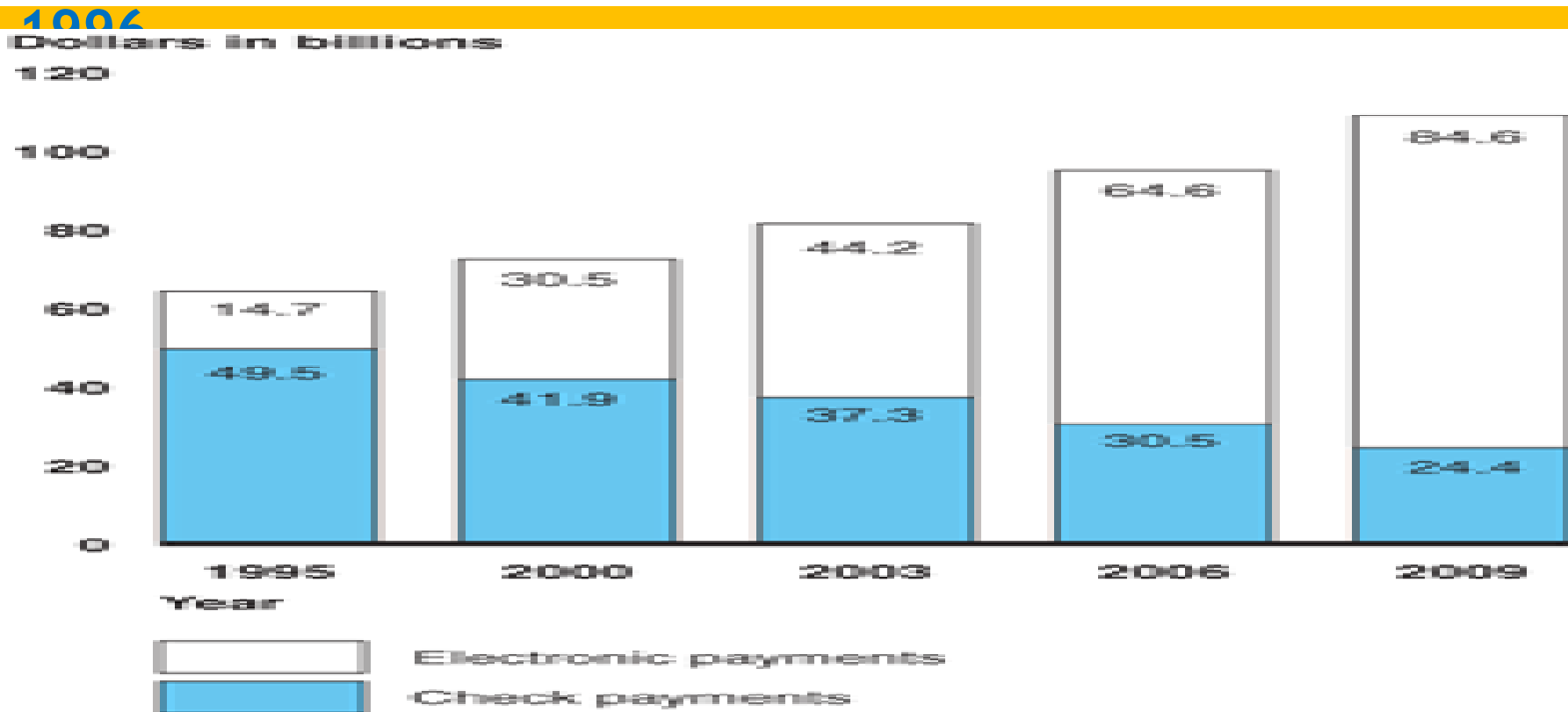
Overview

- Definitions
- History of Electronic Benefit Payments
- Trends in Electronic Benefits Payments
- Current Regulatory Landscape

Definitions

- Electronic Fund Transfers (EFT)
 - Electronic Funds Transfer Act
 - Regulation E
- Electronic Benefit Transfers (EBT)
- Electronic Payment Cards (EPC)
 - Pre-paid/General Purpose Cards
 - Closed/Open Loop
 - One Time/Reloadable
 - Branded Cards

History of EBT



Source: Federal Reserve.

by 2002.



