A Comment on *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, by Allen C. Myers

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In his Note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*,[1] Allen Myers provides a comprehensive analysis of the seemingly intractable problem of judgment creditors depriving recipients access to electronically deposited exempt federal benefits by garnishing their bank accounts. Mr. Myers addresses the state law process of garnishment and the constitutional issues that arise when that process freezes recipients' access to exempt benefits.[2] Mr. Myers then analyzes potential methods to resolve these problems concluding that a statute requiring banks to protect a recipient's benefits provides the best solution.[3] Although I agree that a comprehensive solution requires imposing a statute or regulation upon banks accepting electronic deposits of federal benefits, I suggest a partial solution that Treasury could provide by contract with Financial Agents to disburse benefits.

Since 1996, Treasury has conducted an intensive effort to persuade recipients of federal benefits to open bank accounts and receive benefits by electronic funds transfer (EFT) to their accounts, rather than by paper checks.[4]

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1. Allen Myers, Note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, 66 WASH. & LEE L. REV. 371 (2009).

2. *Id.* at 385–403.

3. *Id.* at 403–21.

4. Treasury launched this effort in response to the enactment of the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(x)(1)(A), 110 Stat. 1321-358, 376 (1996) (codified as amended in 31 U.S.C. § 3332). The Act provided that, unless the Secretary of the Treasury granted a waiver, "all Federal payments made after January 1, 1999, shall be made by electronic funds transfer." 31 U.S.C. § 3332(f)(1) (2000). Although Treasury had used EFT for more than 20 years and adopted the goal of becoming an "All-Electronic Treasury," the enactment of the Debt Collection Improvement Act of 1996 (DCIA) prompted Treasury to intensify its promotion of EFT and efforts to market its electronic payment programs. *See* Management of Federal Agency Disbursements, Interim Rule with Request for

Although Treasury initially labeled this effort as the EFT '99 initiative,[5] the Department now formally calls the effort its "Go Direct" program[6] but frequently refers to it as its Direct Deposit program.[7] One consequence of the Direct Deposit program is to subject a participating recipient of Social Security benefits[8] to the risk that by garnishing her bank account a judgment creditor can deny the recipient her access to benefits. Subject to limited statutory exceptions,[9] Social Security benefits are exempt from legal process.[10] Because the exemption applies to benefits "paid or payable," Social Security benefits

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Comments, 61 Fed. Reg. 39,254, 39,254 (proposed July 26, 1996) (codified at 31 C.F.R. pt. 208 (2008)) [hereinafter Disbursements, Interim Rule].

5. Press Release, U.S. Dep't of the Treasury, Statement of the Honorable John D. Hawke, Jr., Under Sec'y of the Treasury for Domestic Finance, Before the House Committee on Banking and Financial Services (Sept. 25, 1997), http://www.treas.gov/press/releases/rr1957.htm (on file with the Washington and Lee Law Review).

6. Go Direct homepage, http://www.godirect.org (last visited Feb. 5, 2009) (on file with the Washington and Lee Law Review).

7. *See Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 110th Cong. (2008) [hereinafter Grippo, *Protecting Beneficiaries*], *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=7094 (testimony of Gary Grippo, Deputy Assistant Secretary for Fiscal Operations, U.S. Department of the Treasury) ("Direct Deposit is a payment program for consumers who authorize the deposit of payments automatically into a checking or savings account via the Automated Clearing House (ACH) network.") (on file with the Washington and Lee Law Review).

8. There are multiple federal programs that pay benefits that are exempt from legal process. *See* Myers, *supra* note 1, at 372 n.3. Most of the controversy over the garnishment of exempt federal benefits deposited by EFT into a recipient's bank account has focused upon old-age, survivors, and disability insurance payments under Title II of the Social Security Act, 42 U.S.C. §§ 301–1399 (2006). Although the issues I discuss arise in all programs in which Treasury's Financial Management Services disburses exempt benefits, in an attempt to keep the analysis from becoming overly cumbersome, I will limit my discussion to old-age, survivors, and disability payments. For the same reason, I will follow the common practice of referring to these payments as Social Security benefits.

9. Social Security benefits can be garnished to collect court ordered alimony and child support. 42 U.S.C. § 659 (2006). The Internal Revenue Service can levy against Social Security benefits to collect unpaid taxes under 26 U.S.C. §§ 6331(h), 6334(c) (2006). Under the DCIA other federal agencies can recover non-tax debts by administrative set-off against Social Security benefits. 31 U.S.C. § 3716 (2000); *see also* Myers, *supra* note 1, at 382–83 (analyzing exceptions to the exemption of Social Security benefits).

10. 42 U.S.C. § 407(a) provides:

> 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) (2000).

remain exempt after the beneficiary receives payment.[11] Moreover, the benefits retain their exempt status after they are deposited in the beneficiary's checking or other demand account, provided that the benefits remain reasonably identifiable.[12] Nevertheless, many banks respond to a garnishment by freezing the bank account to which EFT benefits payments have been credited.[13] The freeze not only deprives the recipient of access to her exempt benefits, but also frequently results in the assessment of substantial fees that the bank may collect from the recipient's exempt benefits.[14] Additionally, to obtain relief from the freeze and regain access to her exempt benefits, the recipient may be required to appear in the garnishment proceeding to establish her exemption and prove

11. *See* Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973) ("[Section 407] does not refer to any 'claim of creditors'; it imposes a broad bar against the use of any legal process to reach all social security benefits.").

12. *See* Porter v. Aetna Cas. & Sur. Co., 370 U.S. 159, 162 (1962) (finding veterans' benefits deposited in a federal savings and loan account not to be investments but rather the only funds available to meet petitioner's needs and thus retaining their statutory exempt status); S & S Diversified Servs. v. Taylor, 897 F. Supp. 549, 552 (D. Wyo. 1995) ("Social Security benefits are protected from attachment, levy and garnishment even if they are comingled with funds from other sources. . . . Similarly, [these] benefits deposited in a joint bank account retain their exempt status if they are readily traceable.") (citations omitted).

13. *See* OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., PUBL'N NO. A-15-08-28031, CONGRESSIONAL RESPONSE REPORT: FINANCIAL INSTITUTIONS DEDUCTING FEES AND GARNISHMENTS FROM SOCIAL SECURITY BENEFITS 6 (2008) [hereinafter SSA REPORT], *available at* http://www. ssa.gov/oig/ADOBEPDF/A-15-08-28031.pdf (noting that seven out of nineteen financial institutions reliably reported garnishments where the only deposited benefit to the personal account were Social Security benefits). In response to a request from Senate Special Committee on Aging and the Senate Committee on Finance, the Office of the Inspector General reviewed the twelve largest financial institutions and a randomly selected sample of thirteen small, medium, and large financial institutions to determine whether the financial institutions deducted fees and garnishments from beneficiaries' personal accounts that had received direct deposits of exempt Social Security benefits. *Id.* at 4. The report states that 37% of the financial institutions, including 50% of the largest institutions, garnished accounts where only exempt Social Security benefits had been deposited. *Id.* at 6. The Report states that 70% of the financial institutions, including 67% of the largest institutions, garnished accounts in which exempt Social Security benefits had been commingled with other funds. *Id.* at 6–7. There were 1.3 million overall accountholders receiving only Social Security benefits. *Id.* at 7. Nineteen of the financial institutions surveyed garnished 1,686 of those accounts, but 639 of the accounts were garnished to collect alimony or child support claims or enforce IRS levies. *Id.* at 8. There were 6.6 million overall accountholders who received direct deposits of Social Security benefits who deposited other funds in their accounts. *Id.* at 7. The financial institutions surveyed garnished 12,747 of those accounts, but 5,142 of the accounts were garnished to collect alimony, child support, or IRS levies. *Id.* at 8–9.

