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Developments in the Laws Governing Electronic Payments

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Developments in the Laws Governing Electronic Payments

By Sarah Jane Hughes*

I. INTRODUCTION

Since June 1, 2010, developments in the laws governing electronic payments have continued at a brisk pace. First, Congress passed a substantial overhaul of the regulation of all providers of financial services, including providers of consumer financial products and services, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Congress included in the Act an amendment ("Durbin Amendment") to the Electronic Fund Transfer Act ("EFTA") offered by Senator Richard Durbin of Illinois, limiting the amount that issuers with $10 billion or more in assets could charge merchants for processing electronic debit transactions. It instructed the Board of Governors of the Federal Reserve System (the "Board") to promulgate regulations to implement the Durbin Amendment by April 21, 2011. The Board published both a final rule and an interim final rule to implement the amendment on June 29, 2011.

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Although the Cyberspace Law Survey normally runs from June 1 of one year to May 31 of the next year, this survey covers the period from June 1, 2010, to June 29, 2011, in order to capture two events that happened on June 29, 2011, described in this survey—the Federal Reserve Board's issuance of a final rule and interim final rule to implement section 1075 of the Dodd-Frank Act and a decision by the United States Court of Appeals for the Eighth Circuit affirming the district court's denial of a motion for injunction against implementing section 1075.

Meanwhile, in October 2010, TCF National Bank sued the Board in the United States District Court for the District of South Dakota challenging the constitutionality of section 1075, the Durbin Amendment. On June 29, 2011, the same day as the Board’s announcement of the final and interim final rules to implement section 1075, the United States Court of Appeals for the Eighth Circuit upheld the district court’s denial of the plaintiff’s motion for summary judgment. Part II of this survey discusses the amendment, the Board’s efforts to implement it, and the failed efforts to postpone the amendment’s effective dates.

The second major development since the last survey was Congress’s postponement to January 31, 2011, of the effective date of some provisions of the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, which our 2010 survey discussed in detail.

The third major development involved promulgation by the Department of the Treasury of an interim final rule on garnishment for accounts containing federal benefit payments and a request for comments on certain issues on February 23, 2011. The proposed rule was discussed at length in our 2010 survey. Part III of this survey describes the final rule and the issues on which the Department requested comments.

Finally, the states have continued to enact new laws governing payroll and gift cards, despite the federal actions—statutory and regulatory—that occurred over the past few years and that this survey has reported on previously. Part IV of this survey briefly updates developments in state laws on payroll and gift cards. It also discusses the decision in American Express Travel Related Services Co. v. Sidamon-Eristoff.


8. Press Release, supra note 5.


II. THE DURBIN AMENDMENT, THE FEDERAL RESERVE BOARD’S PROPOSED REGULATIONS TO IMPLEMENT IT, AND TCF NATIONAL BANK v. BERNANKE—A MULTI-FACETED TEMPEST

A. THE DURBIN AMENDMENT

Pursuing a change first introduced in 2009,17 in the final version of the Dodd-Frank Act,18 Congress enacted a proposal that limits interchange rates applied to electronic debit transactions to those that are “reasonable and proportional” to the actual processing costs incurred by the issuer of the debit card, with factors such as incremental costs of authorizing, clearing, and settling transactions included in the calculation and no other costs incurred by the issuer not specific to the debit transaction included.19 The Amendment—now EFTA section 920—exempts from its requirements issuers that, together with their affiliates, have assets of less than $10 billion,20 and also allows the Board to provide for adjustments to the fee limit for costs incurred in preventing fraud and to provide against circumvention or evasion of otherwise applicable restrictions on interchange transaction fees.21 In addition, the interchange fee limitations do not apply to transactions using two types of cards—debit cards issued in government-administered payment programs and reloadable, general-use prepaid cards not marketed or labeled as gift cards or gift certificates.22 In addition to limiting the fees that networks could charge for processing electronic debit transactions, the Amendment also directed the Board to regulate debit payment network “exclusivity”23

22. Id. (codified at 15 U.S.C. § 1693o-2(a)(7) (Supp. IV 2010)). The exemption for both these types of cards will not apply after July 21, 2012, if the cardholder may be charged either an overdraft fee or a fee for the first withdrawal each month from ATMs in the issuer's designated ATM network. Id. (codified at 15 U.S.C. § 1693o-2(a)(7)(B) (Supp. IV 2010)). The Act furthermore restricts the use of discounts to promote particular forms of payment, requiring discounts to apply equally to all payment card networks and issuers, as well as uniformly to all buyers. 15 U.S.C. § 1693o-3(b)(2)(A)(i)-(iii) (Supp. IV 2010). The Act also prohibits an issuer or payment card network from inhibiting a merchant's ability to set a minimum or maximum transaction value for card acceptance. The Act allows minimum values not to exceed $10 as a condition of acceptance of credit cards and allows federal agencies and institutions of
and routing. The Amendment instructed the Board to adopt regulations to implement most of its provisions by April 21, 2011, to be effective by July 21, 2011. The Amendment directed the Board to adopt regulations prohibiting network exclusivity arrangements and debit card transaction routing no later than July 21, 2011, but set no effective date for that portion of the regulations.