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History of EBT



2008

- Treasury launched the Direct Express debit card for Social Security and SSI recipients
 - ▣ A low-cost prepaid electronic benefit card offered to Federal beneficiaries.
 - ▣ No monthly fees, most services are free, fees are lower, better protections than most private pre-paid cards
 - ▣ The Direct Express card can be used to make purchases and/or access cash at retail locations, ATMs, and financial institutions.
 - ▣ 50,000 ATM network
 - ▣ More than 1.5 million Federal recipients have signed up for card since June 2008.

All Federal Payments Now EBT

31 CFR Part 208 Final Rule

2010

- Treasury mandated that all Federal benefits must be paid electronically
 - December 2010, Treasury issued a final rule amending 31 CFR Part 208.
 - New recipients of Federal benefits on or after May 1, 2011 are required to receive payments by EFT.
 - Current check recipients are not required to receive payments by EFT until March 1, 2013.
- The rule provides for limited waivers, including:
 - Automatic waivers:
 - Over the age of 90 on May 1, 2011 and also receiving Federal payments by check by March 1, 2013.
 - Where the Direct Express® card is not available to a recipient.
 - Individuals not eligible for the Direct Express® card due to suspension cancellation.
 - Hardship waivers, for geographic barriers and mental impairment, that require the submission of a notarized written request.
- The rule refers to Prepaid Card Interim Rule at 31 CFR Part 210 and the Garnishment Rule at 31 CFR Part 212

EBT and Trends

Traditional



Continued stigma

Limited merchant choices and ATM network

More timely delivery

No Check cashing fees

Decreased fraud and theft

Decreased stigma

Accepted more universally

No or low-cost for states

Branded



- Unbanked population
- Interchange or “swipe” fees
- Consumer protections

EBC and Interchange Fees



Dodd-Frank Wall Street Reform and Consumer Protection Act

EBC and Interchange Fees



- Durbin Amendment
 - Caps interchange or “swipe” fees
 - “Reasonable and Proportional” to costs
 - 21 cents and 5 basis points multiplied by amount of transaction

Consumer Protections

- Electronic Funds Transfer Act
 - ▣ Protection of individual consumers engaging in electronic fund transfers
- Regulation E
 - ▣ Establishes the basic rights, liabilities and responsibilities of consumers who use electronic fund transfer services and financial institutions



EBC and Consumer Protections

- Benefit Card Fairness Act of 2010
- Extend Reg E protections to government-sponsored EBT and EPC
- Include any electronic fund transfers within Reg E's protections
- Require financial institutes to offer low-fee accounts that include FDIC protection
- Prohibit fees on government payment accounts with some exceptions
- Require disclosures to consumers on how to obtain account balances, etc.

PREPAID CARDS



“Account Advances” Pre-paid/General Purpose Cards

\$2.50 per \$20 advance to prepaid card, repaid next deposit;

■ Closed/Open Loop 120%/Open Loop 150% APR

CheckSmart prepaid card used to reload payday loans while evading Arizona payday loan laws

■ Branded Cards

Examples of high fees from private prepaid cards

- \$10-\$20 activation fee (RUSHCard, NetSpend, Vision Premier, etc.)
- \$1 POS transaction fee (RUSHCard, NetSpend, Vision Premier, etc.)
- \$10 inactivity/dormancy fee (Mi Promesa card)
- \$29.95 overdraft fee (Club América card)

NetSpend advance credit line was shut down

by the OTS, and

has been revamped as overdraft protection

PRIVATE PREPAID CARDS PREVIOUSLY INELIGIBLE FOR FEDERAL PAYMENTS

- Previously pre-paid cards were not eligible for deposit of Federal payments.
 - Regulations permitted deposit of federal payments only to accounts “in name of recipient.”
 - Rules were widely ignored.
 - Check cashers, other scammers set up master/subaccount arrangements.
 - IG identified 35,705 payments/mo to check cashers, etc.; 63% of recipients minority, 45% had mental disabilities
 - High-volume states: California, Georgia, Illinois, New York, and Pennsylvania

Federal Benefits Permitted On Prepaid Cards

31 CFR Part 210

- Issued in December 2010 with request for comment.
- Treasury permits Federal payments to prepaid cards if the following requirements are met:
 - Provide the cardholder with pass-through deposit or share insurance.
 - Provide the cardholder with the same consumer protections afforded by Regulation E for Payroll Cards.
 - Card accounts cannot have an attached line of credit or loan feature that triggers an automatic repayment from the card account.
- FMS may refer any violations of this regulation to the appropriate State or Federal regulator, as FMS is not a Regulatory agency, nor does it have authority to regulate fees.

