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Regulating Markets for Retirement Payouts: Solvency, Supervision, and Credibility

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Regulating Markets for Retirement Payouts: Solvency, Supervision, and Credibility

Abstract

Soon the largest cohort of workers in U.S. history will be eligible to retire. Most will have only their personal saving and a lump-sum benefit from a 401(k) plan to supplement Social Security benefits during retirement. The proceeds of these 401(k) and IRA benefits represent the largest amount of money these individuals have ever managed, and the challenges and hazards they face are enormous. This chapter evaluates the regulatory and enforcement structures in place to protect individuals from financial loss through the insolvency, fiscal mismanagement, and/or malfeasance of those who help them manage and invest their retirement distributions.

Keywords

financial loss, retiree protection, 401(k), social security, financial management

Disciplines

Economics

Comments

The published version of this Working Paper may be found in the 2008 publication: [*Recalibrating Retirement Spending and Saving*](#).

Recalibrating Retirement Spending and Saving

EDITED BY

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Chapter 8

Regulating Markets for Retirement Payouts: Solvency, Supervision, and Credibility

Phyllis C. Borzi and Martha Priddy Patterson

In the past, the American worker entitled to a retirement benefit under an employer-sponsored defined benefit (DB) plan could look forward to a stream of retirement income, usually payable monthly. Retirement plans typically paid ‘pensions’ using a DB payment formula where the former employee received guaranteed fixed periodic payments for life and, in many cases, these payments continued during the life of a surviving spouse (although often at a lower level). The worker and the retiree had no role in managing the portion of the overall pool of accumulated assets from which retirement benefits would be paid and, as long as inflation did not run rampant, a retiree had no responsibility for or concern about investing the pension assets over the long term, because each month, another check would be forthcoming to cover the expenses for that month. To the extent that the monthly pension payment was more than necessary to cover that month’s expenses, retirees could continue accumulating assets for that proverbial ‘rainy day’ or unexpected or catastrophic expense.

During their work careers, individuals are frequently insured against a number of hazards. Through their employment, employees are often offered health insurance, disability insurance, and opportunities to save for retirement or to accrue retirement benefits partially subsidized by the employer. Because wages roughly follow inflation, workers are generally protected from the inflation risk, as well (Hess and Schweitzer 2000). But once the individual retires and the accrual stage of retirement saving typically ends, it is more difficult to insure against the new risks of aging and of managing one’s own investments and savings. Risks of longevity, illness, and inflation become very real. In addition, developing hedges against those risks are growing more challenging. The Social Security system pays benefits for life and provides automatic payment increases based on inflation, and Medicare provides certain basic levels of health-care coverage to the elderly and disabled; both offer some protection against these risks. Although DB pensions did provide retirees a considerable percentage of replacement income for life, thus offering a hedge against longevity

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risk (but not against inflation), such plans are becoming increasingly rare.¹

Members of the baby-boomer generation will need to find protections against all these natural and inevitable risks. But they will also face one important risk that was not of much concern for their predecessors: namely, they will have to protect themselves against the risk of fraud. For many, their employer-provided retirement benefits will be paid in the form of a lump-sum benefit rather than a series of periodic payments. Unfortunately, the marketplace offers many opportunities to separate the unwary and the uninformed from their retirement plan cash distributions. When asked why he robbed banks, the famous Depression-era thief, Willie Sutton, answered, 'Because that's where the money is.' It was a sensible 'marketing' strategy for identifying potential robbery targets then, and it is likely to be just as pertinent a strategy today for those who would engage in investment fraud and other financial crimes.

The purpose of this chapter is to begin to identify and examine the legal and regulatory structures in the marketplace designed to protect individual investors from financial loss through the insolvency, fiscal mismanagement, and/or malfeasance of those entities to which they have turned to for help in managing and investing their retirement distributions. In addition, we are interested in the extent to which new products have begun to emerge in the marketplace designed to protect retirees from these risks or that would encourage investment in less risky alternatives. To accomplish these tasks, we utilize two approaches: (*a*) interviews with key thought leaders in the financial services industry, consumer advocates, and state and federal government officials to determine whether and to what extent they have focused on legal, regulatory, and industry protections for retirees and their pension distributions and what new developments were occurring that might enhance protections for retirees; and (*b*) traditional legal research to identify statutes, regulations, and self-regulatory approaches currently in place to address these concerns.

What is at Stake for Retired Individuals?

The average baby boomer who earns a retirement benefit through a 401(k) plan is estimated to have an account balance of just under \$128,000 at age 50 and about \$141,000 at age 60. [Investment Company Institute (ICI) 2006*a*]. While some might argue that these amounts are too small to be attractive to those who specialize in financial frauds, others would disagree. Less sophisticated investors may not be quick to identify the appropriate law enforcement authorities and this may enable fraud to go undetected for a longer period of time. But more importantly, an individual who loses

Au: We have changed 'ICI (2006b)' to 'ICI (2006a)' and 'ICI (2006a)' to 'ICI (2006b)' as per the reference list. Please check the change.

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‘only’ \$128,000, which could represent most of the retirement nest egg, is likely to be far worse off than an individual who loses considerably more in dollar terms though less as a percentage of total net worth.

Unfortunately, fraud follows the money. So, will the 401(k) generation be especially vulnerable to investing in products that are too risky or inappropriate for their age or health status or vulnerable to placing their trust and future in the hands of incompetent investment advisers or other dishonest individuals? Evidence so far suggests it may be. George Gaberlavage, Associate Director of AARP’s Public Policy Institute, has observed that ‘victims [of financial fraud] used to be older retirees, but now the people who are being scammed are younger and younger. People in their 50s are going to state regulators to complain.’²

Au: Please provide the expanded form of ‘AARP’.

Most retiring individuals receiving a 401(k) account payout or other single-sum cash distribution from a retirement plan have never been faced with such a considerable amount of money to manage at one time. Nor have they been faced with the daunting challenge to make it last through the end of their lives. So what are people to do?

The financial industry is well aware of the significant amounts of money that will be available for management and investment as baby boomers retire. In response, they are developing and marketing new products designed to hedge many retirement income risks and to capture these retirement assets for management. Some of these products will be available only through employers who choose to offer their retiring employees access to the product.³ Alternatively, the 401(k) plan itself may offer to act as a facilitator for the individual’s 401(k) distribution by transferring the account balance to a third-party financial organization offering a product with unique features to former participants in an employer’s plan.

Shift to Defined Contribution Plans Affects Nature of Risk in Retirement

As previously noted, the challenges faced by individuals in managing their assets in retirement are significantly affected by the continuing shift to defined contribution (DC) plans and the changing nature of the distribution options offered to retirees in traditional DB plans, since the form in which participants receive their benefits at retirement influences the asset management choices available to them. According to the Investment Company Institute (ICI 2006*b*), 25 years ago there were 30 million active participants in DB plans, 19 million in DC plans, and virtually none in 401(k) plans. But today the situation has changed dramatically: some 47 million workers participate in 401(k) plans, 8 million in other types of DC plans, and only 21 million in DB plans.

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This shift in plan type is important since, at retirement, DC participants typically receive their benefits in a single-sum cash payment, while DB-covered workers typically draw their benefits in the form of a life annuity or other stream of payments. The historical tilt toward annuitization of DB plan distributions may largely be a function of two factors: (*a*) requirements under the Employee Retirement Income Security Act of 1974 (ERISA) imposed on DB plans to offer an annuity option at retirement are inapplicable to most DC plans, and (*b*) the fact that most workers accept the traditional view that pensions are supposed to yield a stream of payments for life.