B. FEDERAL RESERVE BOARD FINAL RULE AND INTERIM FINAL RULE TO IMPLEMENT THE DURBIN AMENDMENT

1. Debit Interchange Fee Limitations
   a. Proposed Rule

   The Board's proposed interchange fee and routing rule requested comment on two "alternative standards" for determining the reasonableness and proportionality of interchange transaction fees to the issuer's costs of processing the transaction. "Alternative 1 (Issuer-Specific Standard with Safe Harbor and Cap)" limited the issuer to interchange transaction fees that "during an implementation period of October 1 or any calendar year through September 30 of the following calendar year" is

   no more than the greater of

   (1) Seven cents per transaction; or

   (2) The costs described in paragraph (c) of this section incurred by the issuer with respect to electronic debit transactions during the calendar year preceding the implementation period, divided by the number of electronic debit transactions on which the issuer charged or received an interchange transaction fee during that calendar year, but no higher than 12 cents per transaction.

   Proposed subsection 235.3(c) defined "allowable costs" in two streams. First, the issuer may include

   only those costs that vary with the number of transactions sent to the issuer and that are attributable to

   (i) Receiving and processing requests for authorization of electronic debit transactions;
Developments in the Laws Governing Electronic Payments  263

(ii) Receiving and processing presentments and representations of electronic debit transactions;

(iii) Initiating, receiving, and processing chargebacks, adjustments, and similar transactions with respect to electronic debit transactions; and

(iv) Transmitting or receiving funds for interbank settlement of electronic debit transactions; and posting electronic debit transactions to cardholder accounts; . . . 30

The second stream restricted the issuers' ability to pass along "fees charged by a payment card network with respect to an electronic debit transaction." 31 Proposed subsection 235.3(e) provided a transition period. 32

Alternative 2 was a pure cap proposal. It provided:

Determination of reasonable and proportional fees. An issuer complies with the requirements of paragraph [235.31(a) of this section [general requirement that fees be proportional and reasonable] only if each interchange transaction fee received or charged by the issuer for an electronic debit transaction is no more than twelve cents per transaction. 33

The proposed regulation followed section 920(a)(5) of the statute and allowed adjustments of the fee limits for fraud-prevention costs. 34 The Board proposed two approaches for implementing adjustments—a "technology-specific approach and a non-prescriptive approach"—and intends to refine its proposals for further public comment. 35

b. Final Interchange Rule Section 235.3(b)

The Board's final rule adopts a variation of Alternative 2, employing a formula that requires that the charge be no more than "the sum of 21 cents per transaction and 5 basis points multiplied by the value of the transaction." 36 Also, the interim final rule permits an additional one cent per transaction for anti-fraud prevention measures, effective October 1, 2011. 37 Thus, the Board estimated in the announcement of the rules that a covered issuer eligible for the fraud-prevention adjustment could receive a total interchange of up to "24 cents for the average debit card transaction, which is valued at $38." 38

30. Id.
31. Id.
32. Id.
33. Id. at 81756.
34. Id. at 81740.
35. Id. See id. at 81742 for additional discussion of the approaches.
37. Press Release, supra note 5.
38. Id.
2. Debit Card Network “Exclusivity” or Routing

a. Proposed Rule

Proposed section 235.7(a) governed prohibitions on network exclusivity. It provided two alternatives.³⁹ Alternatives A and B differed only slightly. Alternative A provided: "An issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to less than two unaffiliated networks."⁴⁰ Alternative B added to the end of Alternative A the phrase "for each method of authorization that may be used by the cardholder."⁴¹ In addition, proposed subsection 235.7(a) also described how an issuer or payment card network will fail to satisfy the "at least two unaffiliated payment card networks" requirement by one of three means—(i) the unaffiliated network added for this purpose "does not operate throughout the United States, unless the debit card is accepted on a nationwide basis on at least two unaffiliated payment card networks when the network(s) with limited geographic acceptance is combined with one or more other unaffiliated payment card networks that also accept the card";⁴² (ii) "[t]he unaffiliated network(s) that is added . . . is accepted only at a small number of merchant locations or at limited types of merchants";⁴³ or (iii) "[t]he payment card network restricts or otherwise limits an issuer's ability to contract with any other payment card network that may process an electronic debit transaction involving the issuer's debit cards."⁴⁴ In addition, to the extent that a merger or acquisition causes unaffiliated networks to become affiliated and that change of affiliation status results in non-compliance with the general requirements, issuers have no more than ninety days following the new affiliation(s) to add an unaffiliated network.⁴⁵