All Prepaid Cards Used for Federal Benefits

Certain Reg. E Protections

- Prepaid cards used for Federal benefits will have the same protections as those for payroll cards:
 - Unauthorized charges procedure
 - Error resolution
 - Opt-in overdraft fee rules
 - Paper statements not required:
 - Must make balance available by phone and at ATMs

- Direct Express Card has similar protections, but longer time (90 days) to dispute unauthorized charges

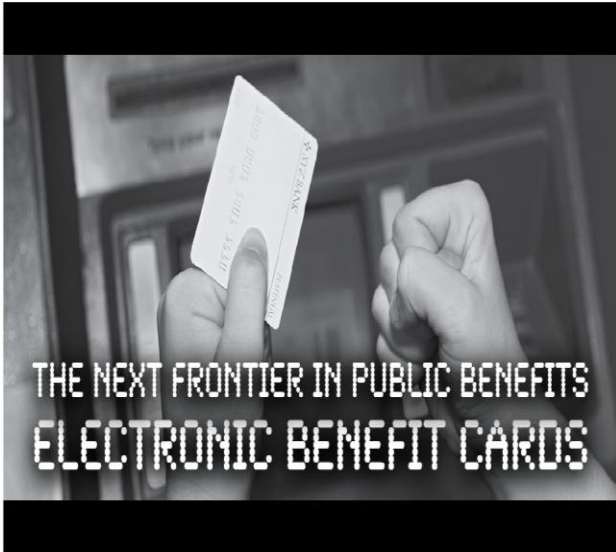
Prepaid Card Consumer Protection Act of 2010

- Expand the definition of “spending card accounts”
- Require full FDIC insurance
- Prohibit certain fees
- Expressly allow other fees
- Require issuers to disclose fees
- Require the Consumer Financial Protection Bureau and the FDIC to issue regulations

Conclusion

- EBT systems have been positive for public assistance beneficiaries, yet significant problems remain.
- Interchange fee caps and the lack of consumer protections for EPC cards leave low and moderate income public benefit recipients vulnerable.
- Regulatory reforms are needed and consumer advocates must lead the effort.
 - Extend EFTA/Reg E protections to all prepaid cards, regardless of issuer
 - Amend EFTA to limit types of fees issuers can charge (Levin and Menendez bills)
 - Prohibit fees for ordinary use of a prepaid card

Resources



By Karen K. Harris and Ji Won Kim

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Over the past twenty years electronic benefit transfers (EBTs) have replaced paper checks for the delivery of public assistance benefits. Since the first demonstration project in Reading, Pennsylvania, in 1984 the delivery of public assistance benefits via EBT has become widespread. By the end of 1998 more than forty states operated EBT systems to deliver food stamp benefits.¹ Since then states have extended EBT systems to other types of public benefit payments as well (e.g., TANF (Temporary Assistance for Needy Families), child support, and WIC (Special Supplemental Nutrition Program for Women, Infants, and Children) nutri-

Webinar

<http://www.povertylaw.org/clearinghouse-review/web-extras/electronic-benefits-cards/resources>

Law Review Article

<http://www.povertylaw.org/clearinghouse-review/issues/2011/may-june-2011-clearinghouse-review/harris.pdf>

Shriver Brief Blog

<http://www.theshriverbrief.org/tags/ebt/>

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PROTECTING CONSUMERS' ACCESS TO THEIR BENEFITS

Margot Saunders
National Consumer Law Center
October 17, 2011
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WE WILL COVER --

- Push for electronic banking
- Threats to funds in bank accounts
- Protections for funds in bank accounts and prepaid cards

NO MORE CHECKS - MANDATED USE OF ELECTRONIC BANKING

- EFT-99 (passed in 1996) pushed electronic delivery of federal payments
- Past 15 years, electronic deposits *encouraged* but not mandated (easy qualify waiver system)
- Now 80% of all federal payment recipients use their own accounts to receive payments



NO MORE CHECKS

- New mandate – effective May 1, 2011 – requires electronic deposit of virtually all non-tax federal payments for **NEW** recipients
- Existing recipients have until March 1, 2013 to switch over
- Few waivers and exceptions