Nevertheless, the predominance of annuitization under DB plan distributions is also changing. For instance, the United States Government Accountability Office (GAO 2003) has reported that all workers in DB plans have an annuity option, but about half of DB plans now offer workers the option at retirement to take their benefits in a single-sum cash distribution. By contrast, almost all DC-covered workers are offered a lump-sum option, and just over one-third can take their distribution in annuity form (certain types of DC plans, other than 401(k) plans, are required to provide benefits in the form of a qualified joint-and-survivor annuity). For a number of reasons, including uncertainty about the long-term economic viability of their companies and the willingness of employers to continue to stand behind their pension promises, as well as the fact that recently interest rates used to calculate lump sums have resulted in more valuable cash payments than annuities, more and more workers in DB plans, when given a choice, decide to take their pensions in lump sum (GAO 2003). For this reason, the number of workers who actually elect annuities when offered continues to decline. For example, some 60 percent of retirees selected annuities between 1992 and 2000, but more recently, retirees tend to elect a lump-sum distribution that is either rolled over to an individual retirement account (IRA) or left in the plan (GAO 2003). Moreover, the same GAO report found that plan sponsors and administrators indicate that most retirees do not select annuities when given payment option choices. For most of those who do so, this decision may also increase their risks of investment and loss, given the fact the Pension Benefit Guaranty Corporation (PBGC) insures private employer and multiemployer pension benefit payments of up to a maximum limit adjusted annually.⁴ No such 'insurance' is available for benefits taken as a lump sum.

As a result, there is much concern about whether retirees possess the skills necessary to face the postretirement challenges in managing their income in light of longevity, investment, and other risks. This concern is not limited to those who have received lump-sum distributions from 401(k) plans, but it also extends more broadly to individuals who receive benefits in a single-sum cash distribution. One could argue that retirees

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who take lump-sum distributions from their DB plans may be potentially more vulnerable to problems managing their distributions than their counterparts in 401(k) plans, since they have not had the experience of facing similar investment management challenges during the accumulation phase of their retirement, unless they were lucky enough to have both DB and self-directed 401(k) plans available to them as workers.

There are little data available on what happens to cash distributions once retirees have received them; what there is, however, suggests that most individuals roll over their distributions to IRAs. In fact, the ICI reports that nearly half of IRA assets came from rollovers from employer-sponsored plans.⁵ However, the likelihood of the distribution being rolled over increased with the age of the individual receiving the distribution until age 60 and the size of the distribution, before a substantial decline for older ages. Copeland (2005) notes that while 55.6 percent of recipients aged 51–60 rolled over their entire distributions, only 37.8 percent of recipients aged 65 or older did so.

Advising Retirees on Financial Matters and the Regulatory Structure

As we have noted, little attention has to date been devoted to the question of whether adequate regulatory safeguards are in place to assure that retirees are protected against fraud and insolvency in connection with the investment vehicles in which they place their trust to meet these conventional risks. A preliminary review of the legal and regulatory environment surrounding existing investment vehicles and the nature and extent of protection for retirees raises important questions regarding this question.

Matrix of Regulators for Retirement Investments

Most of the financial products available to those near or at retirement fall into either the guaranteed ‘insurance’ arena, which includes annuities and long-term care benefits, or the securities arena, which includes mutual funds and stocks that generally offer no guarantees.⁶ One complication with regulating DC plan payouts (and lump sums from DB plans) pertains to the complexity of the US financial regulatory system. Specifically, investments designated as ‘securities’ are regulated by both the United States Securities and Exchange Commission (SEC) and the state agencies with jurisdiction over securities. Generally, investments designated as ‘insurance’ are regulated under state law by a state’s department of insurance. In some states, the same agency regulates both securities and insurance, although usually through different offices.⁷ In addition to governmental

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regulation, both securities and insurance products may also be regulated by self-regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD), which have authority to develop and test monitoring standards.

As we show below, disputes about whether an investment is an ‘insurance product’ or a ‘security’ are becoming increasingly common, as more complex investments are brought to market. Such disputes over regulatory authority also create the potential for an environment that may encourage some unethical financial product marketers to argue that the product is a security when confronted with insurance regulators and, when questioned by security regulators, argue the same product is insurance. Thus a regulatory vacuum could be created that puts retirees at a substantial disadvantage without their even being aware that such a problem exists.

Microcosm of the Problem—Suitability Rules

Under US securities laws, the concept of ‘suitability’ of an investment for a potential purchaser is well established.⁸ That is, the SEC requires that certain securities be marketed only to potential buyers meeting minimum income and net worth standards. Interestingly, however, this federal securities suitability law does not apply to insurance products. And as financial and investment products grow more complex and integrated, tensions are emerging with respect to who has authority to regulate these products. For instance, this question has arisen in the context of which agency should regulate annuity-type investment products such as variable annuities and equity indexed annuities.

In 2003, the National Association of Insurance Commissioners (NAIC) adopted the Senior Protection in Annuity Transactions Model Regulation [National Association of Insurance Commissioners (NAIC 2003)]. Since then, many states have adopted the Model Regulation or similar suitability regulations. In 2006, the NAIC’s Life Insurance and Annuities Committee expanded the model’s protections to cover all consumers. ‘When we first drafted the model, senior citizens were the focus because that’s where the complaints originated,’ said Commissioner Jim Poolman of North Dakota. ‘It’s become increasingly clear that problems are now expanding to include people under 65’ (NAIC 2006).

Should Regulators Consider More Uniformity?

As boomers near retirement and move from the accumulation to the distribution phase of retirement, many more individuals will be receiving their entire pension benefit in a single-sum cash distribution. For some, at least

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some of those assets will reasonably be used to purchase annuities, to help control the risk of outliving their money. Nevertheless, the 50 different state insurance laws pose a significant barrier, both for those seeking to design and market annuities for this group of purchasers and for those potential purchasers seeking to understand the annuity products offered. NAIC has attempted to address these issues by creating a series of 'model' statutes in the hope that each state will adopt the NAIC standard. Such laws can encourage a wider market of insurance and investment products and greater risk pooling of those products, as well as provide a greater likelihood that consumers can compare similar products. In addition, these laws may also mitigate, or, in some cases, eliminate, expensive procedural legal battles over 'choice of law' rules before the purchaser and seller can get to the merits of the suit.

Advocates of more uniformity in insurance-type investments have urged the creation of an 'optional federal insurance charter,' which would regulate certain types of insurance (including property and casualty, life, and health insurance) at the federal level, if insurers elected to be covered by certain specified requirements. In the 109th Congress, for example, bills were introduced that would have authorized the issuance of a federal charter for insurance or any other insurance operations to be regulated, 'to provide a comprehensive system for the regulation and supervision of national insurers and national agencies, to provide for policyholder protections in the event of an insolvency or impairment of a national insurer.'⁹ No action was taken on these bills in the 109th Congress, but similar bills were again introduced in the 110th Congress. It should be noted that this approach has several powerful opponents. The very mention by the United States Secretary of the Treasury Henry Paulson that the idea was worth consideration was enough to generate prompt opposition to the concept by the Coalition Opposed to a Federal Insurance Regulator, a coalition of insurance companies, trade associations, and agents and brokers (Insurancenewsnet 2007).

Some state regulators note that the lack of parallel regulation of investments in areas where both the federal and the state governments have regulatory authorities is a significant problem. According to Wisconsin's Insurance Commissioner Patty Struck, it is unclear how the federal ERISA law governing employer-sponsored benefits will interact with state securities and insurance laws in regulating retirement product sales and other employer retirement plan distributions.¹⁰

Financial Advice

Recent Congressional attention has been focused on facilitating employers' ability to provide financial advice for active employees.¹¹ However, at no

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point in the lengthy and often contentious Congressional debate was the question raised about providing financial advice for persons who have already retired. Arguably, retirees could also benefit from financial counseling. Moreover, their need for advice is quite immediate and serious, since their ability to recover from investment misjudgments is severely limited.

Little is known about what assistance retirees have available to them once they retire, to help them determine how to manage and invest their distributions. Survey data suggest that although few had financial advisers before retirement, many retirees do discuss what to do with their money after retirement with financial and tax advisers. Nevertheless, there is significant distrust in the advice that these financial advisers give. (Greenwald, Bryck, and Sondergeld 2006). In fact, to the extent that retirees have been responsible for investing their pension assets preretirement in their 401(k) plans, there appears to be little change in asset allocation for most retirees' postretirement. (Greenwald, Bryck, and Sondergeld 2006). So in determining whether sufficient regulatory protection exists for the investment vehicles used by many retirees, one should begin by looking at what investment vehicles are being utilized.