In addition, the proposed rule prohibited restrictions on routing, providing that an issuer "shall not . . . inhibit the ability of any person that accepts or honors debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions."⁴⁶ Issuers and payment card networks could not set routing priorities that overrode an individual merchant's routing choices so long as the merchant was selecting routing enabled on the particular debit card presented by the customer.⁴⁷

b. The Final Rule

The final rule makes its prohibition on general network exclusivity effective on April 1, 2012, with respect to issuers, and October 1, 2011, with respect to pay-
Developments in the Laws Governing Electronic Payments 265

ment card networks. Its provisions on routing restrictions in section 235.7(b), which mirror those in the proposed rule, went into effect on October 1, 2011, as well. Specific additional effective dates apply to specific kinds of cards. For example, for debit cards that utilize transaction qualification and substantiation systems described in section 235.7, the effective date of the exclusivity provisions will be April 1, 2013. For general-use prepaid cards, the effective dates will vary depending on whether the card is reloadable and when it was sold. For example, non-reloadable cards will be covered on April 1, 2013, unless they are sold prior to that date. Reloadable cards sold and not reloaded prior to April 1, 2013, will be subject to section 235.7(a)'s requirements on April 1, 2013. Cards sold and reloaded prior to April 1, 2013, will become subject to the rule on May 1, 2013. And, finally, cards sold prior to and reloaded on or after April 1, 2013, will become subject to the rule thirty days after they are reloaded.

3. Proposed Exemptions
   a. Proposed Rule

   The Board's proposed rule allowed for the three statutory exemptions from the regulation's operation:

   i. Section 235.5(a)—Exemption for Small Issuers

   As noted above, section 920(a)(6)(A) of the EFTA does not apply its general provisions to issuers that with their affiliates have assets of less than $10 billion. Proposed section 235.5(a)(1) generally follows the language in EFTA sections 920(a)(6)(A) and (B) to implement this exception.

   ii. Section 235.5(b)—Exemption for Government-Administered Programs

   EFTA section 920(a)(7)(A)(i) generally exempts cards used in federal, state, or local government-administered payment programs from the interchange fee restrictions. The Proposed Interchange Regulation implements its requirements "with minor non-substantive changes to the statutory language" in section 235.5(b)(1).

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48. Final Interchange Rule, supra note 5, at 43468 (to be codified at 12 C.F.R. § 235.7(c)(1)-(2)).
49. Id. at 43454.
50. Id. at 43394 (to be codified at 12 C.F.R. § 235.7(c)(3)).
51. Id. (to be codified at 12 C.F.R. § 235.7(c)(4)).
52. Id. (to be codified at 12 C.F.R. § 235.7(c)(4)(i)).
53. Id. (to be codified at 12 C.F.R. § 235.7(c)(4)(ii)).
54. Id. (to be codified at 12 C.F.R. § 235.7(c)(4)(ii)(A)).
55. Id. (to be codified at 12 C.F.R. § 235.7(c)(4)(ii)(B)).
56. See Proposed Interchange Rule, supra note 10, at 81743-45.
57. Id. at 81743.
59. See Proposed Interchange Rule, supra note 10, at 81743.
60. Id. at 81743-44.
62. See Proposed Interchange Rule, supra note 10, at 81744.
iii. Section 235.5(c)—Exemption for Certain Reloadable Cards

The final exemption from Dodd-Frank section 1075 is for certain reloadable prepaid cards. The Board described the scope of this section 1075 exclusion as pertaining to a plastic card, or other payment code or device, that is:

(i) Linked to funds, monetary value, or assets purchased or loaded on a prepaid basis;
(ii) not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis); (iii) redeemable at multiple, unaffiliated merchants or service providers, or automated teller machines; (iv) used to transfer or debit funds, monetary value, or other assets; and (v) reloadable and not marketed or labeled as a gift card or gift certificate.

The proposed regulation, “for clarity,” refers to this category of exemption as involving a “general-use prepaid card.”

b. The Final Rule

The final rule essentially retains the proposed exemptions for small issuers and government-administered programs. It also includes an exemption for debit cards issued by the bank that holds the account to be debited. Certain reloadable cards are also exempt, pursuant to subsections 235.5(c) and (d). However, the exemptions provided in subsections 235.5(b) and (c) will expire on July 21, 2012.

C. TCF NATIONAL BANK v. BERNANKE

On October 12, 2010, TCF National Bank ("TCF") sued the Board of Governors of the Federal Reserve System seeking to enjoin its enforcement of the Durbin Amendment. TCF first argued that the Durbin Amendment was facially unconstitutional as a violation of TCF's substantive due process rights because it prevented TCF from recovering costs and receiving profits associated with debit service. TCF also argued the Amendment denied the equal protection of law guaranteed by the Fifth Amendment because the exemption for banks with assets of less than $10 billion was not rationally related to a legitimate government
The government responded with a motion to dismiss and argued that the court lacked jurisdiction over the claims. The government also maintained that the suit by TCF was not ripe because TCF had not yet suffered harm.