14. *See id.* at 9–10 (noting that the most common fees were for legal processing and non-sufficient funds); Myers, *supra* note 1, at 378.

the extent to which the funds in her frozen bank account can be identified as benefits exempt from legal process.[15]

The unfortunate situation outlined above, which I refer to as the "garnishment problem," is the topic of Allen Myers's excellent note.[16] Mr. Myers skillfully dissects the garnishment problem and proposes very reasonable regulatory and statutory solutions. In the year since Mr. Myers initially submitted his Note, debate over the garnishment problem has intensified. In response to continuing reports of recipients losing access to exempt benefits that they received by EFT under the Direct Deposit program,[17] members of Congress have pressured Treasury to protect recipients from abusive creditor practices, including the garnishment problem, that had infected the Direct Deposit program.[18] This pressure appears to have prompted a renewed effort by the federal agencies to address the garnishment problem. Treasury acknowledged, both in a hearing before the Subcommittee on Social Security of the House Ways and Means Committee[19] and in a Government Accounting Office (GAO) examination of the electronic payment of benefits,[20] that recipients of benefits by electronic transfer were concerned about garnishment depriving them of access to their benefits in violation of federal law. Although there is some indication that Treasury may be more concerned about the impact of garnishment on its Direct Deposit program than on the recipients,[21] the

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15. Myers, *supra* note 1, at 378–79.

16. *Id.*

17. U.S. GOV'T ACCOUNTING OFFICE, PUBL'N NO. GA0-08-645, REPORT TO THE RANKING MEMBER, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES: ELECTRONIC PAYMENTS—MANY PROGRAMS ELECTRONICALLY DISBURSE FEDERAL BENEFITS, AND MORE OUTREACH COULD INCREASE USE 20–22 (2008) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d08645.pdf; SSA REPORT, *supra* note 13, at 4.

18. On April 14, 2008, Senators Kohl and McCaskill introduced S. 2850, a bill to prevent Treasury from promoting the Direct Deposit Program until it promulgates regulations to resolve the garnishment problem. Illegal Garnishment Prevention Act, S. 2850, 110th Cong. (2008).

19. Grippo, *Protecting Beneficiaries*, *supra* note 7. Mr. Grippo testified that Treasury recognized a recipient who receives exempt benefits by direct deposit into a bank account may be unable to access "lifeline funds" because "an account may be temporarily frozen even when the account contains federal benefits which are exempt from garnishment." *Id.*

20. *See* GAO REPORT, *supra* note 17, at 21 ("Treasury officials stated that they recognized the concerns of many benefit recipients that their federal benefit payments may be garnished in violation of federal law.").

21. Grippo, *Protecting Beneficiaries*, *supra* note 7. In addressing the impact of garnishing electronically deposited exempt benefits, Mr. Grippo observed that, "if the recipient had received their [sic] benefits by paper check, they [sic] could cash the check . . . and have full access to the funds." *Id.* Moreover, the problem with electronic payments that Treasury recognized was that those individuals who have bank accounts and who are subject to garnishment actions may find direct deposit unattractive. *Id.*

Deputy Assistant Secretary for Fiscal Operations and Policy testified that Treasury was willing to coordinate an inter-agency effort to establish a regulatory solution to resolve the garnishment problem.[22]

Two distinct components of the Direct Deposit program interact to create the garnishment problem. First, the program requires Treasury to deposit exempt benefits into a bank account owned by a recipient.[23] By depositing exempt benefits into a recipient's personal bank account, Treasury subjects those benefits to the risk of garnishment. The second component of the Direct Deposit program contributing to the garnishment problem is the shared failure of Treasury[24] and the Social Security Administration[25] to protect a recipient's exempt benefits after they have been deposited into the recipient's bank account. Most proposals to resolve the garnishment problem, including Mr. Myers's, focus on the second component and recommend regulatory or statutory solutions.[26] Although similar proposals have been presented for over a decade with little effect,[27] in June 2008 there appeared to be an emerging consensus on the critical components of a regulatory solution to the

22. *See id.* (indicating Treasury's willingness to "coordinate a joint inter-agency effort . . . based on our expertise in managing federal payments and working with the banking industry").

23. *Infra* notes 48–53 and accompanying text.

24. *See* 31 U.S.C. § 3332(h) (2000) (terminating government responsibility for payments once they have been deposited in recipient's account); *see also* Management of Federal Agency Disbursements, Final Rule, 63 Fed. Reg. 51,490, 51,492 (Sept. 25, 1998) (codified at 31 C.F.R. pt. 208) [hereinafter Disbursements, Final Rule] ("Just as with any other account to which Federal payments are sent, Treasury's liability to the recipient [of benefits transferred by EFT to a recipient's ETA under the Direct Deposit program] is extinguished upon final crediting of the funds to the recipient's account.").

25. *See* SSA REPORT, *supra* note 13, at 3 ("Generally, SSA's *interpretation* of its responsibility for protecting benefits against legal process and assignment ends when the beneficiary is paid."). The report further concluded:

> [I]t appears the exemption provision is to be treated as a defense to be raised by a beneficiary after a freeze or hold has been placed on an account pursuant to a garnishment order, rather than an absolute bar against the imposition of the freeze or hold.
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> Therefore, we suggest SSA revisit its interpretation of the garnishment exemption provision for Social Security benefits to determine if it should be an absolute bar against the imposition of the freeze or hold.

Id. at 11.

26. *See, e.g.*, *id.* at 10–11 (recommending the regulatory solutions set out in the SSA report); *id.* app. F at F-1 (presenting solutions proposed by the American Bankers Association).

27. *See "EFT 99" Provisions of the Debt Collection Improvement Act of 1996: Hearing Before the H. Comm. on Banking & Fin. Serv.*, 105th Cong. 2 (1997) (statement of Margot Saunders, Managing Attorney, National Consumer Law Center) (calling for "crystal clear prohibitions against attachment in EFT accounts").

garnishment problem that would require banks to protect a recipient's access to electronically deposited benefits from being frozen in response to a garnishment.[28]

The emerging regulatory solution has three principal components. First, Treasury and the agencies granting benefits would agree upon a distinctive set of Automated Clearing House (ACH) codes so that bank deposit systems could identify electronic deposits of exempt benefits without manual review.[29] Second, regulations would require a bank, when served with a writ of garnishment against a customer, to review the customer's account for a clearly defined look-back period to determine if the account has received any electronic deposit identified by ACH Codes as exempt benefits.[30] Third, regulations would grant the accountholder access to a portion of the account if exempt benefits were electronically deposited in the account during the look-back period.[31] In other words, a portion of the account would be protected from a freeze imposed as a result of the garnishment. To the extent that the balance in the account on the date the garnishment was served exceeded the protected amount, the account could be frozen.[32] The parties could contest the exempt status of the funds in the account and the amount of the

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28. *See* Grippo, *Protecting Beneficiaries*, *supra* note 7 (outlining Treasury's views on resolving the garnishment issue through inter-agency effort); *Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 110th Cong. (2008) [hereinafter Fritts, *Protecting Beneficiaries*], *available at* http://ways andmeans.house.gov/hearings.asp?formmode=view&id=7095 (statement of Steven D. Fritts, Associate Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corp.) (recommending possible solutions to the garnishment problem) (on file with the Washington and Lee Law Review); *Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 110th Cong. (2008) [hereinafter Saunders, *Protecting Beneficiaries*], *available at* http://ways andmeans.house.gov/media/pdf/110/sau.pdf (statement of Margot Saunders, Counsel, National Consumer Law Center) (explaining the garnishment problem and suggesting possible solutions); SSA REPORT, *supra* note 13, at 10–12 (suggesting potential safeguards to protect benefits recipients from garnishment); *id.* app. F at F-4 to -6 (setting forth possible solutions to the garnishment problem proposed by the American Bankers Association).

29. *See* SSA REPORT, *supra* note 13, at 10 (suggesting the establishment of ACH codes to easily identify exempt funds).

