# Garnishments Move from Back Office to Compliance Spotlight with Recent CFPB Order

Compliance Concerns after CFPB fines bank for improper garnishment practices

Published in ABA Bank Compliance Magazine, Sept/Oct 2022
By Lynn Reilly, VP of Customer Engagement, Safari SOP

Until recently, processing account garnishments was a routine back-office function that typically received little attention from management. That changed in May 2022, when a Consumer Financial Protection Bureau (CFPB) consent order put a spotlight on account garnishments as a compliance concern.

Finding that Bank of America had engaged in unfair and deceptive garnishment practices, the CFPB levied a $10 million fine and ordered at least $592,000 be refunded to customers. The enforcement action also requires the institution to reform its processes and modify its deposit account agreements. (See: Consumer Financial Protection Bureau Newsroom 05/02/22)

The order's potentially broader implications warrant attention from compliance professionals. The CFPB's jurisdiction reaches only entities with assets over $10 billion, but any financial institution that continues practices inconsistent with the order may risk becoming the target of other regulatory agencies or consumer class action litigation. To avoid risks of potential liability, negative publicity, and business disruption, every financial institution should revisit its garnishment response processes in light of the order.

## BACKGROUND ON ACCOUNT GARNISHMENTS

State laws governing account garnishment procedures differ, but can be condensed to a few common elements. First, a garnishor serves notice on the garnishee financial institution (FI). The FI may then conduct legal analysis to determine whether service is proper, whether the issuing court has jurisdiction, which law applies to the garnishment process, and which law governs the amount and sources of funds exempt from seizure.

Having confirmed that a notice is valid, the garnishee seizes the debtor's assets (typically either by freezing funds within the debtor's account or transferring funds to a separate general ledger account). Usually, this happens the same day the order is served.

Some jurisdictions also require a form of written response, for example, to provide information on the debtor's assets. Either the law or the garnishee's policy may also entail notice to the debtor, and the debtor may have an opportunity to object.

While the matter is pending, the garnishee must track:

- Any partial or full release of the underlying obligation;
- The timing of and triggers for payment (either after a waiting period lapses or after an additional court order issues);
- Funds paid to the garnishor; and
- Fees that it may charge the debtor and garnishor.

There can be limits on what funds can be garnished. For example, the CFPB cited the bank for not limiting garnished funds to accounts located in the same state as the court that ordered the garnishment. Note that these limits apply only in some states.

## Compliance Challenges

The garnishment process presents compliance challenges, including managing the sheer volume of incoming orders. BofA, for example, processed hundreds of thousands of account garnishments between 2011 and 2022. Even a small FI can receive thousands annually.

A garnishment notice calls for prompt action to prevent a debtor from withdrawing the targeted funds. The CFPB order sanctioned the bank for seizing customer funds improperly, but the bank could also have incurred liability to garnishors had it *failed* to timely seize funds.

Each garnishment requires tracking of financial details: account information, exemptions applied based on source and amount of funds, amount owing, any releases, and payments to the creditor.

Finally, the underlying law is complex and varies substantially by state. Case-specific relevant facts can include the location of the issuing entity, the account location, sources of funds, and the debtor's state of residence. Legal questions include proper service, jurisdiction, and choice of law for the garnishment itself and the applicable exemptions.

The CFPB's somewhat ambiguous order—added to an already complex backdrop of state law— has created uncertainty for FI's about whether policy or process changes may be warranted.

## THE CFPB'S FINDINGS

The CFPB's lengthy findings of unfair and deceptive practices principally relate to three specific practices.

1. The Bank processed "out of state garnishments" prohibited by some states' laws.

Several states, called "restriction states," prohibit "out-of-state garnishment"; that is, a garnishment directed to an account located in a state other than the issuing state. Rather than distinguishing between restriction states and non-restriction states, the bank generally treated all garnishments alike: if the notice issued from a state where it had a financial center, the bank provided information on the debtor's accounts, seized funds, and paid creditors—without regard to account location. (The CFPB referred to the bank's deposit agreement to determine account location.) The bank also collected fees for these garnishments.

2. The Bank incorrectly applied state law exemptions.

Federal law and many state laws exempt certain amounts and sources of funds from garnishment. When the bank was required to apply exemptions on the customer's behalf, it applied the exemption laws of the issuing state. The CFPB found that the bank should instead have applied the law of the state where the customer resided, noting that "most states" require that their own exemptions apply to residents.

This finding raises three noteworthy points:

- The order does not acknowledge that determining "residence" might raise either a legal question or a practical obstacle (for example, if a customer has more than one home).
- The CFPB required the bank to "accurately and consistently apply the correct state's exemptions," but does not clarify whether that always means the customer's state of residence.
- Choice of law for exemptions—whether the issuing state or the customer's state of residence—is considerably less clear than the order might suggest.

3. The Bank's deposit agreement imposed waivers of customers' legal rights.

In the Bank's deposit agreement, customers "directed" the bank not to contest and absolved it of liability for following legal processes including account garnishment. The CFPB found that including these provisions and relying on them when customers complained about account garnishments were unfair and deceptive practices because they misrepresented customers' rights.

# PENALTIES AND REQUIREMENTS IMPOSED ON THE BANK

## Monetary penalties

The Bank agreed to pay a $10 million penalty to the CFPB and to refund at least $592,000 in fees charged to customers. The order specifies that this penalty should not offset against damages assessed in any related consumer litigation.

## Provisions for out-of-state garnishments and exemptions

In addition to prohibiting the specific practices addressed, the order imposes affirmative requirements including the following:

- Compile accurate information on states' out-of-state garnishment laws and exemptions and implement compliance policies and procedures accordingly. Train personnel and monitor compliance.
- Provide notice to the issuing entity when no account is located in the issuing state, notice to the debtor with details of the garnishment, and in some states, notice to the debtor of their rights to assert exemptions.
- Revise deposit agreements to exclude any waivers of customer rights regarding garnishments.