FEDERAL PAYMENTS COVERED: VIRTUALLY EVERYTHING BUT TAX REFUNDS

- Social Security
- Supplemental Security Income
- Veterans compensation and pension
- Wages for federal employees (soon)
- Civil service annuities
- Railroad retirement benefits
- Black lung payments
- Indian Trust Fund payments (separate prepaid card)

NO MORE CHECKS

- *Not applicable to* –
 - Non-recurring transfers (such as attorneys fees for SS cases) where
 - a) Expectation that no more than 1 payment that year to recipient, and
 - b) Remittance data is not available from recipient's bank
 - Payments not eligible for Direct Express Card (i.e., wages not yet eligible)
 - Payments to recipients who have been excluded from Direct Express Card

NO MORE CHECKS

- ALL new recipients of federal payments on or after May 1, 2011 must receive electronically *unless* qualify for waiver
- Waivers only permitted for –
 - Mental impairment
 - Remote geographic area lacking infrastructure to support electronic financial transaction
- Rules are applicable to Rep Payee (requirements for electronic deposit as well as waivers)

NO MORE CHECKS

- Recipients receiving payments as of May 1, 2011 *by check* may continue checks until February 28, 2013
- After March 1, 2013, unless they qualify for a waiver, must receive payment electronically

NO MORE CHECKS

- Special rules for recipients born before May 1, 1921 (over 90 years old now).
- If they are receiving payments by check on February 28, 2013, they can continue receiving payments by check after that date

NO MORE CHECKS

- If no bank account information is provided by recipient, Treasury will supply recipient with a Direct Express Card
- Recipients can also choose their own private label prepaid card so long as provider satisfies certain Treasury requirements

NO MORE CHECKS

- 31 C.F.R. § 208
- 75 Fed. Reg 80315 (Dec. 22, 2010)
- Our comments on proposed rule –
http://www.nclc.org/images/pdf/banking_and_payment_systems/comments-on-mandatory-deposit-2010.pdf.

THREATS: WITH ELECTRONIC BANKING COMES --

- Increased creditor access to funds (they know where to find the money – no longer under the mattress) exacerbates unaffordable credit
- Increased access by providers to funds for high cost credit products
- Greater need to know about protections

INVOLUNTARY TAKINGS FROM CONSUMERS' BANK ACCOUNTS

- *Garnishment*
- *Set Off*
- *Security interest*



GARNISHMENT

- Judgment creditor – to satisfy judgment uses state authorized procedure to require bank to seize funds in the consumer's bank account
- Bank initially *freezes* the account
- Consumer must *generally* obtain a court order to recover use of the funds
- Consumer asserts funds are exempt by law

SET OFF

- Depository Bank – holding Consumer's account
- Uses statutory, common law and/or contractual right of *set off* to pay—
 - Amounts owed to that bank for another debt (e.g. a car loan or a mortgage)
 - An overdraft
 - Bank fee
 - Any other reason

SECURITY INTEREST

- *Independent Party* -- takes a security interest in the consumer's bank account
- Mostly used in business relationships

CONSUMER PROTECTIONS FROM BANK ACCOUNT SEIZURES

- Some laws relate specifically to funds in bank accounts
- Other laws provide that funds received from certain sources are exempt
 - Exemption continues after funds are



ISSUES – EXEMPT FUNDS BY SOURCE

- State or Federal laws which provide protections for funds from a particular *source, e.g.* –
 - Wages
 - Pensions
 - Social Security payments or other federal payments (VA, SSI, etc)

ISSUES – FUNDS IN BANK ACCOUNTS

- State law that protects a certain amount of funds in a bank account, irrespective of the source of those funds?
- Does a state wild card exemption protect funds in the consumer's bank account?
- Is there clear law that only provide a procedure for the consumer to recover funds after they have been frozen, or does the legal protection prevent the funds from being *frozen in the first instance*?

BANK ACCOUNT PROTECTION

- Certain amount of money in a bank account is protected, regardless of its source
- These protections are generally self-executing (depending on statute) (NY, Conn, Cal)
- Funds can be commingled, exempt funds need not be traceable
- Bank account protections *added to other protections -- cumulative*

STATE WILDCARD EXEMPTIONS MAY APPLY TO BANK ACCOUNTS

- Wild card exemptions not limited to funds derived from an exempt source – applies to funds from any source
- Does not matter if exempt funds are commingled or traceable
- Funds from any source are protected, up to a certain limit
- But wild card exemption have to be asserted so that the protection is not self-executing. Funds can be frozen until the exemption is asserted in court.