30. *See id.* at 13 (recommending a standard length of time to review accounts to determine whether a personal account includes exempt funds).

31. Grippo, *Protecting Beneficiaries*, *supra* note 7 (recommending establishing a level of funds that cannot be frozen while the final levels of exempt and nonexempt funds are determined).

32. *See id.* ("Treasury believes that any solution to this problem . . . would ensure that federal benefit recipients have access to a certain amount of funds that cannot be frozen while the garnishment order is adjudicated by the courts and financial institutions . . . .").

exemption in the garnishment proceedings, but while the proceedings are pending, the accountholder could not be denied access to the protected portion of the account.[33]

Although a consensus was emerging in June 2008, there were significant differences of opinion on the basic components of the regulatory solution, including the length of the look-back period and the amount of the protected portion of the account. For example, the consumer groups contend that the protected portion should be the amount of exempt benefits deposited during the look-back period multiplied by a factor of 2.0 or 2.5,[34] while the American Bankers Association[35] and the FDIC favor a fixed amount.[36] There are a host of other issues that are significant to the parties trying to craft a compromise regulation. Moreover, as many as five banking regulators and several agencies that grant benefits,[37] as well as representatives of the banks and the benefits recipients, may be involved in the negotiations. Given the complexity of negotiating a multiparty compromise, it may have been overly optimistic to expect the federal agencies to propose regulations "in the near future."[38] But, the nine months of silence following the emergence of apparent consensus in June 2008 is troubling.

To be fully effective, a solution to the garnishment problem must address the problem of identification that arises when exempt benefits are commingled with other funds in the bank account subject to garnishment. Depriving a recipient access to the funds in his account, when the only funds deposited in the account are exempt benefits, is an injustice that must be prevented. But accounts containing only electronically deposited exempt benefits are far less common than accounts in which the exempt benefits are commingled with other funds.[39] Moreover, far fewer banks will freeze an account containing

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33. *See id.* (discussing methods of determining protected amounts exempt from any account freeze).

34. Saunders, *Protecting Beneficiaries*, *supra* note 28.

35. *See* SSA REPORT, *supra* note 13, app. F at F-5 (suggesting that accountholders should have access to a specified amount).

36. *See* Fritts, *Protecting Beneficiaries*, *supra* note 28 (suggesting that accounts be granted a defined automatic exemption amount subject to certain conditions).

37. *See* Myers, *supra* note 1, at 412 n.213 (listing five banking agencies: the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), the Federal Reserve Board (FRB), and the National Credit Union Administration (NCUA)); *id.* at 372 n.3 (identifying four types of benefits distributed by the Social Security Administration, Veterans Administration, U.S. Railroad Retirement Board, and the Office of Personnel Management).

38. Saunders, *Protecting Beneficiaries*, *supra* note 28.

39. SSA REPORT, *supra* note 13, at 6–7 (providing empirical data on garnishment of commingled accounts).

only exempt benefits than will freeze a commingled account.[40] Therefore, resolutions that address the identification issue are necessary to fully resolve the garnishment problem. To date, the complexity of implementing a solution to the identification issue has been a principal factor contributing to the failure to resolve the garnishment problem. Treasury recognized that commingling electronically deposited exempt benefits with nonexempt funds in a recipient's bank account increased the risk that a garnishment would deprive the recipient of access to her exempt benefits.[41] But instead of implementing a procedure to protect the exempt status of these benefits, Treasury promoted programs under which the only funds deposited into an account are exempt benefits in order to "facilitate a recipient's ability to defend against impermissible attachments."[42] Even under these programs, however, a recipient's access to exempt benefits is subject to the risk of garnishment.[43] My comments suggest that Treasury could revise its current debit card program to protect recipients' exempt benefits from the risk of garnishment without promulgating additional regulations. My proposal, however, would not protect exempt benefits that are deposited electronically into a recipient's bank account and commingled with nonexempt funds. Therefore, the proposal provides only a partial resolution of the garnishment problem and should not be viewed as a substitute for proposals that address the identification issue and provide a complete answer to the garnishment problem. But if the process of proposing and implementing an inter-agency regulatory solution remains stalled and a viable statutory solution such as Mr. Myers's fails to gain traction, Treasury could implement my proposal as an interim solution to protect recipients willing to receive benefits under a debit card program.

In contrast to the inter-agency effort to protect recipients' access to electronically deposited benefits, my proposal would allow Treasury to protect the benefits under the terms of a contract with the bank receiving the EFTs.

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40. *See id.* at 6 ("[Thirty-seven] percent[] of the 19 [financial institutions (FIs)] included reported that they had garnished funds in accounts where only SSA benefit payments had been deposited."). In contrast, 70% of reporting FIs indicated that they had garnished funds in commingled accounts. *Id.*

41. *See* Electronic Transfer Account, Notice of Proposed Electronic Transfer Account Features, 63 Fed. Reg. 64,820, 64,822 (Nov. 23, 1998) [hereinafter ETA Proposed Features] ("Permitting financial institutions to accept electronic deposits of other types of payments in addition to Federal benefit, wage, salary, and retirement payments to the ETA would have implications with respect to the potential attachment of funds in the account.").

42. *Id.*

43. *See infra* text accompanying notes 92–94, 110–13, 124–27 (discussing the various reasons that the Federal Direct EBT and ETA programs fail to protect benefits issued via these programs from garnishment).

Moreover, in its purest form the proposal would protect the benefits from the risk of garnishment by effecting the disbursement without depositing the benefits in an account of the recipient subject to garnishment. The central feature of my proposal is a contract between Treasury and a bank under which bank acts as a Financial Agent of the United States in disbursing benefits. The proposal envisions a structure similar to Treasury's current Direct Express card program,[44] but, by making more effective use of the contract with the Financial Agent, ensures that benefits are not subject to the risk of garnishment.

Treasury has considered and implemented programs, including the current Direct Express program, to disburse benefits through banks acting as Treasury's Financial Agents.[45] Treasury, however, did not design these programs to protect recipients' exempt benefits from the risk of garnishment.[46] On each occasion Treasury's sole objective was to create a structure under which it could pay benefits by EFT to unbanked recipients.[47] As a result, these programs do not provide an effective resolution of the garnishment problem. Nevertheless, Treasury could design a Financial Agent structure that would provide at least a partial resolution of the problem.

An evaluation of Treasury's use of Financial Agents must begin with an analysis of the Debt Collection Improvement Act of 1996 (DCIA)[48] and Treasury's interpretation of that statute. Treasury had been promoting the electronic payment of benefits for nearly twenty years when Congress enacted the DCIA.[49] Passage of the DCIA, however, prompted Treasury to intensify its

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44. *See* Financial Management Service, Direct Express Overview, http://www.fms.treas.gov/directexpresscard/index.html (last visited Feb. 8, 2009) [hereinafter Direct Express Overview] (providing an overview of the Direct Express debit card system) (on file with the Washington and Lee Law Review).

45. *See id.* (explaining how Direct Express cardholders can make cash withdrawals from those ATMs inside "the Direct Express network"); *see also* Disbursements, Final Rule, *supra* note 24, at 51,493 (explaining that banks providing Electronic Benefits Transfer services do so as Treasury's Financial Agents).

46. *See* Direct Express Overview, *supra* note 44 (failing to include garnishment protection as an objective of the Direct Express program).

47. *See id.* (explaining that the Direct Express system "provides another option for federal beneficiaries who do not have a bank account").

48. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321-358 (codified as amended in scattered sections of 31 U.S.C.).