1. The District Court's Denial of the Motion for Preliminary Injunction

The district court denied the plaintiff's motion for a preliminary injunction because it found TCF was unlikely to succeed on either its due process challenge or its equal protection claim. Applying rational basis review for the due process challenge, the court held that the Durbin Amendment was reasonably supported by two proper legislative purposes: "(1) to ensure that such [interchange] fees are reasonable and (2) to prevent retailers and consumers from having to bear a disproportionate amount of costs of the debit card system." The district court also held that TCF would likely not succeed on its equal protection claim because the economic classification in the Durbin Amendment was again supported by rational legislative purposes and thus satisfied rational basis review.

2. The Appeal and the Outcome

The plaintiff appealed the district court's denial of the injunction it sought. On June 29, 2011, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision. The U.S. Court of Appeals for the Eighth Circuit agreed with the district court that TCF was unlikely to win on the merits and did not have a sufficient property interest to raise a due process challenge.

The court of appeals went on to say that a facial Fifth Amendment challenge to a legislative act, such as the Durbin Amendment, must establish that no set of circumstances exists under which the act would be valid, a burden that TCF had not met. The court reasoned that the Durbin Amendment only restricts how much certain financial institutions issuing a debit card may charge for processing a transaction; it does not restrict how much those institutions may charge their customers for the privilege of using their banking services, including debit-card services.

The Eighth Circuit disagreed with TCF's argument that market pressures would prevent it from assessing customer fees because smaller banks exempt from the Durbin Amendment would be able to avoid assessing customer fees.

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72. Id.
73. Id.
74. Id. at *22.
75. Id. at *4–5.
76. Id. at *4.
77. Id. The court noted the defendants' offered rational bases for the exemption of smaller banks: safeguarding smaller institutions from revenue loss resulting from interchange fee regulation and ensuring the availability of debit cards for consumers. Id.
78. TCF Nat'l Bank v. Bernanke, 643 F.3d 1158, 1161 (8th Cir. 2011).
79. Id. at 1162–63.
80. Id. at 1163.
81. Id. at 1164.
noting that evidence suggests that Visa will charge only one interchange fee and thus produce no competitive advantage for smaller banks.\textsuperscript{82} The appellate court held that the Amendment satisfied rational basis review because there is a legitimate government interest in favoring one class of banks—those with assets of less than $10 billion—over larger banks that issue debit cards: protecting smaller banks against their larger counterparts in order to allow for needed diversity in financial services.\textsuperscript{83} As a result, the court held that TCF was unlikely to prevail on the equal protection argument and affirmed in favor of the government on that basis as well.\textsuperscript{84}

D. OTHER EFFORTS TO STOP THE DURBIN AMENDMENT

Even before the Board published its proposed Interchange Fee regulations, congressional efforts to halt implementation of the Durbin Amendment had begun. Chief among them were S. 575\textsuperscript{85} and H.R. 1081,\textsuperscript{86} which would have delayed the effective date of the regulations and required a study of the effects.\textsuperscript{87} These efforts culminated in the June 2011 failure of S. 575 (introduced by Senators Tester and Corker) to get the sixty votes needed for approval.\textsuperscript{88} Retailers hailed the Senate vote.\textsuperscript{89}

As a result of the failure of congressional efforts to repeal or delay the Durbin Amendment and the dismissal of TCF's constitutional challenge, the final rule and interim final rule are ready to go into effect as the Board's June 29, 2011, actions require.

III. TREASURY DEPARTMENT ADOPTS INTERIM FINAL RULE ON GARNISHMENT FOR ACCOUNTS CONTAINING FEDERAL BENEFITS PAYMENTS

Last year's survey\textsuperscript{90} reported on a Treasury proposal to protect federal benefits payments in bank accounts from garnishment.\textsuperscript{91} Federal law exempts benefits payments, including Social Security benefits, Supplemental Security Income (SSI) benefits, federal railroad retirement benefits, federal railroad unemployment and

\textsuperscript{82} Id.
\textsuperscript{83} Id. at 1165.
\textsuperscript{84} Id.
\textsuperscript{86} Consumers Payment System Protection Act, H.R. 1081, 112th Cong. (2011).
\textsuperscript{89} See Russell Redman, Retailers Hail Senate Vote on Debit Card Fees, CHAIN DRUG REV. (June 9, 2011), http://www.chaindrugreview.com/front-page/newsbreaks/retailers-hail-senate-vote-on-debit-card-fees (citing, inter alia, representatives of the Food Marketing Institute, Retail Industry Leaders Association, and National Retail Federation).
\textsuperscript{90} 2010 Survey, supra note 12, at 170–73.
sickness benefits, Civil Service Retirement System benefits, and Federal Employee Retirement System benefits from garnishment. Protections for these benefits payments continue after their deposit into accounts at financial institutions, unless the garnishor is the United States government or certain individuals entitled to garnish even otherwise protected federal benefits.

