# Client Alert.

**February 25, 2013**

# Will the CFPB Take on the Regulation of Retirement Savings Plans?

**By Daniel A. Nathan**

According to a recent Bloomberg report, the Consumer Financial Protection Bureau is considering whether it should take a role in helping Americans manage their retirement savings. CFPB Director Richard Cordray told a Bloomberg reporter that the consumer protection agency is "exploring" that possibility and considering the extent of its authority in that area. The Bloomberg report notes that this would be the agency's first foray into consumer investments

Aside from the Bloomberg piece, there has been little in the media or in the CFPB's public record indicating its intention to expand its regulatory reach to retirement savings accounts. If the CBPB follows through on Cordray's explorations, this could increase the number of regulators to which the investment community must answer. Unnamed sources apparently in the know elaborated on Cordray's statement in the Bloomberg article, indicating that the CFPB is concerned that retirees, and consumers generally, might be "falling prey to financial scams" relating to retirement savings.

Indeed, for a number of months, Cordray has been making comments that suggest that the CFPB considers retirement savings to be another consumer financial product subject to CFPB oversight. In remarks in April 2012, for instance, Director Cordray included saving for retirement as a consumer financial protection issue along with choosing a credit card or buying home. In November 2012, he linked saving for retirement with buying a home or paying for college as individual goals that are helped by properly functioning consumer finance markets. And while unfair, deceptive, or abusive practices in administering retirement savings accounts are an issue that would most likely affect seniors, Cordray also has mentioned the impact of such practices on veterans, as well as the challenges faced by women in ensuring long-term financial security, given their lower average earnings, among other things.

Enhanced supervision of retirement plans is a laudable goal, but it begs the question of whether the CFPB has the statutory authority to take on that role. Currently, the key regulators of retirement savings accounts and retirement plans are the Securities and Exchange Commission—which regulates sales of securities and investment advice, among other things—and the Department of Labor—which regulates retirement plans. Title X of the Dodd-Frank Act allows for the possibility that the Bureau, under limited circumstances, could seek to join Labor in its retirement oversight, but the SEC's turf seems to be pretty well-protected. Ultimately, it appears that, with some narrow untested exceptions, the most that the CFPB could do to regulate retirement savings would be in the nature of investor education.


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## SOURCES OF THE CFPB'S POTENTIAL JURISDICTION

Although the CFPB's mandate—to make markets for any and all consumer financial products and services work for Americans—seems broad on its face, the drafters of Title X of Dodd-Frank—the Consumer Financial Protection Act—set fairly specific limits on the Bureau's powers with respect to financial products and services covered by other regulators.

The Department of Labor has primary oversight and regulatory authority for retirement plans as the enforcer of the Employee Retirement Income Security Act (ERISA). ERISA covers both defined benefit and defined contribution retirement plans, including 401(k)s, 403(b)s, employee stock ownership plans, and profit-sharing plans. Labor is charged with, among other things, ensuring that retirement plan administrators provide certain disclosures to plan participants. While the Department has not traditionally been known as an aggressive enforcement-oriented agency, that might be changing given the dramatic growth in assets in pension plans, 401(k)s, IRAs, and other retirement accounts—now in excess of $18 trillion. *See*, *e.g.*, http://www.fa-mag.com/news/dol-audits-70-percent-result-in-fines-yielding-105-billion-in-2010--9802.html; http://www.benefitspro.com/2012/03/23/waiting-for-the-crackdown-dol-retirement-plan-enfo.

Dodd-Frank specifically bars the CFPB from rulemaking or enforcement authority with respect to products or services that relate to any specified employee benefit and compensation plan, including plans subject to ERISA. [Dodd-Frank § 1027(g).] The only exceptions under Dodd-Frank depends upon the willingness of the Departments of the Treasury and Labor to ask the CFPB to implement appropriate consumer protection standards with respect to retirement plans, or to grant a request by the CFPB for the same. [Dodd-Frank § 1027(g)(3)(b).] Given Labor's recent ramped-up enforcement efforts, it is anybody's guess as to whether the agency will want to cede ground to the newcomer to regulate retirement plans.