49. *See* Disbursements, Interim Rule, *supra* note 4, at 39,254 ("Treasury began using electronic funds transfer more than 20 years ago . . . ."); *Hearing on the U.S. Department of the Treasury's Proposed Rules Regarding the Management of Federal Agency Payments Through the use of Electronic Funds Transfers (EFT) Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. 11 (1997) (testimony of John Dyer, Acting Principal Deputy Commissioner, Social Security Administration), *available at* http://commdocs.house.gov/committees/bank/hba43663.000/hba43663_0f.htm ("SSA has offered . . . EFT to those receiving Social Security and

efforts to implement its electronic payment policy.[50] The DCIA included the mandate that, after January 1, 1999, Treasury would be required to make all federal payments by EFT.[51] The burden that this mandate imposed upon Treasury was mitigated by a provision that granted the Department broad authority to waive the EFT requirement.[52] Nevertheless, Treasury viewed the mandate as an obligation to overcome existing barriers to electronic payments.[53] In doing so, Treasury knew that its greatest challenge would be to design a structure under which Treasury could pay federal benefits by EFT to an estimated ten million unbanked recipients who were receiving paper benefits checks.[54] Paying benefits by EFT to unbanked recipients presented a challenge

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Supplemental Social Security Income Benefits for more than 20 years.").

50. *See* 31 C.F.R. § 208.1 (2008) (requiring that, except as specified, "all Federal payments made by an agency . . . be made by electronic funds transfer").

51. *See* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(x)(1)(A), 110 Stat. 1321, 1321-376 (codified as amended at 31 U.S.C. § 3332(f)(1) (2000)) ("[A]ll Federal payments made after January 1, 1999, shall be made by electronic funds transfer.").

52. *See id.* § 31001(x)(2)(A) (codified as amended at 31 U.S.C. § 3332(f)(2) (2000)) (allowing the Secretary of the Treasury to waive the EFT requirement in certain circumstances).

53. *Oversight of the Implementation of the Electronic Funds Transfer Provisions of the Debt Collection Improvement Act of 1996: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the H. Comm. on Gov't Reform & Oversight*, 105th Cong. 20 (1997) [hereinafter Hawke, *Oversight*], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_house_hearings&docid=f:45434.pdf (testimony of John D. Hawke, Jr., Treasury Undersecretary for Domestic Finance) (concluding that "this legislative mandate provides an important opportunity" to lower costs and enhance access while maintaining quality service).

54. *Electronic Benefits Transfer, and its Effect on Senior Citizens, Veterans, the Disabled and Needy Families: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. (1997) [hereinafter Hawke, *EBT Effect*], *available at* http://banking.senate.gov/97_05hrg/052297/witness/hawke.htm (statement of John D. Hawke, Jr., Treasury Undersecretary for Domestic Finance) (on file with the Washington and Lee Law Review). Mr. Hawke testified as follows:

> It is estimated that eighteen percent of all federal benefit payment recipients—approximately 10 million individuals—do not have accounts with a financial institution. Fulfilling our mandate to assure these families access to an account at a financial institution, at reasonable cost, in order to receive electronic payments is perhaps the single most significant challenge Treasury is facing in the implementation of EFT '99. The law provides adequate time to address these issues carefully and ensures a smooth, well-planned transition for recipients and for payment-paying agencies.

Id. At a separate hearing, Mr. Hawke further testified:

> By far, the most complex and controversial policy issue confronting us in our efforts to implement EFT 1999 is how to meet the needs of recipients without bank accounts. Under the existing Federal payment system, electronic payments may only be deposited into accounts at financial institutions . . . . As a result, the

because Treasury can make payments by EFT only through the ACH network and only a financial institution can receive an ACH credit transfer.[55] Treasury frequently asserted that these restrictions precluded the Department from paying benefits by EFT to unbanked recipients.[56]

The obvious solution to Treasury's perceived dilemma was to encourage unbanked recipients to open bank accounts in order to receive benefit payments made by EFT. Therefore, it is not surprising that Treasury sought to meet the mandate of the DCIA through a program that made low cost bank accounts available to recipients of federal benefits.[57] But Treasury also considered other options to address the problem of unbanked recipients. On May 9, 1997, Treasury proposed rules governing the Direct Federal Electronic Benefit Transfer (EBT) program under which Treasury could have paid benefits by EFT to unbanked recipients.[58] Treasury withdrew these proposed rules on September 25, 1998, apparently because the Department had concluded that the DCIA mandated that Treasury not only pay benefits by EFT but also assure recipients of access to bank accounts.[59]

> population of Federal payment recipients without bank accounts is currently precluded from receiving the benefits of direct deposit.

Hawke, *Oversight*, *supra* note 53, at 18.

55. Management of Federal Agency Disbursements, Notice of Proposed Rulemaking, 62 Fed. Reg. 48,714, 48,716 (proposed Sept. 16, 1997) (codified at 31 C.F.R. § 208.2(e)) [hereinafter Disbursements, Proposed Rulemaking]. The notice states:

> Treasury cannot deliver a Federal payment by EFT directly to an entity other than a financial institution because electronic financial transactions are made primarily through the ACH network and membership in the ACH network system is limited to financial institutions.

Id.

56. *Hearing on the U.S. Department of Treasury's Proposed Rules Regarding the Management of Federal Agency Payments Through the Use of Electronic Funds Transfers (EFT) Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. (1997) (testimony of John D. Hawke, Jr., Undersecretary for Domestic Finance) [hereinafter Hawke, *"EFT '99"*], *available at* http://commdocs.house.gov/committees/bank/hba43663.000/hba43663_0.htm#0 ("[B]ecause of ACH rules at present, we can only make electronic transfers into accounts at depository institutions. That sort of set the base-line for us.").

57. *See* Management of Federal Agency Disbursements, 31 C.F.R. pt. 208 (2008) (mandating, with exceptions, that any individual who receives a federal benefit, wage, salary, or retirement payment be paid by EFT).

58. Electronic Benefits Transfer; Selection and Designation of Financial Institutions as Financial Agents, Notice of Proposed Rulemaking, 62 Fed. Reg. 25,572 (proposed May 9, 1997) [hereinafter EBT Proposed Rulemaking].

59. *See* Disbursements, Final Rule, *supra* note 24, at 51,490 ("Treasury has determined that the statutory mandate to assure recipients access to accounts is better implemented by designing an ETA . . . .").

The validity of the assertion that the DCIA imposed a statutory mandate on Treasury to provide recipients with access to bank accounts is, at least, debatable. The Act does provide that "[e]ach recipient of [f]ederal payments required to be made by electronic funds transfer" must designate a financial institution to receive the payments.[60] Moreover, the DCIA also requires Treasury to prescribe regulations that "ensure that individuals required . . . to have an account at a financial institution because of the application of subsection (f)(1) [the mandate of payment by EFT] . . . will have access to such an account . . . ."[61] Although these provisions appear to require Treasury to provide recipients access to bank accounts, the waiver provisions of the DCIA undercut that conclusion. The Act provides that Treasury can waive the payment by EFT requirement if compliance would impose a hardship upon a recipient or "in other circumstances as may be necessary."[62] Treasury has applied these waiver provisions to allow unbanked recipients to remain unbanked and to receive paper benefits checks.[63] Although the DCIA does assume that a recipient must have a bank account to receive benefit payments by EFT and the statutory language is admittedly tricky, it would be absurd if Treasury could not waive the requirement that a recipient designate a bank to receive EFTs when the recipient is unbanked and Treasury is paying benefits by EFT to an unbanked recipient.[64]

In 1998, when it announced its conclusion that the DCIA imposed a statutory mandate to ensure recipient access to bank accounts, Treasury was actively encouraging financial institutions to provide bank accounts to members of society who had traditionally been denied access to banking services.[65]

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60. 31 U.S.C. § 3332(g) (2000).

61. *Id.* § 3332(i)(2)(A).

62. *Id.* § 3322(f)(2)(A)(iii).

63. 31 C.F.R. § 208.4(a) (2008) (excepting individuals from payment by EFT when it would impose a hardship).

64. EBT Proposed Rulemaking, *supra* note 58, at 25,575 (providing that unbanked recipients are not required to meet the requirement under Treasury's Direct Deposit regulation, 31 C.F.R. § 210.4(a), that a recipient designate a financial institution to receive the direct deposits because "a recipient who does not have an account at a financial institution cannot satisfy this requirement").