On February 23, 2011, the Department of the Treasury published its interim final rule and requested comments on the interim final rule. The interim final rule covers every financial institution that holds accounts to which designated federal agencies directly deposit federal benefit payments, and "account holders" who are "natural persons against whom a garnishment order is issued and whose name appears in a financial institution's records as the direct or beneficial owner of the account." This section addresses the provisions of the Department's interim final rule implementing most of the provisions of the original proposal.

A. PROCEDURES TO BE FOLLOWED BY FINANCIAL INSTITUTIONS THAT RECEIVE GARNISHMENT ORDERS DIRECTED AT A DEPOSIT ACCOUNT

The interim final rule sets forth procedures that financial institutions must follow when they receive garnishment orders against account holders who receive certain benefit payments by direct deposit. Following an initial determination that the garnishment order is not served for the United States or a state or federal child support enforcement agency, the interim final rule requires financial institutions that receive garnishment orders to determine whether exempt federal benefits payments were deposited into the account during the two-month period immediately preceding their account review (the "lookback period") and ensure that the account holder enjoys access to amounts equal to the sum of benefits, or to the current

93. See Interim Final Garnishment Rule, supra note 13, at 9939.
94. See id. at 9956.
95. Id. at 9939. The comment period on the interim final rule closed on May 24, 2011. The final rule had not been adopted as of June 19, 2011, the date that research for this survey was completed. The interim final rule will be codified, respectively, at 5 C.F.R. pts. 831 & 841 (Office of Personnel Management); 20 C.F.R. pt. 350 (Railroad Retirement Board); 31 C.F.R. pt. 212 (Department of the Treasury); and 38 C.F.R. pt. 1 (Department of Veterans Affairs).
96. Id. at 9949.
97. Id. at 9949-50. The term "account" does not include an account to which a benefit payment is subsequently transferred following its initial delivery by direct deposit to another account. Id. at 9950.
98. Id. at 9956-58.
99. Id. at 9956.
100. Id. at 9956-57. The lookback period specifically captures "the two month period that begins on the date preceding the date of the 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." Id. at 9956. Examples of the application of the "lookback period" definition are found in Appendix C to the Interim Final Garnishment Rule. Id. at 9960.
balance in the account, whichever is lower.\textsuperscript{101} The interim final rule also requires financial institutions to notify account holders of protections from garnishments for exempt federal benefits.\textsuperscript{102} It also prohibits charges or collection of a garnishment fee against a protected amount, and also prohibits garnishment fees after the date of account review.\textsuperscript{103} As mentioned in the 2010 survey, "[t]his anti-garnishment/bank-safe-harbor proposal represents a rare case in which interests of financial institutions and consumer account holders align against the interests of third parties."\textsuperscript{104}

**B. Determining Which Credits in an Account Are Protected**

Benefit payments protected by the interim final rule are limited to those that include an "XX" in positions 54 and 55 of the Company Entry Description field in the Batch Headers Record of the direct deposit entity.\textsuperscript{105} The "protected amount" of federal benefits in deposit accounts will include only "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 the account review."\textsuperscript{106}

**C. Specific Steps Required of Financial Institutions That Receive Garnishment Orders**

On receipt of a garnishment order, the interim final rule requires financial institutions to take a series of steps. Following the original determination described in the preceding subsection of this survey, the financial institution has two options. First, the threshold step is to determine whether the garnishment order was obtained by the United States or a state child support enforcement agency.\textsuperscript{107} If so, then the financial institution may follow its otherwise customary procedures for handling the garnishment order.\textsuperscript{108} If others are attempting to garnish the account, sections 212.5 and 212.6 require that financial institutions take additional steps.\textsuperscript{109} First, the institution must review the account's history "to determine if a benefit payment was deposited to the account during the lookback period."\textsuperscript{110} This review generally should be concluded within two business days of the garnishment order's receipt.\textsuperscript{111} In cases in which (1) there is insufficient information to determine that the debtor is an account holder, or (2) someone serves the institution with a batch of garnishment orders, the two-day rule does not apply

\begin{itemize}
  \item \textsuperscript{101} Id. at 9956–57.
  \item \textsuperscript{102} Id. at 9957–58 (financial institutions' responsibility to give notice to account holder).
  \item \textsuperscript{103} Id. at 9957 (prohibiting collection of garnishment fees).
  \item \textsuperscript{104} 2010 Survey, supra note 12, at 172.
  \item \textsuperscript{105} Interim Final Garnishment Rule, supra note 13, at 9950.
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id.
\end{itemize}
and the deadline is extended to whatever date is permitted under the garnishment orders. In cases in which the account review reveals no benefit payment deposits during the lookback period, the institution should follow its otherwise customary procedures for handling garnishment orders. If benefit payments were deposited to the garnishee's account during the lookback period, then the institution must follow the procedures set forth in section 212.6.