EXEMPT *FEDERAL* BENEFIT PAYMENTS DEPOSITED IN BANK ACCOUNTS --

- Social Security benefits
- SSI benefits
- Veterans' benefits
- Federal Retirement and Railroad Retirement
- Student loan disbursements for debts the student owes to others
- Federal Emergency Management Agency (FEMA) funds to help individual victims of disaster through the Individuals and Households Program (IHP)
- Certain other private retirement benefits and pensions

FEDERAL PROTECTIONS FOR EXEMPT FUNDS

- The Social Security Act provides that Social Security and SSI benefits are not transferable or assignable and forbids “execution, levy, attachment, garnishment or other legal process” to reach benefits paid or payable to recipients
- These benefits are exempt both before and after payment to the beneficiary
- Other federal benefit programs have similar language

STATE LAW EXEMPTIONS FOR FUNDS IN BANK ACCOUNTS

- Public assistance benefits, such as from the Temporary Assistance to Needy Families program (“TANF”)
- Unemployment Compensation
- Workers Compensation
- Child Support
- Many state laws also specifically recognize the federal exemptions from garnishment and attachment, applied to Social Security funds and other federal sources

OTHER STATE LAW EXEMPTIONS

- Most states exempt at least a portion of benefits received under various employee retirement or pension plans
- Sometimes a state's exemption is found in the statute creating or regulating the retirement or pension plan, rather than in a general exemption law
- In some states, these exemptions are also extended to tax-qualified IRAs, and private retirement plans

EXEMPT BENEFIT PAYMENTS DEPOSITED IN BANK ACCOUNTS

- In *Porter v. Aetna Casualty & Surety Co.*, VA funds in bank account exempt so long as they are readily traceable and “retain the quality as moneys”
- Applies to other exempt benefits (state and federal), in all sorts of accounts:
 - Funds remain exempt in checking,
 - Savings, or
 - Certificates of Deposit
- So long as these are “usual means of safekeeping” money used for daily living expenses.”

PROTECTIONS FOR WAGES DEPOSITED IN BANK ACCOUNTS

- Wages in a bank account generally protected under State law to same extent as the wages would be if garnished directly from employer
- More questionable under Federal law

MONEY IN JOINT ACCOUNTS

- Issue of state law – is money held in a joint account held “by the entirety” or simply “jointly”
- If held by the entirety, then only debts owed by both spouses may be basis for taking of entirety property
- If held only jointly then all money as accessible for debts of either owner – regardless of ownership of funds
- Most jurisdictions rule that a creditor may seize funds only to the extent of the debtor-depositor’s equitable interest in the funds
- Courts focus: (1) the agreement between the bank and the depositors; (2) the co-depositors’ respective net contributions to the account, and/or (3) statutes defining the rights in jointly held bank accounts

EFFECT OF COMMINGLING EXEMPT WITH NON-EXEMPT FUNDS

- Exempt funds in a bank may be commingled with non-exempt funds
- Minority of courts held simple commingling may cause lost exemption
- Instead, a majority of courts continue to protect such funds
- Some state statutes provide that specified exempt benefits lose their exemption if commingled
- But, but no state applies this rule to *federal* benefits – as state law cannot affect a federal exemption

PROTECTING FEDERALLY EXEMPT FUNDS DEPOSITED IN A BANK ACCOUNT -- ROADMAP

- Freezing versus garnishment. Temporary freezing of funds pursuant to a garnishment order will often have the same effect as a final taking (access to courts & repetitive seizures are problems)
- Exempt funds versus traceable. Just because that exempt money has been commingled with non-exempt funds only raises the issue of whether the exempt funds can be traceable.