65. *See* Hawke, *EBT Effect*, *supra* note 54. Mr. Hawke testified as follows:

> One of Secretary Rubin's top domestic policy goals is to encourage those without bank accounts to move into the financial services main stream. Financial service providers offer many services that are critically important, if not essential, to virtually all American families. These may include access to federally insured deposits, the opportunity to earn interest on deposits, the availability of personal credit, and access to home mortgages. Some 40 million American households with incomes under $25,000 need these services. The programs described earlier are an

Secretary Summers asserted that, "in the [new] economy, ensuring access to a basic bank account must be a national priority."[66] He frequently described a bank account as the "basic passport to the broader economy"[67] and asserted that a checking account was "the most basic link to the mainstream economy."[68] Moreover, Treasury encouraged banks to use the ETA as a model for low cost bank accounts that could be offered to the entire spectrum of unbanked Americans.[69] Secretary Summers may have viewed the introduction of the

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> attempt to assist those without bank accounts to transition into the traditional financial services world without sacrificing convenience or low cost.

Id.; *see also* Michael A. Stegman, *Electronic Benefit's Potential to Help the Poor*, 32 BROOKINGS POLICY BRIEF SERIES (1998), http://www.brookings.edu/papers/1998/03children families_stegman.aspx? (on file with the Washington and Lee Law Review). Specifically, Stegman noted that:

> [N]either economy nor efficiency are the keys to the transformational power of this unheralded electronic banking measure [(the payment of federal benefits by EFT pursuant to the Debt Collection Improvement Act of 1996)]. Treasury Secretary Robert E. Rubin understood from the beginning that EFT '99 presents "[a] real opportunity to have an effect on a very large number of people in the inner city . . . [who] use expensive check cashing services to get hold of cash. If we can figure out a way to get them into the banking system for the first time, not only will it give them a more efficient way to cash checks and access to other financial services, but it may also encourage people to save, to plan financially, and therefore, to improve their economic life over time."

Id. (quoting Press Release, Robert Rubin, Treasury Secretary, U.S. Dep't of Treasury, Making "Welfare-to-Work" Work: Remarks to the Kennedy School Forum (Dec. 12, 1996), http://www.ustreas.gov/press/releases/rr1410.htm (on file with the Washington and Lee Law Review)); *see also* Press Release, Michael S. Barr, Treasury Deputy Assistant Secretary, U.S. Dep't of Treasury, Remarks to the National Federation of Community Development Credit Unions (June 9, 2000), http://www.treas.gov/press/releases/ls692.htm ("Working toward bridging this financial divide has been a high priority of this Administration. . . .") (on file with the Washington and Lee Law Review).

66. Press Release, Lawrence H. Summers, Secretary of the Treasury, Remarks at Rainbow/Push Wall Street Project Conference: The United States Economy and the Challenge of Inclusion (Jan. 12, 2000), http://www.treas.gov/press/releases/ls329.htm [hereinafter Summers, Inclusion] (on file with the Washington and Lee Law Review).

67. *See* Press Release, Lawrence H. Summers, Secretary of the Treasury, Remarks at CFPI Coalition: Extending the Frontier of Capital (Jan. 27, 2000), http://www.treas.gov/press/releases/ls350.htm [hereinafter Summers, Frontier] (asserting that "a bank account provides . . . [the] basic passport to the broader economy") (on file with the Washington and Lee Law Review); Summers, *supra* note 66 (same); Lawrence H. Summers, Secretary of the Treasury, Remarks at U.S. Conference of Mayors: Building Safer, More Prosperous American Cities (Jan. 28, 2000), http://www.treas.gov/press/releases/ls356.htm [hereinafter Summers, Cities] (same) (on file with the Washington and Lee Law Review).

68. Summers, Frontier, *supra* note 67.

69. *See* Press Release, Lawrence Summers, Treasury Secretary, Remarks to the Consumer Bankers Association (May 8, 2000), http://www.treas.gov/press/releases/ls609.htm (discussing the expansion of ETA-like programs to incentivize the opening of bank accounts by unbanked

ETA as an illustration of how government can set an example that induces the private sector to provide socially beneficial services.[70] When Secretary Summers described the ETA as an "entry point to the financial services mainstream,"[71] one suspects that he was focusing more upon the unbanked worker than the retired recipient of Social Security benefits. Perhaps Treasury's decision to abandon the Direct Federal EBT program, under which it could have paid benefits by EFT to unbanked recipients, in favor of the ETA was driven more by Treasury's overriding policy of making banking services available to all members of society than by a perceived "statutory mandate" under the DCIA to ensure access to bank accounts.

Whatever the basis for its 1998 decision that benefits could not be paid by EFTs to unbanked recipients, the Department had changed its position by 2008.[72] On June 10, 2008, Treasury launched its Direct Express program to enable Treasury to pay benefits by EFTs to unbanked recipients.[73] The Direct Express program is an updated version of the proposed Direct Federal EBT program that provides benefits via prepaid debit cards.[74] The adoption and promotion of the Direct Express program not only evidences a revision of Treasury's interpretation of the DCIA, but also suggests a shift in Treasury's priorities. Apparently, in the summer of 2008, paying benefits by EFT became more important than providing unbanked recipients of Social Security and SSI benefits a passport to the broader economy. In any event, for present purposes the Direct Federal EBT and Direct Express programs are significant because the role the Financial Agents play in these programs suggests a relatively

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persons who do not receive benefits) (on file with the Washington and Lee Law Review).

70. *Cf.* Summers, Frontier, *supra* note 67 (discussing how publicly funded efforts to expand community capital spur private investment; "seed capital that is well planted in these communities will spread and it will multiply").

71. Summers, Cities, *supra* note 67.

72. *See* Press Release, Financial Management Service, U.S. Dep't of the Treasury, U.S. Treasury Introduces Direct Express® Debit Card for Social Security Payments (June 10, 2008), http://www.fms.treas.gov/news/press/directexpress_launch.html [hereinafter Direct Express Press Release] ("The U.S. Department of the Treasury's Financial Management Service (FMS) has announced that a prepaid debit card for Social Security payments and other federal benefits is now available.") (on file with the Washington and Lee Law Review).

73. *See id.* ("'People without bank accounts now have a user-friendly, practical alternative to paper checks for their monthly federal benefit payments,' said FMS Commissioner Judith Tillman.").

74. *See* U.S. Dep't of the Treasury, Overview: Direct Express Debit MasterCard, http://www.fms.treas.gov/directexpresscard/index.html (last visited Feb. 4, 2009) (describing the Direct Express program) (on file with the Washington and Lee Law Review); *supra* text accompanying notes 58–59 (describing the old Direct Federal EBT program); *infra* text accompanying notes 117–21 (describing the new Direct Express program).

straightforward way for Treasury to pay benefits by EFT without subjecting recipients to the risk of garnishment.

By statute, the Secretary of the Treasury is authorized to designate national banks to disburse public money as Financial Agents of the United States.[75] In 1996, the statute was amended to clarify that the Secretary had the authority to designate financial institutions to act as Financial Agents of Treasury in disbursing benefits and providing services under an EBT program.[76] The duties of the Financial Agent are defined in a Financial Agency Agreement executed by Treasury and the financial institution.[77] The statutes authorizing the Secretary to designate Financial Agents permit Treasury to include terms in the Financial Agency Agreement obligating the Financial Agent to perform "all reasonable duties . . . as may be required."[78] Significantly, in the context of the garnishment problem, the Secretary appears to have the authority to require a Financial Agent to hold public money as a special deposit in which case the funds remain Treasury's property.[79]

In response to the mandate of the DCIA, Treasury designed three programs to address the challenge of paying benefits by EFT to unbanked recipients that use financial institutions acting as Financial Agents of Treasury in disbursing benefits.[80] Under the proposed Federal Direct EBT

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75. 12 U.S.C. § 90 (2000); 31 C.F.R. pt. 207 (2008) (detailing EBT scope, definitions, and Financial Agent duties).

76. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 665, 110 Stat. 3009, 3009-385 (codified as amended in 12 U.S.C. § 90 (2006)).

77. *See* 31 C.F.R. § 202.4 (2008) (defining deposit agreement terms); U.S. DEP'T OF THE TREASURY, FINANCIAL AGENCY AGREEMENT 1–5 (1999) [hereinafter TREASURY AGREEMENT], *available at* http://www.fms.treas.gov/eta/start/faa.pdf (providing an agreement form).

78. 12 U.S.C. § 90 (2006); *see also id.* § 332 (allowing state banks to act as Financial Agents).

79. *See, e.g.*, Swan Brewery v. United Trust, 832 F. Supp. 714, 717 (S.D.N.Y. 1993) (noting that depositor retains title to specially deposited funds); W. Orange v. Assocs. Disc. Corp., 197 So. 2d 858, 861 (Fla. App. 1967) (identifying that the right to a special deposit remains in the depositor); Newark Distrib. Terminals v. Hospelhorn, 191 A. 707, 711 (Md. 1937) ("A specific deposit is where money is deposited for some specific purpose . . . in which case title to the money does not pass to the bank but remains in the depositor until the money is properly paid out . . . ."); Hodge v. N. Trust Bank, 54 S.W.2d 518, 522 (Tex. App. 2001) ("[A] special deposit . . . remains property of the depositor . . . .").

80. *See* EBT Proposed Rulemaking, *supra* note 56, at 25,573 ("EBT is an EFT system for unbanked recipients of Direct Federal benefit payments."); Press Release, Financial Management Service, U.S. Dep't of the Treasury, U.S. Treasury to Launch Prepaid Cards for Unbanked Social Security, SSI Benefit Recipients (Jan. 4, 2008), http://www.fms.treas.gov/news/press/financial_agent.html ("Direct Express represents a significant step forward in the evolution of federal benefit payments . . . [t]he explosive growth in the prepaid card industry offers an important opportunity for Treasury to give unbanked payment recipients secure, easy access to their funds.") (on file with the Washington and Lee Law Review).

program[81] and the Direct Express programs[82] mentioned above, the benefits that Treasury transferred to the Financial Agent were not deposited in the recipients' personal bank accounts. The third program was the ETA which Treasury implemented in 1999 under the Direct Deposit program.[83] In contrast to the Federal Direct EBT and Direct Express programs, under the ETA program the benefits transferred to the Financial Agent are deposited in the personal bank accounts of the recipients. These programs did not protect recipients from the risk of garnishment.[84] Nevertheless, they are significant to resolution of the garnishment problem because the Financial Agent structure used in the programs suggests a way for Treasury to address the garnishment problem without promulgating additional regulations and enacting new legislation.

The Federal Direct EBT program was Treasury's first attempt to address the problem that unbanked recipients presented to meeting the requirements of the DCIA. The program, however, was similar to three pilot programs under which benefits were disbursed through a prepaid debit card.[85] Treasury stated that it designed the Federal Direct EBT to allow the Department to pay benefits by EFT and did not present the program as a way to protect recipients from the risk of garnishment.[86] Therefore, it is not surprising that the protection afforded against garnishment is unclear. Moreover, because Treasury abandoned the proposed Direct Federal EBT, the question of whether the program would have

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81. *See* EBT Proposed Rulemaking, *supra* note 58, at 25,575 (stating that, under the Federal Direct EBT, the account created in the name of the benefit recipient will only be used for the disbursement of benefit payments).

82. Direct Express Overview, *supra* note 44 (stating that the monies paid from the government are directly deposited into the benefit holders' Direct Express accounts).

83. *See* ETA Proposed Features, *supra* note 41, at 64,822 (stating that individuals who receive federal benefits are eligible to open an ETA, and summarizing the attributes of ETAs created from the distribution of federal benefits).

84. *See infra* text accompanying notes 92–94, 110–13, 124–27 (discussing the various reasons that the Federal Direct EBT and ETA programs fail to protect benefits issued via these programs from garnishment).

85. *See* EBT Proposed Rulemaking, *supra* note 58, at 25,573 (stating that Treasury has tested EBT in pilot programs, including a one-year program in Maryland, a program in Texas, called Direct Payment Card, and the Benefit Security Card program that was available in eight southeastern states); William Sessums, *"Unbanked" Citizens Draw Government Attention*, 9 COMMUNITY INVESTMENTS No. 4 (Fall 1997), http://frbsf.org/publications/community/investments/cra97-4/page2.html (discussing the pilot programs) (on file with the Washington and Lee Law Review).

86. *See* EBT Proposed Rulemaking, *supra* note 56, at 25,572 (explaining that the EBT program was developed to "afford unbanked recipients with a safe, reliable, and economical means of accessing their benefits").

resolved the garnishment problem was never answered.[87] Nevertheless, the structure of the proposed Direct Federal EBT program merits consideration.

The proposed Direct Federal EBT program required Treasury to contract with a financial institution to act as Treasury's Financial Agent in disbursing benefits.[88] The contract required the Financial Agent to receive benefits from Treasury by EFT,[89] establish accounts for each recipient and allocate the benefits to those accounts,[90] and issue a debit card to each recipient through which the recipient could access benefits.[91] The commentary to the proposed rule provided that, in establishing the accounts for the recipients and providing services, "[t]he Financial Agent acts as agent of the United States, not as agent of the unbanked recipient."[92] Moreover, under the proposed Direct Federal EBT program a disbursement of benefits to a recipient was not complete until the Financial Agent provided the recipient access to the benefits.[93] These attributes suggest that under the proposed Direct Federal EBT program, Treasury, acting through its Financial Agent, would have retained ownership of the funds until the recipient accessed her benefits by using her debit card at an ATM or in a point of sale transaction. If Treasury retained ownership of the benefits after they were transferred to the Financial Agent and until a recipient accessed the benefits, a garnishment served on the Financial Agent by a judgment creditor of a recipient should not affect the recipient's access to the benefits. The proposed rule, however, contains provisions that undercut this interpretation. For example, the comment to the proposed rule requiring that "the deposit account records of the Financial Agent make clear the unbanked recipient's ownership rights in the account" was created to enable the recipient to access her benefits.[94] But recall that Treasury proposed the Direct Federal

87. *See* Disbursements, Final Rule, *supra* note 24, at 51,492 (stating that, in the final rule, the definition of direct federal electronic benefits transfer had been modified and that the definition of EBT was "no longer limited to the disbursement of payments to recipients who do not have an account at a financial institution").

88. *See* EBT Proposed Rulemaking, *supra* note 58, at 25,573–74 (describing the relationship between Treasury and the Financial Agent and the duties required of the Financial Agent).

89. *Id.* at 25,573 ("In the Direct Federal EBT program, a financial institution designated by Treasury as its Financial Agent for EBT establishes an account in the name of the recipient for the purpose of receiving and providing adequate access to Direct Federal payments by EFT.").

90. *Id.*

91. *Id.* at 25,574.

92. *Id.*

93. *Id.* at 25,573 ("[I]n EBT, disbursement is a multi-step process that includes . . . the provision of access to [the recipient's] account.").

94. *Id.* at 25,575.