With respect to jurisdiction over securities sales, brokers, or investment advisors, Dodd-Frank puts a full stop on the CFPB's authority to regulate broker-dealers, investment advisors, and anyone else regulated by the SEC with respect to compliance with Title X. [Dodd-Frank § 1027(i)] At most, the Act requires the SEC to consult and coordinate, "where feasible," with the Bureau with respect to any rule regarding an investment product or service that is the same type of product that is subject to the CFPB's jurisdiction. The Act also requires the two agencies to negotiate an agreement to establish procedures for such coordination. Whether such coordination will occur, and whether an agreement will be formed, probably depends on inter-agency politics and the SEC's willingness to share its internal processes with another agency; given the SEC's historic unilateralism, that is an unlikely prospect.

The Bureau might seek to approach retirement savings plans by looking at practices involving the insurance products that are used to fund retirement programs, specifically, variable annuities and other annuities. Again, Dodd-Frank throws up a barrier to CFPB jurisdiction, by excluding persons regulated by state insurance regulators. [Dodd-Frank § 1027(f).]

It is worth noting that a narrow window might still exist for the CFPB to assert jurisdiction over someone who sells retirement savings products that are not securities, is not registered with the SEC, is not regulated under ERISA, and does not fit into any of the other exclusions under Dodd-Frank § 1027. The Bureau might consider itself obligated to pursue someone who manages to thread that needle and engages in unfair, deceptive and abusive practices.


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Finally, the Bureau could seek to protect consumers of retirement plans through its special mandate under the Office of Financial Protection for Older Americans to, in the words of its current head, "promote sound financial management and decision-making of seniors, with a particular focus on the areas of long-term savings and planning for retirement and long-term care." [Humphrey Nov. 2011 Senate Banking Committee testimony.] This Office is charged by Dodd-Frank with "activities designed to facilitate the financial literacy of [seniors] on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through the dissemination of materials to seniors on such topics. The office carries out its mission through a combination of investor education, assisting seniors in choosing financial advisors, and coordinating with other regulators and community organizations, and it has a particular focus on long-term savings and planning for retirement and long-term care." [Dodd-Frank § 1013(g)(3).] These are worthy goals, but the Office's mandate does not amount to rulemaking, examination, or enforcement authority over retirement plans.

In the specific focus on seniors, the CFPB aims to protect a traditionally vulnerable class of individuals who also have received attention from the SEC and FINRA. In recent years, the SEC and FINRA have engaged in rulemaking, enforcement, and investor education efforts aimed at protecting seniors. Some of Dodd-Frank's focus appears to take its cue from some of the SEC's and FINRA's efforts; for example, Dodd-Frank directs the Office to "monitor certifications or designations of financial advisors who advise seniors," a significant recent focus of the SEC's and FINRA's seniors efforts, and to alert the SEC and state regulators to certifications or designations that are identified as unfair, deceptive, or abusive. Both the SEC [http://www.sec.gov/investor/pubs/senior-profdes.htm and FINRA [Regulatory Notice 07-43] have issued guidance regarding professional designations.

## WHAT TO LOOK OUT FOR

If the CFPB did identify a way to claim jurisdiction more robust than the guidance-related functions of Office of Financial Protection for Older Americans, it is worth considering what the Bureau would focus on. The types of unfair, deceptive, or abusive practices that the Bureau is empowered to address include conduct that takes advantage of a consumer's lack of understanding of the risks of a product, or of a consumer's reasonable reliance on a financial institution to act in the consumer's interest. [Dodd-Frank § 1031.] Such practices might include sales of unsuitable products, or failing to maintain or provide access to required records. [Dodd-Frank § 1036.]

One area of focus might be on the fees charged by retirement savings vehicles. The Government Accountability Office stated its concerns about those fees, and inadequate consumer education around those fees, in a pair of reports issued in 2006 and 2012 [GAO-07-21 (2006); GAO-12-325 (2012).] The CFPB and the Department of Labor have both moved to raise awareness of plan fees and costs. On its blog, the CFPB noted in August 2012 that "more than 70 percent of people with 401(k)s don't realize they're paying fees," and referred readers to Department of Labor guidance on retirement plans for consumers. Labor promulgated a new rule in 2010 under ERISA requiring disclosure of certain information, including fee and expense information. [29 C.F.R. Part 2550.]

The regulated industry and Congress are bound to remain keenly aware of the point at which regulatory competition—which might benefit the public by motivating regulators to do their best—becomes regulatory duplication, which wastes resources and overwhelms financial institutions with redundant requests. The CFPB will have to remain cognizant of these political issues while it decides how to assert jurisdiction in this area.


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