**D. Specific Changes from Prior Rules Affecting Garnishment Orders Addressed to Financial Institutions**

Additional provisions in section 212.5 deserve attention before we move on to section 212.6's procedures. Unlike in the recent past, institutions will benefit from the new regulation because they will not have to consider (a) the commingling of exempt and non-exempt funds in the garnishee's accounts, (b) the fact of co-ownership of accounts, (c) deposits for multiple federal benefits beneficiaries to one account, or (d) any instructions or information in the garnishment order, including information about the nature of the debt or obligation underlying the garnishment order. In addition, financial institutions must perform the account review before taking any action pursuant to the order that might affect funds in the account. Finally, subsection 212.5(f) provides that (1) the institution should conduct separate account reviews for each account owned by any individual against whom a garnishment order has been issued, regardless of the number of accounts the garnishee may have at the institution, and calculate and protect separately sums consistent with the lookback period rules described above, and (2) the institution need not calculate or protect sums transferred from the account into which they were originally deposited into other accounts.

**E. Additional Requirements on Institutions that Receive Garnishment Orders**

When the account review discloses protected benefits in an account, section 212.6 imposes other requirements on financial institutions. If the institution determines that exempt federal benefits were deposited during the lookback period, then it must:

- calculate the protected amount, as section 212.3 defines it;
- not freeze the account or otherwise restrict the account holder's access to the protected amount;

112. Id. This extension does not apply to cases in which the institution receives multiple separate garnishment orders on the same date. See id. (describing the operation of 31 C.F.R. § 212.5).
113. Id.
114. Id.
115. Id.
116. Id.
117. Id. This means that portions of benefits later transferred to a savings account need not be protected.
118. Id. at 9951.
119. Id.
provide "full and customary access" to protected amounts;\textsuperscript{120} and

not require of the account holder any action prior to accessing protected amounts.\textsuperscript{121}

In addition, subsection 212.6(b) requires that calculations of protected amounts be made for each account to which federal benefits were originally deposited, regardless of how many accounts this may be, if the name of the account holder is the name of the garnishee.\textsuperscript{122} Subsection 212.6(c) also provides that the protected amount is conclusively considered exempt from garnishment under the law.\textsuperscript{123} Account holders are entitled to notice from the financial institution in a form and in a time frame dictated by section 212.7.\textsuperscript{124} There is no duty to send a notice if the account review shows a zero or negative balance on the date of the review.\textsuperscript{125}

\section*{F. SPECIAL RULES FOR SERVICE OF THE SAME GARNISHMENT ORDER MORE THAN ONCE}

Special procedures apply to institutions that receive the same garnishment order for the same individual more than once. In these cases, subsection 212.6(f) provides that the institution must perform the account review only once, on the first service of the specific garnishment order.\textsuperscript{126} However, the institution must still protect the account holder's access to the protected amount regardless of the receipt of more than one copy of the same garnishment order.\textsuperscript{127} If the institution receives a new or different garnishment order against the same account, it must conduct a new account review and act accordingly.\textsuperscript{128}

Subsection 212.6(g) protects amounts deposited or credited to the protected account following the account review.\textsuperscript{129} It also prohibits freeze or other action against subsequent deposits or credits until a new or different garnishment order issues and is served on the institution.\textsuperscript{130} This provision protects account balances from the application of "continuing" garnishment orders that some states allow.\textsuperscript{131} Accordingly, the institution incurs no obligation to monitor, preserve, or remit funds coming into the garnishee's custody on an ongoing basis.\textsuperscript{132}

\begin{footnotesize}
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 9957 ("The financial institution shall not ... take any ... action related to the order if the same order is subsequently served again upon the financial institution.").
\textsuperscript{128} Id. at 9951.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. (explaining the operation of subsection 212.6(g)).
\end{footnotesize}
G. Prohibition on Charging or Collecting Garnishment Fees from Protected Amounts

Finally, subsection 212.6(h) prohibits the institution from charging garnishment fees against the protected amount, and also prohibits the subsequent charging or otherwise collecting of a garnishment fee after the date of the account review on a retroactive basis.133

H. Requirements for Notices Sent by Financial Institutions to Account Holders

Subsection 212.7(b) describes the content of the notice that financial institutions must send account holders when the institution is served with a garnishment order. The notice must mention that the institution has received a garnishment order and describe briefly what a garnishment is, as well as provide information about the account holder's rights.134 The interim final rule provides a model notice in Appendix A to the Rule. Use of the model notice is conclusive evidence of compliance with the notice requirement, but use of the model notice is optional.135 The institution must deliver the notice directly to the account holder and may not include information not related to the garnishment in the notice.136 The institution must send the notice within three business days from the date of the account review.137 The institution may send one notice to account holders with multiple accounts.138 Subsection 212.7(c) allows the institution to include additional information in the notice, specifically:

- 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.139

Moreover, subsection 212.7(d) allows the institution to modify the notice to discuss the particular state's garnishment laws and protections, or to avoid confusion regarding the interplay of the Rule and state requirements, or to provide more comprehensive information about the account(s) involved.140

I. Preservation of Other Federal Rights to Keep Funds Exempt from Garnishment

The interim final rule does not alter or limit rights that account holders may have under federal law to claim exemption from garnishment or otherwise alter

133. Id.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
the exempt status of funds in the account, such as, for example, when the funds were not credited or deposited by direct deposit. As a result, funds deposited by check remain exempt and the account holder should continue to follow procedures in place under specific federal laws to protect those funds from garnishment. Moreover, the rule does not alter the exemption status of funds in excess of the protected amounts.

**J. Rights Under the Interim Final Rule May Not Be Altered by Agreement**

With a single exception provided in subsection 212.10(d)(3), bank-customer agreements may not alter the rule's requirements. Effectively, as the explanation states, section 212.8 precludes both a waiver in any agreement or provisions inconsistent with the rule's provisions in a bank-customer agreement. The exception covers cases in which the account holder instructs the financial institution, in a writing dated after the date of service of the garnishment order, to use exempt funds to satisfy the order.

**K. Access to Protected Funds Remains Subject to Regulation CC**

Section 212.6 preserves the application of deposit availability rules provided by Regulation CC on all funds in the accounts the rule otherwise protects. Similarly, a limitation on withdrawal in a time-deposit agreement also would apply to funds in accounts protected by the rule.

**L. Preemption of State Laws by the Interim Final Rule**

The interim final rule employs conflict preemption as its applicable preemption rule. As the explanation describes:

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 deposited in 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 laws.

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141. Id. at 9951, 9958.
142. Id. at 9951.
143. Id.
144. Id.
145. See id. at 9951, 9958.
146. Id. at 9951.
148. Interim Final Garnishment Rule, supra note 13, at 9951–52.
149. See id. at 9952.
Developments in the Laws Governing Electronic Payments

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. 150

M. SAFE HARBOR FOR FINANCIAL INSTITUTIONS THAT COMPLY WITH THE RULE

Section 212.10 provides a safe harbor for institutions that comply with the rule from liability to judgment creditors. 151 This safe harbor applies even where a judgment creditor established that funds in the account at the time of service of the garnishment order were non-exempt deposits, and where funds were withdrawn from the account during the two-day period during which the institution performed the account review. 152

N. ENFORCEMENT OF THE RULE

Federal banking agencies will enforce compliance with the rule pursuant to section 212.11. The interim final rule does not specify how violations of the rule will be enforced against financial institutions not holding federal charters. The enforcement provision also specifies record retention requirements, including both the records of account activity and actions taken, for a period of not less than two years from the date of receipt of the garnishment order. 153

IV. DEVELOPMENTS IN STATE PAYROLL AND GIFT CARD LAWS

Since 2007, this survey has reviewed developments in state laws governing payroll cards and gift cards. The states have continued to enact new laws on these two subjects, despite the Board’s coverage of payroll cards under Regulation E, 154 and Congress’s reach into the regulation of gift cards in the Credit CARD Act of 2009. 155

A. STATE PAYROLL CARD LEGISLATION AND OTHER DEVELOPMENTS

States continue to enact legislation to govern the use of payroll cards by employers. As of March 21, 2011, nineteen states have enacted statutes or issued regulations or agency guidance directly addressing payments of wages by payroll cards. 156

150. Id. (describing section 212.9 of the Interim Final Garnishment Rule).
151. Id.
152. Id.
153. Id.
B. State Gift and Stored Value Card Legislation

States continue to enact and amend laws affecting the issuance, redemption, and escheat of value in gift and other general-purpose stored-value cards. The most recent compilation of legislation available online was published by the National Conference of State Legislatures.\(^{157}\) Five states have enacted or amended their laws on gift or stored-value cards. For example, Michigan enacted legislation that escheated gift card value if the card had not been used for three years after becoming payable or distributable.\(^{158}\) New Jersey amended its gift card laws, specifically including a more aggressive escheat rule to cards, traveler's checks, money orders and other "similar instruments."\(^{159}\) The law's effective date was November 15, 2010.\(^{160}\) The amendments (a) imposed escheat priority rules based on a presumption that the place of purchase would govern the state's right to escheat funds,\(^{161}\) (b) applied the presumption retroactively to cards, traveler's checks, money orders, and other "similar instruments" issued before July 1, 2010,\(^{162}\) and (c) required issuers of affected payment devices and instruments to record names and street addresses of purchasers or owners—or the purchaser's zip code—if that information is not collected in the ordinary course of business.\(^{163}\) Florida's new gift card laws provide more protection for consumers than the CARD Act and its implementing Federal Reserve Board regulations provide. For example, "closed loop cards" purchased in Florida never expire; the CARD Act allows for expiration dates five years after purchase.\(^{164}\) In addition, cards sold in Florida may not carry fees; the Act and FRB regulations place no limit on fees one year after issuance if the card has not been used.\(^{165}\) The other states that have amended their gift card laws in some respects since the 2010 survey, include Hawaii\(^{166}\) and Louisiana.\(^{167}\)