EBT program in 1997 to enable Treasury to pay benefits to unbanked recipients by EFT and the Department apparently gave little thought to the risk of garnishment.[95] Since that time, Treasury has recognized the impact of the garnishment problem[96] and appears to have acknowledged that the Department has an obligation to protect the exempt status of benefits after Treasury has paid them by an EFT.[97]

The second program in which Treasury utilized a Financial Agent structure to address the problem of paying benefits by EFT to unbanked recipients was providing ETAs under the Direct Deposit program. Treasury formally adopted the Direct Deposit program on September 25, 1998,[98] and published the requirements for an ETA on July 16, 1999.[99]

Treasury asserts that the ETA is an EBT program because Treasury determines the attributes of the account to which the benefits are sent and contracts with financial institutions to act as Treasury's Financial Agents in providing the accounts.[100] The structure of the ETA, however, differs on one significant aspect from the structure of the Direct Federal EBT program: There is no doubt that the recipient owns the ETA and that benefits deposited in the account are subject to the risk of garnishment.[101]

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95. *See* Hawke, *Oversight*, *supra* note 53, at 18 ("By far, the most complex and controversial policy issue confronting us in our efforts to implement EFT 1999 is how to meet the needs of recipients without bank accounts."). Treasury's responses, in a September 1997 hearing, to specific questions about banks attaching funds in violation of the statutory prohibition and beneficiaries' concerns about this practice, demonstrate that the Department had yet to focus on the garnishment problem. Treasury's representative stated only that "banks ought to be observing their legal obligations with respect to attachments and that the bank regulators will be overseeing that," that he was unfamiliar with the attachment issue but would be happy to look into it, and that he hoped to receive comments on the issue of ETAs having special attachment rules, about which Treasury kept "an open mind." Hawke, *"EFT '99"*, *supra* note 56, at 29.

96. *See* Grippo, *Protecting Beneficiaries*, *supra* note 7 ("Individuals who have bank accounts and are subject to garnishment actions may find direct deposit unattractive.").

97. *See id*. ("Treasury believes that any solution to this problem . . . would ensure that federal benefit recipients have access to a certain amount of funds that cannot be frozen while the garnishment order is adjudicated . . . and while the final amounts of exempt and non-exempt funds are determined.").

98. Disbursements, Final Rule, *supra* note 24, at 51,490.

99. *See* Electronic Transfer Account, Notice of Electronic Transfer Account Features, 64 Fed. Reg. 38,510 (July 16, 1999) [hereinafter ETA Features Notice] (listing the ETA requirements).

100. *See* Disbursements, Final Rule, *supra* note 24, at 51,493 (noting that a financial institution offering an ETA does so as "Treasury's Financial Agent" and that an ETA falls within the definition of an EBT).

101. *See* ETA Features Notice, *supra* note 99, at 38,513–14 (noting that funds deposited in ETAs could be subject to attachment for payment of child support obligations).

Treasury designed the ETA to provide recipients of federal benefits access to a low cost bank account to receive benefits paid by EFT.[102] To offer an ETA, a financial institution must enter into a Financial Agency Agreement with Treasury under which the financial institution agrees to act as a Financial Agent of the United States.[103] The Agreement requires a financial institution to offer the ETA on terms prescribed by Treasury.[104] In exchange for opening an ETA, Treasury pays the financial institution a fee.[105] In defining the terms of the ETA, Treasury took some steps to protect recipients' benefits from the claims of creditors. For example, the terms of the Agreement preclude the Financial Agent from setting off against an ETA to recover an obligation unrelated to the ETA.[106] In addition, the Agreement precludes the Financial Agent from entering into an agreement granting a non-bank provider of payment services access to an ETA.[107] Treasury also considered proposals to prohibit the attachment or garnishment of funds in an ETA[108] and to require the Financial Agent to determine and protect the exempt portion of the balance in a recipient's ETA if the account is garnished.[109] When Treasury published the requirements for the ETA on July 16, 1999, it was well aware of the garnishment problem.[110] Moreover, Treasury apparently assumed that it had the authority to include terms in the Agreement that would obligate the Financial Agent to protect recipients from the risk of garnishment.[111]

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102. *See* Disbursements, Proposed Rulemaking, *supra* note 55, at 48,721 ("This section addresses the problem of delivering Federal payments by EFT to individuals who do not have an account at a financial institution.").

103. *See* Disbursements, Final Rule, *supra* note 24, at 51,497 ("Any Federally-insured financial institution will be permitted (but not required) to offer ETAs as Treasury's Financial Agent upon entering into an ETA Financial Agency Agreement.").

104. TREASURY AGREEMENT, *supra* note 77, at 1–2.

105. *See id.* at 5 (requiring the Treasury Department to pay a set up fee for every ETA that a financial institution establishes).

106. *See id.* at 3 (listing specific fees that the financial institution is allowed to set off against an ETA); *see also* ETA Features Notice, *supra* note 99, at 38,513 n.4 (noting that funds deposited in ETAs could be subject to attachment for payment of child support obligations).

107. TREASURY AGREEMENT, *supra* note 77, at 3.

108. ETA Features Notice, *supra* note 99, at 38,512 ("Several consumer organizations requested that Treasury prohibit attachment of all funds.").

109. *See id.* ("One consumer organization said that when presented with an attachment order, financial institutions should determine which funds are attachable (or not attachable) as a way to assist recipients. Financial institutions opposed any shifting of the burden for defending against an attachment in this manner.").

110. *See id.* (requiring financial institutions to disclose to anyone who opens an ETA the types of funds that can be attached by outside creditors).

111. *See id.* at 38,513 (providing the Agreement terms, which read, in part, "If we/[name of Institution] receive an order of attachment, garnishment, or levy, we will immediately send you

Nevertheless, Treasury decided not to require its Financial Agents to protect a recipient's exempt benefits deposited electronically into an ETA.[112] All that Treasury requires, with respect to garnishment and attachment, was the inclusion of a disclosure in the agreement opening an ETA, that informs recipients that many federal benefits are exempt from garnishment and attachment, that the Financial Agent would promptly notify the recipient of an attachment or garnishment, and that a recipient who questions a creditor's right to remove funds from her account should "contact [her] benefit agency or . . . local legal services organization."[113]

Under the structure of the ETA, Treasury does not retain ownership of benefits paid by EFT to its Financial Agent.[114] As a result, the Financial Agent cannot refuse to freeze the ETA on the grounds that the ETA is owned by Treasury. Nevertheless, the role of the Financial Agent in providing an ETA suggests a possible resolution of the garnishment problem. In prohibiting setoff and access to an ETA, Treasury exercised its authority to impose a contractual obligation upon the Financial Agents to protect a recipient's benefits after they are deposited in the account.[115] Treasury must then have the authority to protect electronically deposited benefits in an ETA created by a Financial Agent from the risk of garnishment. That Treasury chose not to exercise that power in 1999 does not preclude it from doing so in 2009. An assessment of the impact this action would have upon the garnishment problem, however, must take into account the market failure of the ETA. Although estimates of the number of unbanked recipients of federal benefits range from four to ten million, the Government Accounting Office estimated that in 2006 there were only 90,000 active ETAs.[116]

The Direct Express program is Treasury's third and most recent attempt to use a Financial Agent structure to address the problem of paying benefits to unbanked recipients by EFT. The Direct Express program is very similar to the Federal Direct EBT program that Treasury abandoned in 1998. To implement the Direct Express program, Treasury entered into an Agreement with

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a copy of the order and the name of the creditor and contact person, if any").

112. *See id.* (requiring only notification of Treasury and recipient).

113. *Id.*

114. *See id.* at 38,511 ("By characterizing the ETA as an individually owned account, Treasury intended to indicate that the ETA would not be a Treasury owned account or an account owned by a corporation, organization, or other entity.").

115. *See id.* at 38,513 ("Treasury will not permit financial institutions to set off against an ETA obligations incurred by a recipient in connection with other products or services offered by the institution.").