A Brief Examination of the Regulatory Structure Applicable to Key Asset Products

The most recent EBRI/ICI data regarding where 401(k) assets are invested show that 38 percent of the assets are in equity funds, 11 percent in company stock, 10 percent in balanced funds (including lifestyle and lifecycle funds), and 39 percent in fixed-income securities [including 10 percent in bond funds, 13 percent in guaranteed investment contracts (GICs) and other stable value funds, and 4 percent in other money funds; data for 2005]. For purposes of this discussion, 'funds' include mutual funds, bank collective trusts, life insurance separate accounts, and pooled investment products primarily invested in the type of funds indicated above (Holden and VanDerhei 2006). With respect to IRA assets, some 45 percent are invested in mutual funds, 38 percent in brokerage funds, 9 percent in life insurance, and 7 percent in banks/thrifts (Copeland 2007).

In view of this concentration, we focus our exploration into the regulatory structure for monitoring fraud and solvency for four asset product categories: mutual funds, bank products, insurance company products (including annuities), and brokerage accounts. To this we turn next.

Overview of Regulation of Mutual Funds

Legally known as an 'open-end company', a mutual fund is an investment company that pools money from many investors for investment by an

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investment adviser in stocks, bonds, short-term money-market instruments, and other instruments.¹² Mutual funds are generally organized under state law as corporations or business trusts.¹³ Unlike a typical corporation, however, a mutual fund generally has no employees of its own. Rather, most funds are organized and operated by an investment adviser who supplies the fund with its officers and employees and, more often than not, selects the fund's initial slate of directors [United States Securities and Exchange Commission (SEC 2006)]. Congressional concern about the potential for abuse inherent in such a structure led to the enactment of the Investment Company Act of 1940 (the '1940 Act or Act'), 15 U.S.C. section 80a-1 *et seq.*¹⁴ The thrust of the Act is on disclosure to the public of information about the fund and its investment objectives. The Act also includes detailed requirements concerning investment company structure and operations (SEC 2007a).

In addition to the detailed requirements contained in the 1940 Act, mutual funds are subject to the Securities Act of 1933 (1933 Act), which requires fund shares offered to the public to be registered with the SEC and regulates mutual fund advertising, and the Securities Exchange Act of 1934 (1934 Act), which regulates how funds are sold and requires persons distributing funds or executing fund transactions to be registered with SEC as broker-dealers. Finally, investment advisers to mutual funds are subject to the Investment Advisers Act of 1940 (IAA), which requires them to register with the SEC, imposes reporting requirements, and prohibits them from engaging in fraudulent, deceptive, or manipulative practices.

The SEC is responsible for the enforcement and administration of the federal securities laws, including the 1940 Act. The SEC oversees mutual funds by performing on-site inspections of mutual funds' compliance with federal securities laws, reviewing disclosure documents, and engaging in other regulatory activities, such as rulemaking, responding to requests for exemptions from applicable federal securities laws, and providing interpretations of those laws (GAO 1997). The SEC is also responsible for investigating and prosecuting violations of securities laws by mutual funds (GAO 1997).

In addition to the federal securities laws discussed above, mutual funds are also subject to state regulation in those states in which it sells shares. While the National Securities Markets Improvement Act of 1996 (NSMIA) provided that, among other things, mutual funds registered under the 1940 Act are subject to exclusive federal jurisdiction with regard to regulatory requirements, the states may still impose notice requirements (Hazen 2005). The NSMIA also preserves states' enforcement jurisdiction with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions.¹⁵ Notably, it was the then New York Attorney General, Eliot Spitzer, who first identified the

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recent trading abuses in the mutual fund industry and brought enforcement actions against a number of mutual fund companies.

Aside from that important example, little has been written about the effectiveness of this law, although its purpose was to reduce the multiplicity of regulation of securities and eliminate duplication and conflicts between state and federal regulatory efforts except in the narrow areas described above. Presumably, one expected effect of this delineation of authority was that state resources could now be redirected toward protecting consumers from fraudulent conduct by brokers and dealers, although most states do not appear to have followed the lead of New York and used the tools offered by NSMIA as did Attorney General Spitzer.

Reporting and Disclosure Requirements for Mutual Funds

The 1940 Act expressly recognizes that investors are adversely affected when mutual funds fail to provide adequate, accurate information on funds' securities.¹⁶ Consequently, the Act contains detailed registration, reporting, and disclosure requirements. Before a mutual fund can begin to operate, it must first file a notification of registration with the SEC.¹⁷ Mutual funds must then file a registration statement with the SEC within three months after the filing of the notification of registration.¹⁸ The purpose of the registration statement is to provide information as to a fund's proposed activities for the protection of investors.¹⁹ The registration statement must contain, among other things, a detailed description of the fund's investment policies, and those policies that the fund deems as matters of fundamental policy.²⁰ Once filed, the objectives and policies identified in the registration statement can only be changed with shareholder approval.²¹

In addition, the 1940 Act requires mutual funds to file periodic reports with the SEC and to send certain reports to shareholders.²² In what one legal commentator (Hazen 2005) characterizes as a 'final safety net for investors', SEC regulations require that, 'in addition to the information expressly required to be included in a registration statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.'²³

While the 1940 Act's disclosure regime is undoubtedly comprehensive, it appears that 401(k) participants might not necessarily receive the same level of disclosure as other mutual fund participants. According to Andrew J. Donohue, Director of the SEC's Division of Investment Management, '[d]ifferent 401(k) participants receive varying levels of information, from full prospectuses and shareholder reports to one-page charts containing limited data and information' (Donohue 2007). Mr. Donohue intends to

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address this issue by working with the U.S. Department of Labor on a standardized mutual fund disclosure document for 401(k) investors as part of SEC's current disclosure reform initiative (Donohue 2007).

Structural Requirements for Mutual Funds

The 1940 Act also requires mutual funds to have a board of directors that will 'protect the interests of the fund's shareholders' (GAO 2004a). In what has been described as the 'cornerstone' of the 1940 Act's effort to control conflicts of interest within mutual funds, the Act requires that at least 40 percent of a fund's board be composed of independent outside directors.²⁴ Specifically, the Act provides that, except in limited circumstances, no more than 60 percent of the members of the board may be 'interested persons' of the fund.²⁵ The term 'interested person' means the fund's investment adviser, principal underwriter, and certain other persons (including their employees, officers, or directors) who have a significant relationship with the fund, its investment adviser, or principal underwriter.²⁶ If, however, an investment adviser is affiliated with the principal underwriter of a fund, a majority of the board of directors must be independent of both the investment adviser and the principal underwriter.²⁷

The Act assigns a number of special responsibilities, involving the supervision of management and financial auditing to disinterested directors. Disinterested directors must, for example, review and approve the contracts of the fund's investment adviser and principal underwriter.²⁸ In this regard, the Act requires that disinterested directors request 'such information as may reasonably be necessary to evaluate the terms of [the] contract.'²⁹ Disinterested directors are also required to select the accountants who prepare the fund's filings under the Act.³⁰ Finally, the Act vests disinterested directors with the authority to appoint other disinterested directors to fill vacancies resulting from the assignment of advisory contracts.³¹

The Act also limits who can serve as an officer, director, employee, investment adviser, or member of an advisory board of a mutual fund. For example, certain persons convicted of a felony or misdemeanor arising from a securities transaction within the past ten years, or anyone temporarily or permanently enjoined from effecting securities transactions, are prohibited from serving as an officer, director, employee, investment adviser, or member of an advisory board of a mutual fund.³² In addition, mutual funds are precluded from indemnifying any director or officer against any liability to the fund or the fund's shareholders to which such director or officer would otherwise be subject by reason of willful misfeasance, bad faith, or gross negligence, in the performance of his or her duties.³³ Finally, mutual funds must safeguard their assets by placing them in the hands of a custodian and by providing fidelity bonding of officers and employees of

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the fund.³⁴ Under the Act, a person convicted of larceny and embezzlement from a mutual fund can be fined up to \$10,000 or imprisoned up to five years.³⁵

Prior to the enactment of the 1940 Act, Congress mandated a study of the investment company industry.³⁶ As the Supreme Court noted in *E.I. du Pont v. Collins*, 432 U.S. 46 (1977), one of the problems identified in that study was the numerous transactions between investment companies and persons affiliated with them, which resulted in a distinct advantage to the 'insiders' over the public investors.³⁷ In response to this problem, the 1940 Act prohibits conflict of interest transactions between the fund and affiliated persons.³⁸ For example, with limited exceptions, the Act prohibits an affiliated person, promoter, or underwriter of a fund from selling securities (or other property) to the fund.³⁹ These provisions are designed to preclude officers, directors, and principal underwriters, among others, from self-dealing in transactions to which the mutual fund is a party.