Some states continue to regulate gift and general-use stored-value cards only under their abandoned property or escheat statutes.\(^{168}\) A few states mandate that gift cards sold after specified dates must be redeemable for cash,\(^{169}\) or that

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\(^{161}\) N.J. Stat. Ann. § 46:30B-42.1(c) (West 2003 & Supp. 2011) (requiring issuers to obtain the name and address of the purchaser or owner and, "at a minimum, [to] maintain a record of the zip code of the owner or purchaser" (emphasis added)).

\(^{162}\) Id. § 46:30B-6.

\(^{163}\) Id. § 46:30B-42.1(c).


\(^{165}\) See id.


Developments in the Laws Governing Electronic Payments

balances remaining on cards below specified amounts may be redeemed for cash. At least one state, Kansas, expressly does not require merchants to redeem gift cards or gift certificates for cash.

C. SOME WINS, SOME LOSSES IN HIGH-STAKES NEW JERSEY STORED-VALUE DECISION

Among the most intriguing developments involving gift and other stored-value cards is the court’s decision in American Express Travel Related Services Co. v. Sidamon-Eristoff, which provides a comprehensive discussion of tensions between issuers of stored-value cards, holders of these cards, and states interested in applying their escheat or abandoned property statutes to balances on gift and stored-value cards. American Express and other plaintiffs sought an injunction on multiple federal constitutional grounds against enforcement of New Jersey’s 2010 amendments to its Unclaimed Property Law. The amendments were scheduled to take effect on November 15, 2010. The defendants, including the New Jersey treasurer, opposed the motion for injunction and moved to dismiss. The court granted in part and denied in part the requests for preliminary injunction in an opinion that runs ninety-two pages long.

Among the key features of Judge Freda L. Wolfson’s decision as to gift and other stored-value cards were her issuance of a preliminary injunction against the state enforcing a presumption relating to the place of purchase found in Chapter 25 and some subsequent “Guidances” issued by the state treasurer—that otherwise would have created escheat powers in “a forum having no continuing relationship to any of the parties to the proceedings”—for which the court found no support. In addition, the court enjoined enforcement retroactively against issuers of stored-value cards with existing stored-value card contracts that obligate the issuers to redeem the cards solely for merchandise or services.

Additionally, the court concluded that Chapter 25 is not preempted by the CARD Act because Chapter 25 affords “greater protection” to consumers in that Chapter 25 (a) imposes “no time restriction on the consumer’s right to recover his or her funds,” and (b) also converts the value in a gift or general-purpose card “into 100% cash value.” Accordingly, the court concluded that the stored-value

171. KAN. STAT. ANN. § 50-6,108(b) (West Supp. 2010).
173. Id. at 562 n.1.
174. Id. at 563.
175. Id. at 599, 606.
176. Id. at 615.
177. Id. at 592.
178. Id.
card plaintiffs in the action had not demonstrated a likelihood of success on the merits of their CARD Act preemption claim.\footnote{Id.}

V. CONCLUSION

As of June 29, 2011, efforts to alter the composition, powers, and funding of the new Bureau of Consumer Financial Protection that Title X of the Dodd-Frank Act created are still underway.\footnote{See Jennifer Liberto, Republicans Target Consumer Bureau, CNN.com (Feb. 24, 2011, 12:30 PM), http://money.cnn.com/2011/02/24/news/economy/republicans_target_consumer_bureau/index.htm (CNN coverage of Republican members' attempts to cut the Bureau's budget).} The Bureau is scheduled to receive the transfer of authorities and new powers and funding that Title X provides it on July 21, 2011.\footnote{See Consumer Fin. Servs. Grp., Dodd-Frank Act “Designated Transfer Date” Announced; Elizabeth Warren Named to White House, Treasury Positions, BALLARD SPAHR LLP (Sept. 21, 2010), http://www.ballardspahr.com/AlertsPublications/LegalAlerts/2010-09-21_DoddFrankDTDAnnnounced.} The recent effort to delay implementation of the Durbin Amendment failed, as did the constitutional challenge brought by TCF, but probable regulatory challenges to the final regulation lie ahead of us.

Last year's survey concluded: “Looking just over the horizon, we see a new year with a new Bureau of Consumer Financial Protection and new authority, and, accordingly, more to cover in next year's survey.”\footnote{2010 Survey, supra note 12, at 173.} It seems that the next survey is likely to bring even more to cover, including whatever the 112th Congress, the new Consumer Financial Protection Bureau, the states, and private parties may do next.