NEW TREASURY RULE ON GARNISHMENT OF FEDERAL BENEFITS IN BANK ACCOUNTS

- Vastly strengthens protections for exempt federal benefits deposited into bank accounts and subaccounts and prepaid cards
- Applicable to ALL state and federal banks and credit unions
- Requires procedure in *every case in which bank receives a garnishment order*

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Protects following ALL federal *exempt* benefits:
 - Social Security & SSI
 - Veterans Benefits
 - Railroad Retirement and Railroad Unemployment Benefits
 - Federal Employee Retirement
- Does not *yet* protect:
 - Federal wages, including military pay or retirement benefits
 - Coast Guard payments

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Garnishment orders from the federal government (i.e., taxes, federally guaranteed student loans) or state child support enforcement agencies are not covered by the rule.
- Garnishment orders from private child support or alimony collectors are covered and are treated as any other debt. (Such orders must be served on government and proceed by offset.)

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Upon receipt of garnishment order, bank looks to see if required Notice from federal agency or state child support agency is included
- If “yes” then, garnishment proceeds without protections for federal funds in the account
- This means that **NO PROTECTIONS** against garnishment from state **CHILD SUPPORT AGENCIES**, and the **ENTIRE AMOUNT** in the account can be seized.

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Then bank determines if within the previous two months any exempt Federal benefits have been *electronically* deposited into the customer's account.
- If “no” – garnishment proceeds normally under state law.

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- If “yes” then bank calculates “protected amount”
- “Protected amount” is calculated by determining the lesser of –
 - The sum of all exempt benefits electronically deposited into that account in the previous 2 months, or
 - The balance of the account on the day the review is conducted.

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- If account contains a protected amount, the bank cannot freeze, or otherwise restrict the account holder's "full and customary" access to that amount.
- Bank is required to provide the same degree of access to the account as was provided before the bank received the garnishment order.

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- If there is a protected amount in the account, bank must send a Notice describing what has happened and how consumer can protect exempt, but seized funds
- Bank is protected from liability for contempt citations, penalties, or other action by creditor
- No other protection from liability for banks – e.g. from actions by consumer

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Self-Executing Protection – debtor not required to do anything to protect exempt funds up to the protected amount
- Creditor cannot challenge the exempt status of any funds within the protected amount
- Debtor can follow state procedures to protect exempt funds that have been seized.

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Commingled funds and co-owners make no difference on protected status of funds
- No cap on amount of benefits protected
- Determination is entirely based on sum of exempt benefits deposited into *each* account within 2 months
- Lump sum in account protected only if deposited electronically within 2 month period
- No protections for funds transferred between accounts

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Continuing garnishments prohibited against accounts with protected amounts in them
- State law is preempted on this point
- Repeat servings of the same garnishment order are to be ignored by bank
- Weaker state laws are preempted
- Stronger state laws are to be honored
 - Pennsylvania protects first \$10,000 of any account containing exempt benefits
 - California protects up to \$2,700 of directly deposited SS benefits
 - NY protects flat \$2,500 within 45 days

PROTECTING FEDERAL BENEFITS IN BANK ACCOUNTS

- Effective May 1, 2011
- 76 Fed. Reg. 9939 (Feb. 23, 2011)
- 31 C.F.R. §§ 212.1 to 212.12.
- Our comments on these rules found at <http://www.nclc.org/issues/protection-of-exempt-public-benefits.html>

QUESTIONS?

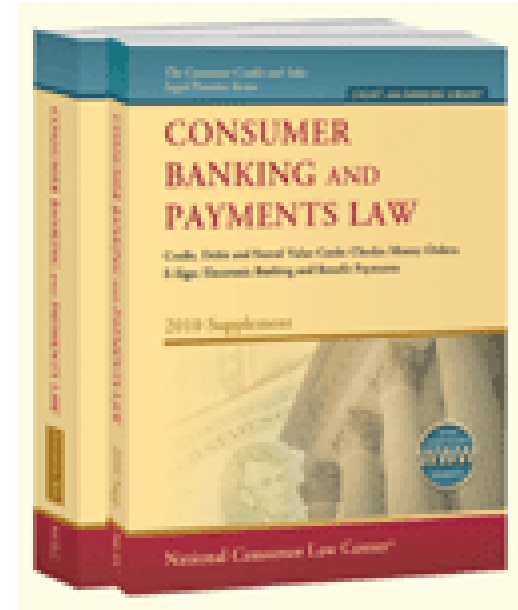
For more information:

Consumer Banking and Payments Law manual

- <http://www.USDirectExpress.com>

Nclc.org/

- Other Consumer Protection Issues
 - Exempt Public Benefits
- Bank Account and Payment Systems
 - Prepaid Debit Cards



THANK YOU

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