To enforce these provisions, the 1940 Act authorizes the SEC to seek injunctive relief against a mutual fund officer, director, adviser, or underwriter, among others, for a breach of fiduciary duty involving personal misconduct with respect to any fund for which such person serves or acts.⁴⁰ In addition, under the Act, an investment adviser is 'deemed to have a fiduciary duty with respect to the receipt of compensation for services' from a mutual fund.⁴¹ This duty is in addition to the specific fiduciary responsibilities that are already imposed on investment advisers by the IAA of 1940. These requirements are important to investors because they emphasize the significant fiduciary duties that arise as a result of the legal relationship formed when an investor entrusts his or her assets and financial well-being to an individual whose job is to invest those assets in a prudent manner on his or her behalf. In order to create a climate of confidence for individuals to invest in mutual funds in the first place, conflicts of interests, self-dealing, and other similar activities that create opportunities for the mutual fund or its officers or employees to enrich themselves at the expense of the investor must be clearly prohibited. Just as importantly, situations in which these activities occur in violation of these rules must be dealt with swiftly and severely in a way that reinforces public confidence in the integrity and responsiveness of the enforcement regime created under the securities laws.

SEC Response to Mutual Fund Scandals

In recent years, there have been reports of mutual fund improprieties involving late trading of fund shares, inappropriate market timing activities,

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and the misuse of nonpublic information about fund portfolios. The SEC has brought enforcement actions against a number of mutual fund complexes and issued new rules designed to improve fund governance, ethical standards, and disclosure to investors.⁴² As of May 31, 2005, the SEC brought 29 enforcement actions involving mutual fund complexes (and their employees) and 12 enforcement actions against broker-dealers (and their employees).⁴³ While moving forward to undertake this type of public enforcement activity by the SEC is important, the ultimate outcome of these actions (many of which are still in progress) and their success at deterring future wrongdoing remains unclear. Investor confidence that the SEC possesses the resources and will aggressively enforce existing laws will largely depend on the real and perceived success of these legal actions.

On the regulatory front, mutual funds and investment advisers must now establish internal compliance programs to ensure compliance with the federal securities laws.⁴⁴ As part of these compliance programs, funds and advisers must (a) implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, (b) conduct an annual review of their policies and procedures, and (c) designate a chief compliance to administer the compliance program. The SEC has also adopted amendments to Form N-1A under the 1933 Act and 1940 Act to require mutual funds to disclose (a) market timing procedures, (b) practices regarding 'fair valuation' of portfolio securities, and (c) policies and procedures addressing disclosure of their portfolio holdings.⁴⁵ The SEC also issued new rules under the IAA of 1940 that require investment advisers to adopt written codes of ethics to ensure compliance with federal securities laws.⁴⁶ Such codes must, at a minimum, include a standard (or standards) of business conduct that reflects the fiduciary obligations of investment advisers.

These measures all focus on enhanced disclosure and improvements in corporate governance as a means to provide greater protection for investors. Although these are important and necessary regulatory actions, it remains to be seen whether the type of mutual fund abuses that affected ordinary investors (including those seeking to invest their pension distributions) will in fact be deterred by these measures, or whether new forms of malfeasance will occur despite these changes.

Overview of Insurance Regulation

For historical reasons, regulation of insurance in the United States has long been the exclusive domain of the states. States' authority to regulate insurance was affirmed by Congress in 1945 when it passed the McCarron-Ferguson Act, 15 U.S.C.A. section 1011-1015, which granted an

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antitrust exemption for insurance activities to the extent that they were regulated by state law. This Act held that ‘the continued regulation and taxation by the several States of the business of insurance is in the public interest.’ More recently, the Gramm-Leach-Bliley Act reaffirmed the preeminence of regulation of insurance by the states as granted by the McCarron-Ferguson Act. As a result, each state has its own statute governing insurance companies and the products they offer. While far from uniform, state insurance statutes generally contain, among other things, restrictions on insurance operations (including investment activities, agent licensing, and product filing requirements) and other requirements to ensure solvency and protect consumers. As discussed more fully below, the insurance laws of all states also establish life and health guaranty associations to protect policyholders against the insolvency of an insurance company.

Insurance companies offer a wide range of insurance/investment products to retirement plans. Two of the more common products found in 401(k) plans are GICs and variable annuities. A GIC is a fixed income investment option offered by insurance companies, which typically provides a guaranteed rate of return for a specified time period (McGill et al. 2004). The rate of return provided by GICs will generally be based on currently available market yields of a specified asset mix, which will generally be slightly lower than the rate of return on similar investments (McGill et al. 2004).

A variable annuity is a contract between the purchaser and an insurance company under which the insurer agrees to make periodic payments beginning either immediately or at some future date, and if the purchaser dies during the accumulation phase, a death benefit is paid to the purchaser’s beneficiary [United States Securities and Exchange Commission and National Association of Securities Dealers (SEC/NASD 2004)]. A purchaser of a variable annuity allocates his or her contributions among the various investment options, which are generally contained in subaccounts. These investment options are, more often than not, mutual funds that invest in stocks, bonds, money market instruments, or some combination of the three (SEC 2007*b*). Unlike a fixed annuity, payment amounts under a variable annuity will depend on the performance of the underlying investment portfolio.

Variable annuity contracts are generally subject to federal securities laws.⁴⁷ Thus, absent an exemption from the registration requirements of the 1933 Act, variable annuities must be registered as securities with the SEC. One such exemption is contained in section 3(a)(2) of the 1933 Act for securities issued in connection with a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401(a) of the Internal Revenue Code.⁴⁸ It is important to note,

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however, that the section 3(a)(2) exemption is from the 1933 Act's registration requirements. Marketers of variable annuities remain subject to the antifraud provisions of the federal securities laws.

Notwithstanding the classification of variable annuities as securities under the 1933 Act, states can and often do classify variable annuities under their own state securities and insurance laws. According to a recent study conducted by the Hawaii Legislative Reference Bureau, only 14 states classify variable annuity contracts as securities (Sugano 2006). This is significant because sales abuses involving variable annuities will only fall within the jurisdiction of the state securities commissioner if such contracts are classified as a security. In those states that do not classify variable annuities as a security, abuses surrounding the marketing and sale of those products would presumably fall within the jurisdiction of the state insurance commissioner.

To make matters more confusing, the insurance statutes in 40 states include language providing the state insurance commissioner with exclusive jurisdiction over the issuance and sale of variable insurance contracts (Sugano 2006). The author of the Hawaii study notes that this raises the question of 'whether insurance divisions get involved in enforcement activities in those states where variable annuities are not defined as 'securities' under the securities laws' (Sugano 2006). Interestingly, when the author of the Hawaii study posed this question to NAIC, whose membership is composed of the insurance commissioners of all of the states, an NAIC representative stated that NAIC does not track such information. The Hawaii study also notes that there may be problems of overlapping jurisdiction in those states that have securities statutes that classify variable annuities as securities, and insurance statutes that provide the insurance commissioner with exclusive jurisdiction over variable annuities (Sugano 2006).