## Enhanced regulatory oversight

The order imposes the typical ongoing, detailed CFPB oversight, which will place the bank under ongoing scrutiny while it remediates its garnishment processes. The reporting burdens may ultimately prove to be the most onerous sanction, and include these specific requirements:

- Develop and submit for CFPB approval a compliance plan with detailed steps and timeline for implementation. Provide staffing and resources necessary to comply.
- Submit for CFPB approval a redress plan for repaying fees, including template customer communications, deadlines, and details on customers, payments, and how affected customers will be identified and payments calculated, tracked, and distributed.
- Provide comprehensive reporting on "the manner and form in which Respondent has complied with ... the Consent Order" (including contact information for everyone processing garnishments for BofA).

# GARNISHMENT COMPLIANCE AFTER THE CFPB ORDER

While garnishments and the CFPB consent order present certain complexities, ultimately, fundamentals familiar to compliance professionals are the foundation for success. An effective compliance program entails at least these elements: a compliant policy, an individual responsible for the function, staff training, a system to facilitate execution, and feedback and audits.

## Develop a compliant policy

In response to the order, compliance professionals should review deposit agreements and garnishment response practices to identify appropriate changes. The right answers will vary with each FI's circumstances. For example, compliance for smaller FIs located in only one or two states may be considerably simpler than for larger entities.

Perhaps the most important policy decision is how to determine which state's laws govern whether the garnishment is valid and which exemptions apply. This decision may implicate an FI's deposit agreement. Any policy decision likely will involve weighing the risks of non-compliance—with the CFPB order or with state law—against the practical challenges of administration.

For example, assume an FI adopts a policy that strictly adheres to the order. For each garnishment, the FI would identify the issuing state, the account location, and the debtor's current state of residence. The order suggests (with some ambiguity) that the issuing state's law governs garnishment procedures, while the debtor's state of residence "usually" determines exemptions. In practical effect, discerning the underlying facts, determining applicable law for the garnishment itself and for exemptions, and accurately executing legal requirements could potentially involve legal personnel in every garnishment. That consideration must be balanced against the competing requirements of practicable process and timely execution. In addition, an FI following such a policy may dispute more garnishments and, as a result, respond to more challenges from creditors' attorneys (who likely will cite state garnishment law rather than the CFPB order).

Alternatively, an FI could provide in its deposit agreement that it will apply the laws of the issuing state. That would dramatically simplify administration and reduce the risk of challenge by creditors' attorneys. However, it is unclear from the order whether the CFPB would likewise find that approach to be an unfair practice or in violation of consumer protection laws.

In short, understanding the CFPB's potentially inconsistent requirements across multiple states involves legal analysis beyond the scope of this article. It is prudent for every FI to consult with legal counsel about the order, the risks it raises, and the optimal balance of risk versus the practical realities of handling garnishments.

FIs should also reconsider customer notification policies. The order requires that the Bank notify customers of garnishments (unless prohibited by law), identifying accounts and account locations, the issuing entity, and the customer's state of residence as determined by current records. Similar notices may be a wise risk mitigation step for other FIs, and with automation, they should create only minimal administrative burden.

Finally, a policy should include plans for recordkeeping and auditing, as well as feedback to correct any deficiencies. The order sets out a long list of details to be collected for each garnishment, information which likely is appropriate for retention in any case.

## Implement procedures and systems for ongoing audits, feedback, and deficiency correction

Because garnishment response has generally been considered a routine, low-profile function, tools and systems may also need updating. Typically, back-office staff handle garnishments with spreadsheets or homegrown systems. A modern software solution will streamline processing and aid compliance.

Whatever system an FI uses, the following are recommended practices.

- Organize everything in one system. Storing relevant information in multiple sources makes effective oversight and auditing cumbersome, if not impossible.
- Require entry of key data points for compliance and consistency, (for example, the locations of the issuing state, debtor residence, and account).
- Limit manual work. A system should prompt next steps and track due dates (for example, to seize funds, answer interrogatories, or make payment), generate standard documents such as customer notices, and minimize steps needed to capture account and payment information.
- Configure compliance alerts. Automatically generated alerts (for example, for lack of jurisdiction or an out-of-state garnishment) minimize risk of error.
- Make reports easily accessible. Built-in and configurable reporting enables feedback and management oversight.

# TURNING THE CHALLENGES OF THE CFPB ORDER INTO OPPORTUNITIES

To avoid potential liabilities of non-compliance with the CFPB order, FIs should promptly assess current policies and practices. While the CFPB may have drawn attention to and created ambiguity about an often-overlooked process, compliance professionals may also find opportunity to both reduce risk and improve efficiency.

## About the Author

Lynn Reilly is VP of Customer Engagement at Safari SOP, which provides garnishment and subpoena processing systems. She assists Safari customers in implementing efficient and compliant processes. Lynn has 25 years of legal experience as in-house counsel, in private practice, and with providers of legal technology. She has practiced in the e-discovery group at K&L Gates and as Senior Corporate Counsel for e-Discovery at T-Mobile. Reach her at lynn@safarisop.com.

## About Safari SOP

Safari SOP is the only purpose-built solution for legal order processing teams handling account garnishments, levies, subpoenas, and document requests. Learn more at SafariSOP.com

- Sign up for a demo of Safari: safarisop.com/demo
- View other articles and resources: safarisop.com/resources
- Contact Mark Hentschell, VP of Sales at mark@safarisop.com or 425.298.3620