116. GAO REPORT, *supra* note 17, at 12.

Comerica Bank under which Comerica agreed to act as Treasury's Financial Agent in disbursing Social Security and Supplemental Security Income (SSI) benefits.[117] Under the program, Treasury pays benefits by EFT without depositing them in the recipients' personal bank accounts.[118] Treasury accomplishes this electronic disbursement to unbanked recipients by originating EFTs to Comerica acting as Treasury's Financial Agent.[119] Comerica opens a Direct Express account for and issues a Direct Express Debit MasterCard to each recipient participating in the program.[120] The recipients access their benefits through their debit MasterCards at ATMs or in point of sale transactions with merchants in the MasterCard Network.[121]

Because Comerica receives and disburses the benefits as Treasury's Financial Agent and the benefits are not deposited in the recipients' personal bank accounts, the structure of the Direct Express program suggests that the program may protect recipients' benefits from the risk of garnishment.[122] The Testimony of Gary Grippo, Treasury's Deputy Assistant Secretary for Fiscal Operations and Policy, at a June 24, 2008, hearing before the Subcommittee on Social Security of the House Ways and Means Committee supports the view that the Direct Express program shields recipients' exempt benefits from the risk of garnishment.[123] The hearing was scheduled to determine whether the actions of creditors were improperly depriving recipients of exempt benefits that they received by electronic deposit to their bank accounts under the Direct Deposit program.[124] Mr. Grippo was invited to discuss the impact of garnishment. He acknowledged the garnishment problem under the Direct Deposit program and stated that because of risk of garnishment, recipients of

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117. *See* Direct Express Overview, *supra* note 44 (providing an overview of the program).

118. *Id.*

119. *See id.* (explaining the mechanics of the system); Direct Express Press Release, *supra* note 72 ("Treasury has engaged a financial agent—Dallas-based Comerica Bank—to issue this nationally available card exclusively for payment of federal benefits.").

120. Direct Express Press Release, *supra* note 72.

121. *Id.*

122. *See* Grippo, *Protecting Beneficiaries*, *supra* note 7 (stating that "one operational solution to the problem [of improper garnishments] that we currently have in place is the Direct Express card").

123. *See id.* (stating that creditors would not have the right to take any funds out of the Direct Express card account).

124. *See* Press Release, Subcomm. on Soc. Sec., H. Comm. on Ways & Means, Chairman McNulty Announces a Hearing on Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices (June 17, 2008), http://waysandmeans.house.gov/hearings.asp?formmode=view&id=7063 (on file with the Washington and Lee Law Review).

exempt benefits "may find direct deposit unattractive."[125] Mr. Grippo also addressed the impact of the Direct Express program upon the garnishment problem stating:

> One operational solution to the problem that we currently have in place is the Direct Express card. The card account contains primarily Social Security Benefit payments, which, under federal law, are protected from garnishment by creditors other than the United States government. This means that creditors do not have the right to have these funds taken out of the account, none of which would be frozen pending resolution of a garnishment order.[126]

This testimony indicates that if a judgment creditor of an individual receiving Social Security or SSI benefits under the Direct Express program served Comerica with a writ of garnishment, Comerica would protect the recipient's access to her exempt benefits by refusing to freeze the recipient's account.

Unfortunately, Mr. Grippo appears to have overstated the protection that the Direct Express program provides against the garnishment of exempt benefits. As of January 7, 2009, the Treasury's Financial Management Service list of common questions about the Direct Express card stated the following about the possibility of the debit card account being attached or garnished by creditors:

> Social Security benefit payments are generally protected from attachment or garnishment under federal law. This means that your creditors do not have the right to have these funds taken out of your account. There are a few exceptions, however. For example, funds in your account can be taken if you owe child support alimony obligations. Supplemental Security Income benefits can not be garnished. If you have questions about a creditor's right to remove money from your account, contact the Social Security Administration or your local legal services organization.[127]

This statement indicates that Comerica, acting as Treasury's Financial Agent under the Direct Express program, is not obligated to protect a recipient's exempt benefits by refusing to freeze the recipient's account in response to a garnishment. Comerica's obligation to protect a recipient's exempt benefits appears to be no greater than the obligation that Treasury required of a bank acting as Treasury's Financial Agent in disbursing benefits

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125. Grippo, *Protecting Beneficiaries*, *supra* note 7.

126. *Id.*

127. DIRECT EXPRESS CARD, COMMON QUESTIONS 16, *available at* http://fms.treas.gov/directexpresscard/common_questions111008.pdf.

through ETAs under the Direct Deposit program.[128] Both programs appear to allow the Financial Agent to freeze a recipient's account in response to a garnishment and may require the recipient to prove that the funds in the account are exempt benefits. Although Mr. Grippo's testimony indicates that Treasury may now be willing to require its Financial Agents to protect recipients' benefits from garnishment,[129] the Direct Express Overview web page indicates that Treasury has yet to do so.

Treasury could address the garnishment problem through a new debit card program that closely resembles the Direct Express program. The critical difference between the programs is that the terms of the Financial Agency Agreement under the new program would require the Financial Agent to provide the services necessary to protect recipients' access to exempt benefits in the event of a garnishment. Treasury could achieve this result by obligating the Financial Agent to provide one of the following services. First, the Agreement could require the Financial Agent to treat the funds that it receives from Treasury by EFT as a special deposit.[130] If the Financial Agent holds the funds as a special deposit, Treasury will retain ownership of the funds after it transfers the funds to the Financial Agent by EFT and until the recipient accesses her benefits through her debit card.[131] Moreover, funds held by a bank as a special deposit are not subject to garnishment.[132] In the alternative, the Agreement could require the Financial Agent to assert the recipient's exemption in response to a garnishment. In the new debit card program, the only funds that are credited to a recipient's debit card account are the exempt benefits that Treasury transferred to the Financial Agent. Therefore, requiring a Financial Agent to assert the recipient's exemptions would not be a major imposition and should not deter banks from agreeing to serve as the Financial

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128. *See supra* notes 117–21 (discussing the financial agent's disclosure and notification obligations under the Direct Deposit program).

129. *See* Grippo, *Protecting Beneficiaries*, *supra* note 7 (stating that creditors may take funds out of an account under certain circumstances).

130. *See* 12 U.S.C. § 90 (2006) (stating that banks designated as Financial Agents "shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them"); *see generally* MILTON R. SCHROEDER, 2 THE LAW AND REGULATION OF FINANCIAL INSTITUTIONS ¶ 18-13 (2008).

131. *See* SCHROEDER, *supra* note 130, ¶ 18-13 ("The payee [who did not receive delivery] never acquired an interest in the instrument, has no rights as a person entitled to enforce it, and still is entitled to enforce the underlying obligation, if any, for which the check was supposed to constitute payment.").

132. *See* Romualdo P. Eclavea, Annotation, *Special Bank Deposits as Subject to Attachment or Garnishment to Satisfy Depositor's General Obligations*, 8 A.L.R. 4th 998 (1981, Supp. 2008) (stating that a "special account [is] not subject to garnishment").

Agent under a debit card program.[133] Although both provisions would protect recipients from the risk of garnishment, the special deposit provision has one advantage. If such a garnishing creditor asserts that his claim is not subject to the statutory exemption, a Financial Agent obligated to assert a recipient's exemption would have to evaluate the creditor's claim before responding to the garnishment. In contrast, a Financial Agent holding the benefits as a special deposit could respond to the garnishment stating it did not maintain an account owned by the recipient and refuse to freeze the recipients' access to her benefits.

Although the Financial Agent structure outlined above would protect recipients from the risk of garnishment, it provides only a partial solution to the garnishment problem. Most recipients of federal benefits maintain bank accounts in which exempt benefits are commingled with other funds.[134] It would be cumbersome, if not impossible, to protect these benefits through the Financial Agent structure. Protecting exempt benefits that have been commingled with other funds in a recipient's bank account from the risk of garnishment requires a more complex solution, such as those Mr. Myers proposes in his Note.

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133. *See supra* notes 39–43 and accompanying text (describing the problem of identifying and distinguishing exempt benefits from other funds).

134. *See* SSA REPORT, *supra* note 13, at 11 ("FIs stated that it is difficult to distinguish exempt and non-exempt funds when the accountholders' funds are co-mingled.").