State Guaranty Association Coverage

As noted above, every state has a guaranty association which protects policyholders against the insolvency of an insurance company operating in that state. While established under state law, guaranty associations are not state agencies (GAO 1993); this implies that the states do not guarantee that the guaranty associations themselves will have sufficient funds to cover their obligations (GAO 1993). When an insurance company is liquidated, state life and health insurance guaranty associations are triggered to provide coverage and benefits to policyholders living in their state [National Organization of Life and Health Insurance Guaranty Association (NOLHIGA 2007a)]. If the insolvent insurer does not have enough funds to meet its obligations, each state guaranty association assesses the member insurers

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in its state a share of the amount required to meet the claims of resident policyholders (NOLHIGA 2007*a*). The amount assessed is based on the amount of premiums each company collects in that state on the kind of business for which benefits are required (NOLHIGA 2007*a*). Table 8-1 summarizes different state practices.

While coverage varies by state, most guaranty associations cover direct individual or direct group life and health insurance policies as well as individual annuity contracts issued by the guaranty association's member insurers (NOLHIGA 2007*b*). State guaranty associations generally do not cover any portion of a policy in which the investment risk is borne by the individual, such as a variable annuity (NOLHIGA 2007*b*). Coverage of GICs, on the other hand, varies from state to state (NOLHIGA 2007*b*). Those states that exclude unallocated contracts from coverage generally do not cover GICs. Our review of state guaranty association statutes and information contained on the National Organization of Life and Health Insurance Guaranty Association's website indicates that some 30 states now provide some coverage for GICs.⁴⁹

Overview of Regulation of Bank Investment Products

Bank-offered investment products are regulated by the federal banking agencies (the Federal Reserve Board, the Treasury Department's Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC; see GAO 2007). The Federal regulatory objectives in connection with bank-offered investment products are twofold: (*a*) to maintain the safety and soundness of the bank and (*b*) to protect the interests of trust customers (GAO 1986).

In 2005, trust institutions held more than \$20 trillion in fiduciary assets for retail and institutional clients (FDIC 2005). Trust institutions exercised investment discretion over almost 27 percent, or 4.9 trillion, of these assets. According to the FDIC (FDIC 2005), approximately half of all fiduciary assets are held in retirement accounts (employee benefit assets plus IRAs and Keoghs).

Bank regulators have the authority to grant or terminate the trust powers of banks and bank-holding companies and their bank and trust subsidiaries. Under 12 U.S.C. section 92a, the OCC is authorized to grant permission for a national bank to act as a fiduciary and to promulgate regulations governing the proper exercise of fiduciary powers. OCC supervises the trust activities of national banks under regulation 12 CFR part 9. The Federal Reserve and FDIC, in turn, supervise state banks' trust activities under regulations similar to OCC's. The Federal Reserve also supervises the trust company subsidiaries of bank-holding companies.

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TABLE 8-1 State Guaranty Association Coverage

<i>State</i>	<i>Statute</i>	<i>Coverage of GICs/Unallocated Annuity Contracts</i>	<i>Coverage of Variable Annuity Contracts</i>
Alabama	Ala. Code §27-44-3(a)	^a	Covers portion guaranteed by insurer
Alaska	Alaska Stat. §§21.79.020(b), (c)	Yes	Covers portion guaranteed by insurer
Arizona	Ariz. Rev. Stat. Ann. §20-682B	Yes ^b	Covers portion guaranteed by insurer
Arkansas	Ark. Code Ann. §§23-96-107(b); 23-96-106(a)	Yes	Covers portion guaranteed by insurer
California	Cal. Ins. Code §1067.02(b) (2)	No ^c	Covers portion guaranteed by insurer
Colorado	Colo. Rev. Stat. §10-20-104(2) (b)	No	Covers portion guaranteed by insurer
Connecticut	Conn. Gen. Stat. §§38a-860(f) (1), (2)	Yes	Covers portion guaranteed by insurer
Delaware	Del. Code Ann. §§4403(b) (1), 4403(b) (2)	Yes	Covers portion guaranteed by insurer
District of Columbia	D.C. Code Ann. §31-5402(b) (2)	No	Covers portion guaranteed by insurer
Florida	Fla. Stat. Ann. §631-713(3)	No	Covers portion guaranteed by insurer
Georgia	Ga. Code Ann. §§33-38-2(a); 33-38-2(c)	Yes	Covers portion guaranteed by insurer
Hawaii	Haw. Rev. Stat. §431:16-203(b) (2)	No	Covers portion guaranteed by insurer
Idaho	Idaho Code §41-4303(1), (2)	Yes	Covers portion guaranteed by insurer
Illinois	215 Ill. Comp. Stat. Ann. 5/531.03(2) (a), (b)	Yes	Covers portion guaranteed by insurer
Indiana	Ind. Code Ann. §§27-8-8-2-3(d), (e)	Yes	Covers portion guaranteed by insurer
Iowa	Iowa Code §§508C.3.2, 3.3	Yes	Covers portion guaranteed by insurer
Kansas	Kan. Stat. Ann. §§40-3003(b); 40-3008(n) (1)	No ^d	Covers portion guaranteed by insurer
Kentucky	Ky. Rev. Stat. Ann. §304.42-030(2) (b)	No	Covers portion guaranteed by insurer
Louisiana	La. Rev. Stat. Ann. §§22:1395.3B(1), (2)	Yes	Covers portion guaranteed by insurer

Au: Please check whether the change from 'No5' to 'No4' in the footnote of Table 8-1 is correct.

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<i>State</i>	<i>Statute</i>	<i>Coverage of GICs/Unallocated Annuity Contracts</i>	<i>Coverage of Variable Annuity Contracts</i>
Maine	Me. Rev. Stat. §§4603.1, 2	Yes	Covers portion guaranteed by insurer
Maryland	Md. Code Ann §§9-403(b)(1), (2)	No	Covers portion guaranteed by insurer
Massachusetts	Mass. Gen. Laws §146B(4)(B)(2)	No	Covers portion guaranteed by insurer
Michigan	Mich. Comp. Laws Ann. §500.7704(2)	Yes	Covers portion guaranteed by insurer
Minnesota	Minn. Stat. Ann. §§62B.19	Yes	Covers portion guaranteed by insurer
Mississippi	Miss. Code Ann. §83-23-205(2)(a), (b).	Yes	Covers portion guaranteed by insurer
Missouri	Mo. Ann. Stat. §376.717.3	No	Covers portion guaranteed by insurer
Montana	Mont. Rev. Code Ann. §33-10-201(4)	Yes	Covers portion guaranteed by insurer
Nebraska	Neb. Rev. Stat. Ann. §44-2703(2)(b)	No	Covers portion guaranteed by insurer
Nevada	Nev. Rev. Stat. Ann. §686C.035.1(a)	No	Covers portion guaranteed by insurer
New Hampshire	N.H. Rev. Stat. Ann. §§408-B:5, II(a), (b)	Yes	Covers portion guaranteed by insurer
New Jersey	N.J. Rev. Stat. §§17B:32A-3.b, 3.c	Yes	Covers portion guaranteed by insurer
New Mexico	N.M. Stat. Ann. §59A-42-3A 59A-42-3B	^e	Covers portion guaranteed by insurer
New York	N.Y. Ins. Law §§7703(a) 7703(b)	Yes	Covers portion guaranteed by insurer
North Carolina	N.C. Gen. Stat. §§58-62-21(b), (c)	Yes	Covers portion guaranteed by insurer
North Dakota	N.D. Cent. Code §§26.1-38.1-01.2, 1.3	Yes	Covers portion guaranteed by insurer
Ohio	Ohio Rev. Code Ann. §§3956.04(B)(1), (2)	Yes	Covers portion guaranteed by insurer
Oklahoma	Okla. Stat. Ann. §2025.B.2.	No	Covers portion guaranteed by insurer
Oregon	Or. Rev. Stat. §§734.790(1), (3)	Yes	Covers portion guaranteed by insurer
Pennsylvania	40 PA. Stat. §§991.1703(b)(1)	Yes	Covers portion guaranteed by insurer

(cont.)

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<i>State</i>	<i>Statute</i>	<i>Coverage of GICs/Unallocated Annuity Contracts</i>	<i>Coverage of Variable Annuity Contracts</i>
Rhode Island	R.I. Gen. Laws §§27-34.3-3(b)(1), (2)	Yes	Covers portion guaranteed by insurer
South Carolina	S.C. Code Ann. §38-29.40	No	Covers portion guaranteed by insurer
South Dakota	S.D. Codified Laws §58-29C-46B(2)	No	Covers portion guaranteed by insurer
Tennessee	Tenn. Code Ann. §56-12.204(b)(2)	No ^f	Covers portion guaranteed by insurer
Texas	Tex. Ins. Code Ann. §463.202(c)(1)	Yes	Covers portion guaranteed by insurer
Utah	Utah Code Ann. §§31A-28-103(2)(a), (b)	Yes	Covers portion guaranteed by insurer
Vermont	Vt. Stat. Ann. tit. 8 §§4153(a) 4153(b)(1), (2)	Yes	Covers portion guaranteed by insurer
Virginia	Va. Code Ann. §38.2-1700C	No	Covers portion guaranteed by insurer
Washington	Wash. Rev. Code Ann. §48.32A.025	Yes	Covers portion guaranteed by insurer
West Virginia	W.Va. Code Ann. §33-26A-3(b)(1)	Yes	Covers portion guaranteed by insurer
Wisconsin	Wis. Stat. Ann. §646.01(1)(b)	No	Covers portion guaranteed by insurer
Wyoming	Wyo. Stat. Ann. §26-42-103(c)	No	Covers portion guaranteed by insurer

Source: Authors' compilation of state laws and National Organization of Life and Health Guaranty Associations summary of state statutes governing guaranty associations.

^a Alabama's statute neither includes nor excludes GICs and/or unallocated annuity contracts.

^b Arizona's guaranty association will only cover a GIC if the 'contract holder exercises an annuity option for individual persons' provided by the GIC on or before the date the life insurance company becomes subject to a delinquency proceeding. See Ariz. Rev. Stat. Ann. §20-682B.

^c The California statute does, however, contain a limited exception to the exclusion. See Cal. Ins. Code §1067.02(b)(2).

^d Coverage is, however, provided for unallocated annuity contracts issued to IRC §457 plans.

^e New Mexico's statute neither includes nor excludes GICs and/or Unallocated annuity contracts.

^f Coverage is, however, provided to unallocated annuity contracts issued to IRC §403(b) plans.

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Provided certain requirements are met, collective investment funds are exempt from the registration, disclosure, and recordkeeping requirements of the 1940 Act.⁵⁰ They are not, however, exempt from the antifraud provisions of the 1933 Act and 1934 Act. Nor, for that matter, are they exempt from ERISA if the fund contains any account assets subject to ERISA. Thus, a collective investment fund in which one or more ERISA-covered employee benefit plans participate must comply with the myriad requirements imposed by ERISA, and participants of such funds are protected by ERISA (GAO 1986).

OCC regulations allow national banks to maintain and invest fiduciary assets in a collective investment fund. A collective investment fund is a trust managed by a bank or trust company that pools investments of retirement plans and other large institutional investors.⁵¹ Participating interests in a collective investment fund are not FDIC-insured (United States Comptroller of the Currency (OCC) 2005). The regulations set forth detailed requirements concerning the need for a written plan, fund management (including the use of an outside adviser), fund valuation, admission and withdrawal, audit, and financial reports, and conflicts of interest, among other things. The regulations are intended to protect the interests of fiduciary accounts invested in collective investment funds (GAO 1986).

Collective Investment Fund Requirements

Part 9 of the regulations permit national banks to maintain and invest fiduciary assets in a collective investment fund ‘where consistent with applicable law.’ The term ‘applicable law,’ as used in the regulations, refers to (a) the terms of the instrument governing a fiduciary relationship; (b) the law of a state or other jurisdiction governing a national bank’s fiduciary relationships; (c) applicable federal law governing those relationships; or (d) any court order pertaining to the relationship.⁵²

Section 9.18(b)(1) of the regulations requires that collective investment funds be established and maintained in accordance with a written plan, which must be approved by resolution of the bank’s board of directors or by a committee authorized by the board. A copy of the plan must be made available to any person for inspection at the main office of the bank during banking hours. The written plan must, at a minimum, contain the following information regarding the manner in which the bank will operate the fund:

1. investment powers and policies with respect to the fund;
2. allocation of income, profits, and losses;
3. fees and expenses that will be charged to the fund and to participating accounts;

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4. terms and conditions governing the admission and withdrawal of participating accounts;
5. audits of participating accounts;
6. basis and method of valuing assets in the fund;
7. expected frequency for income distribution to participating accounts;
8. minimum frequency for valuation of fund assets;
9. amount of time following a valuation date during which the valuation must be made;
10. bases upon which the bank may terminate the fund; and
11. any other matters necessary to define clearly the rights of participating accounts.⁵³

A bank that administers a collective investment fund generally must have exclusive management of the fund, except as a prudent person might delegate to others.⁵⁴ The regulation also dictates the frequency in which a collective investment fund must be valued.⁵⁵ Specifically, a collective investment fund must determine the value of the fund's readily marketable assets at least once every three months. Collective investment funds must be valued at market value, or if such valuation is not readily ascertainable, at a fair value determined in good faith by the bank.⁵⁶ The regulations also require that collective investment funds must be audited at least once during each 12-month period by auditors responsible only to the bank's board of directors.⁵⁷

Collective investment fund must issue an annual report that is intended both for the bank and the beneficiaries of participating accounts.⁵⁸ The report must disclose the fund's fees and expenses in a manner consistent with applicable law in the state in which the bank maintains the fund. The regulations also require that the report contain a list of investments in both cost and current market value, a summary of investment changes for the period reflecting purchases (with costs) and sales (with profit and loss), income and disbursements since the last report, and notation of any investments in default. The report may not contain predictions of future fund performance, but may include historical performance data.⁵⁹

Banks that administer collective investment funds are subject to the following self-dealing and conflicts of interest rules: (a) the bank may not have an interest in the collective investment fund, except in its fiduciary capacity (this includes a prohibition on any creditor relationship between the bank and the fund or its participants); (b) the bank may not make a loan on the security of the participant's interest in the fund; (c) the bank may not lend, sell, or otherwise transfer assets of a fiduciary account to the bank, insiders, or affiliates; (d) no fund assets may be invested in the bank's stock or obligations.⁶⁰

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Banks may charge a 'reasonable fund management fee' if (a) the fee is permitted under applicable law (and complies with disclosure requirements, if any) in the state in which the bank maintains the fund; and (b) the amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participating fiduciary accounts that would not have been provided to the accounts were they not invested in the fund.

Bank Investment Contracts

A bank investment contract (BIC) is a stable-value investment product issued by a bank that guarantees to return the principal amount deposited by the contract holder on a specified date and at a specified rate of interest. Most BICs are insured by the FDIC (1988, 1989). Whether a particular BIC is insured by the FDIC depends on whether the BIC qualifies as a 'deposit.'⁶¹ If a BIC is a deposit, FDIC insurance will apply. If, however, the BIC is not a deposit, no FDIC insurance will apply. While BICs are somewhat similar to GICs in that they may offer some insurance protection, BICs generally do not contain annuity provisions.

Au: 'FDIC 1988 and 1989' are not listed in the reference list. Either include them in the reference list or delete the citations.

Overview of Self-Directed Brokerage Accounts

A relatively small number of 401(k) plans offer participants access to self-directed brokerage accounts. For example, about one-fifth of 401(k) plans report offering such accounts (Deloitte Consulting LLP 2006). Self-directed brokerage accounts offer plan participants the ability to invest in individual stocks and bonds in addition to mutual funds. Participants typically open an account with a brokerage firm of their own choosing, or, in some cases, the plan may offer a variety of brokerage firms from which participants may select.

The SEC shares oversight responsibilities over broker-dealers with the SROs (primarily NASD). The 1934 Act makes it unlawful for any broker or dealer to utilize interstate commerce 'to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security' unless such broker or dealer registers with the SEC.⁶² In addition to registering with the SEC, brokers and dealers must also become members of an SRO.⁶³ The states also play an important role in the regulation of brokers and dealers.

Broker-dealers are subject to the 1934 Act's 'antifraud' provisions.⁶⁴ These provisions prohibit misstatements or misleading omissions of material facts, and fraudulent practices and conduct, among other things.⁶⁵ The 1934 Act also requires SROs to implement rules designed to prevent

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fraudulent and manipulative acts and practices.⁶⁶ One of the most important is NASD's rule imposing a 'suitability' obligation upon its member broker-dealers. The rule provides, in relevant part, that:⁶⁷

- (a) In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.
- (b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:
 - (1) the customer's financial status;
 - (2) the customer's tax status;
 - (3) the customer's investment objectives; and
 - (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

NASD has also issued guidance stating that broker-dealers have a 'fundamental responsibility for fair dealing' with their customers (NASD 2007b).

As noted above, broker-dealers are also subject to state regulation. Specifically, broker-dealers are subject to registration with, and antifraud enforcement by, states in which they do business.

Au: 'NASD 2007b' is not listed in the reference list. Either include it in the reference list or delete the citation.

Au: Please check the change in the Heading 'The Securities ... (SIPC)'. We have changed it to 'The Securities ... (SIPA)'

The Securities Investor Protection Act of 1970 (SIPA)

The SIPA of 1970 created the Securities Investor Protection Corporation (SIPC), a private nonprofit corporation to protect investors from losses resulting from the financial failure of broker-dealers in whose custody the investors have placed cash or securities.⁶⁸ SIPC's mission is to promote confidence in securities markets by allowing for the prompt return of missing customer cash and securities held at a failed member-firm (GAO 2001: 6). SIPA gives SEC oversight responsibility over SIPC.⁶⁹ SIPC maintains a fund financed by annual assessments on all member firms and interest generated from its investments.⁷⁰ The SIPC fund amounted to \$1.29 billion at year-end 2005 (SIPC 2005). This fund is used for advances to trustees for customer claims and to cover certain administrative expenses of a liquidation proceeding (GAO 2001).

Most broker-dealers registered under the 1934 Act must become members of SIPC.⁷¹ There are, however, a number of important exceptions. Specifically, broker-dealers whose business consists exclusively of (a) the distribution of shares of mutual funds, (b) the sale of variable annuities, and (c) the business of insurance are not required to become members of

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SIPC.⁷² Thus, while shares of mutual funds are protected securities under SIPA, broker-dealers that deal exclusively in mutual funds are not SIPC members. Customers of such broker-dealers are, therefore, not protected by SIPC. SIPC provides coverage only if a member-brokerage firm goes bankrupt and does not have sufficient assets to settle its customer accounts. It does not protect investors against market risk or against losses due to poor performance of investments. SIPC does, however, cover individuals whose securities are stolen by a member-broker (SIPC 2007). To qualify for relief under SIPA, an investor must qualify as a 'customer' as defined by SIPA. Section 78lll(2) defines a 'customer' as follows [15 U.S.C.S. section 78lll(2)]:

Any person ... who has a claim on account of securities received, acquired, or held by the Debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral security, or for purposes of effecting a transfer. The term 'customer' includes any person who has a claim against the Debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the Debtor for the purpose of purchasing securities.

SIPA sets coverage at a maximum of \$500,000 per customer, of which no more than \$100,000 may be in cash. In addition, a few insurance companies offer excess SIPC insurance, that is, private insurance that firms can purchase to cover claims in excess of the \$500,000 limit under SIPA (GAO 2004*b*).

Does the Current Regulatory Structure Offer Sufficient Protection?

Our overview of the key elements of the existing regulatory structure governing the four major types of assets that retirees are likely to utilize may lead the reader to believe that a sufficient layer of protection exists to safeguard individuals from serious fraud or insolvency. Nevertheless, little evidence exists regarding the effectiveness of these structures in preventing loss or ensuring that losses to investors are appropriately compensated.

It is one thing to note that if securities fraud occurs, investors have a right to sue to hold the wrongdoer accountable. As a practical matter, however, this right may be less than useful for the newly retired Enron employee whose 401(k) benefit is less than half what it should have been because corporate executives engaged in fraudulent activity. Similarly, state guaranty funds may be designed to compensate insurance policyholders for certain losses, but, as previously described, they typically operate after-the-fact:

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after losses occur, the fund assesses each surviving insurer to make up the shortfall caused by an insurance company's failure. It can be months or years before policyholders receive compensation, yet during that period, retirees still have to pay their bills and go on with their lives. Additionally, resources for state enforcement and oversight are always in short supply.

Moreover, many of these statutory protections rely on various forms of disclosure as a mechanism to assure that investors are protected. The assumption seems to be that forcing public disclosure is an adequate substitute for traditional enforcement measures such as government auditing and monitoring. Yet disclosure that is neither understandable nor meaningful can be expensive for the entity required to undertake it, while nearly useless to the individual who was supposed to benefit from it. For instance, trying to make sense of a prospectus or a brokerage account or mutual fund statement is a daunting task for many individuals, and in fact may create more confusion and less likelihood the individual investor focuses on the most important information necessary to make a reasonable investment decision. (Choi, Laibson, and Madrian 2006). While some in the baby-boomer generation may be more financially literate than their parents, the degree of competence necessary to avoid potential dangers in evaluating the relative merits of a particular investment, understanding the dimensions of the financial risks one is facing, and managing income and investment decision-making is far from guaranteed or universal (Lusardi and Mitchell 2007).

Financial Advisers: New Training for New Challenges

Many retirees seek assistance from financial advisers to help them navigate the process of determining when, where, and how to invest their lump-sum retirement payouts, and how to manage their money in retirement. Providers of financial advice have a myriad of trade associations, credentialing organizations, and continuing education programs. But this multiplicity of education standards and credentialing creates considerable confusion among even financially knowledgeable individuals. Many of these designations do require extensive education and passage of lengthy examinations. Some of the organizations allow the public to access information about the individual credentialed by the organizations, including whether the individual remains in good standing with the organization.

The Coalition on Investor Education, consisting of North American Securities Administrators Association (NASAA), the Consumer Federation of America (CFA), the IAA, the Financial Planning Association (FPA), and the CFA Institute (provider of the Certified Financial Advisor designation),

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is one organization working on ways to clarify these various credentials.⁷³ They divide these players roughly into three groups: (a) investment advisers, (b) brokers, and (c) 'financial planners.'

'Investment adviser' and 'broker' are terms with specific legal definitions and defined responsibilities under securities laws (as discussed above). In contrast, 'financial planner' is not a legally defined term, but is a label commonly used to encompass all other suppliers of financial advice or products. The lack of clarity as to what type of background or experience an individual must have before acting as a financial planner or holding oneself out as some other type of an adviser in these matters in the marketplace is a source of concern, particularly for those who have well-recognized credentials and training in the business of providing financial education and investment advice. For instance, a subcommittee within the NASAA also is studying what action, if any, should be taken in defining and credentialing various state-recognized professional designations, such as 'elder adviser', so that consumers will have a better understanding about the competencies and training of these varying types of advisers. Newly retired individuals seeking advice on financial management and investment of their retirement distributions may be an easy target for those individuals in local communities who advertise their availability to assist individuals in these complicated and daunting financial tasks, even though these 'advisers' may have had little or no training or experience in these matters themselves.

It is also worth noting that providers of investment services and advice have differing legal obligations to their customers. As previously noted, whether the provider has a fiduciary duty to his or her customers can affect the advice the retiree might be given. Under the securities laws, investment advisers do have such a fiduciary duty and they are required to disclose their qualifications, how they are compensated, possible conflicts of interest and the existence of any pending disciplinary actions. In contrast, brokers are not generally bound by a fiduciary duty to their customers, nor are they required to disclose up-front conflicts of interest or their compensation structure. However, individuals providing financial advice may be registered or licensed investment advisers or brokers and therefore it may not be easy to determine what their legal duties and responsibilities to customers are. Although consumers may find out whether a person or firm is registered or licensed as an investment adviser or broker and review their disciplinary record by contacting NASAA or consulting their website, few retirees may even be aware that this is a problem, let alone how to investigate the credentials and record of the individual or firm interested in offering them advice.

The SEC has addressed the issue of fraud against retirement savings in a vigorous way through public awareness, using investor education,

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examinations, and enforcement.⁷⁴ During 2006, the Commission brought 23 lawsuits in the US federal courts involving fraud against seniors.⁷⁵ In addition, the Commission has partnered with state securities regulators, the New York Stock Exchange, and NASD to maximize enforcement and training resources.⁷⁶ Although this appears a step in the right direction in terms of recognizing the potential problem and the need for careful supervision of those who provide investment services and advice to seniors, it is far too early to evaluate the adequacy of these efforts.

The Role for Annuitization in a 401(k) World

Annuities can be offered as an investment alternative for participants in a 401(k) plan or as a form of payment when retirement assets are distributed from the plan. However, annuities have, to date, not yet become popular, either as an investment option in 401(k) plans or as a payout method.⁷⁷ But the retirement of the baby boomers may change that. Within the last few years, many financial product companies have entered this market by providing annuities as a 401(k) plan distribution product. In the past, plan sponsors may have been reluctant to include an annuity option for participants taking a distribution from a 401(k) plan.

The Regulatory Environment

One disincentive to 401(k) and other plan distributions in the form of annuities has been significantly reduced by section 625 of the Pension Protection Act (PPA) of 2006.⁷⁸ That section directs the Department of Labor to issue final regulations within one year of the Act's enactment to alter the applicability of its Interpretive Bulletin 95-1⁷⁹ to DC plans. In explaining what ERISA's fiduciary standards required, that Bulletin states that any employer-purchased annuity must be 'the safest available' annuity. The Bulletin was issued during the height of the Congressional and public debate over the safety and security of annuities purchased by terminating overfunded DB pension plans, and in particular the investigations and legal actions surrounding plan purchases of annuities offered by the Executive Life Insurance Company, placed in receivership by the California Insurance Department. The U.S. Department of Labor was apparently motivated to issue this directive by concern for participants in terminating overfunded DB plans, but its language appeared to sweep more broadly. The ordinary reading of the term 'safest' indicates that only a single annuity can meet that standard. Consequently, the practical meaning of the Interpretive Bulletin has been debated for more than a decade. During the recent consideration of pension legislation, Congress was told that as a result of

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the 'safest available annuity' rule, some DC plan sponsors avoided offering annuity options to their 401(k) participants because of concern about fiduciary liability in selecting a potential annuity carrier.

Section 625 of the PPA is an attempt to address that concern. It requires the Department to issue regulations clarifying that when a fiduciary selects an annuity as an optional form of distribution from an individual account (DC) plan covered by ERISA, that decision is not subject to the 'safest available annuity' requirement. However, all other fiduciary standards otherwise applicable under ERISA will still apply to the fiduciary's decision (e.g., the duty to prudently select the annuity carrier initially and monitor its performance once selected). Even after this change in the Department's Interpretive Bulletin 95-1 to clarify its limited applicability to DC plans, however, some plan sponsors may remain reluctant to enter into the role of offering various annuity payout options, in part because it still requires extra work on the part of the plan sponsor to identify, evaluate, and communicate the availability of a suitable annuity product.

The Employer Role in Offering 401(k) Annuity Products

Of late, a number of insurers have begun to develop and market annuity products for 401(k) plans, reviewed elsewhere in this volume (Ameriks et al. 2008). But from the perspective of individuals who will be receiving their benefits in the form of a lump-sum distribution, perhaps the most helpful marketplace development that is occurring is the effort to facilitate employer involvement in offering annuities as an optional form of distribution for benefits that would otherwise be paid as a single-sum cash payment. Keeping the plan sponsor of a DC plan engaged as a facilitator of the participant's ability to select an annuity at retirement and making the choice of an annuity a more attractive option could encourage a great number of individuals to annuitize and potentially reduce the chance of outliving their benefits.

Two interesting examples of this new approach of making it easier for sponsors of 401(k) plans to offer annuities are the products offered by Income Solutions®, an annuity purchase program of Hueler Investment Services, Inc., and the program designed by the Expect to Live More (ELM) Income Group of Washington.⁸⁰ In both cases, the goal is to offer viable and affordable annuity options to retiring employees, while allowing the plan sponsor to avoid ERISA plan responsibilities for the products its former employees purchase. Income Solutions® has brought a product to the market that enables plan sponsors to offer their retiring employees literally a supermarket of annuity providers who will compete for the retiree's business by supplying a bid to the retiree based on the same

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annuity features offered by its competitors participating on the site. The Income Solutions platform in effect enables the 401(k) plan participant to compare apples to apples as he or she decides whether to annuitize the 401(k) account balance at retirement and if so at what price. ELM Income Group of Washington is an outgrowth of a cooperative project undertaken by a number of large companies that banded together to use their combined marketplace leverage to challenge insurers to provide lower cost and more flexible annuity products for their employees and to the public at large. One unique feature of ELM's strategy that was required of insurance carriers with whom they contracted is that the insurers must make available the same products to the public (and to other employers) through their Internet website and toll-free numbers connected to salaried customer service representatives. ELM's first annuity offering involved fixed annuity products from Nationwide and The Principal Financial Group.

Conclusions

Many near-retirees confront the question of whether to receive their retirement benefits in a single-sum cash distribution or some other form. Most people facing this choice will be participants in DC plans with no other distribution option offered, but increasingly, participants in traditional DB plans may also affirmatively select a lump sum rather than an annuity. Yet once they have received their lump-sum distribution, the challenge of assuring that this sum will be sufficient to assure their financial security in retirement despite the longevity, illness, and inflation risks they will face is formidable.

While retirees who want to invest some or all of this single-sum retirement distribution have many financial products available to them, there are also many uncertainties as to whether adequate regulatory and enforcement structures exist in the marketplace to assure that their investments are protected from any financial loss they may suffer as a result of the insolvency or fraud of those individuals or entities to which they have entrusted their money. As we have shown, there is a detailed and complex regulatory structure governing the four major asset classes that most retirees use for their investments [mutual funds, bank products, insurance company products (including annuities), and brokerage accounts]. Nonetheless, there have been cases where individual investors have suffered losses, despite these regulatory protections.

In the past, financial risks to retirees were limited since the vast majority of them received their benefits in the form of an annuity—typically a monthly stream of income. Although purchasing annuities is not entirely risk-free, since the solvency of the annuity carrier is still a potential source

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of concern, at present the regulatory structure for guarding against fraud and insolvency of insurance carriers appears more developed and reliable than for the other types of investment opportunities. As previously noted, insurance is largely state-regulated and most states seem to be doing a good job in protecting annuity purchasers. But changes in the employer-sponsored plan marketplace have reduced the reliance on annuities as a hedge for the significant risks faced by retirees. Recently, however, as more and more attention has been paid to the challenges retirees must overcome in managing their single-sum pension distributions, there appears to be a renewed interest in annuitization and some heartening product development activity in the marketplace. We believe it unlikely that there will be a major resurgence of the traditional DB plan, but it is positive that some employers are beginning to believe that encouraging retirees to elect annuities may assist participants to avoid making investment and income mistakes in retirement.

Additional research is necessary in several areas. First, more analysis is needed on the regulatory structures covering the major asset categories relied on by individuals for investment of their retirement distributions. Although here we have only provided an overview of available protections, our research suggests that many experts are just beginning to focus on whether the currently regulatory system is resilient enough. It relies heavily on a combination of government regulation and peer-review standard-setting, and it is unclear if it is capable of providing the type of before-the-fact identification and prevention of potential solvency and fraud problems necessary to avoid large retiree losses—particularly when they may have no alternative income replacement mechanisms to rely on while the legal and regulatory tools available under the current system are used to compensate them for their loss.

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Notes

¹ According to the Employee Benefit Research Institute (EBRI 2007), the number of single-employer DB plans declined sharply from 112,208 in 1985 to 28,769 in 2005. In terms of participants, in 2005 the number of active participants in DB plans was 16.2 million, in contrast to 22.2 million in 1985. This decline in the number of DB plans reflects the termination of plans sponsored many small- and medium-sized employers.

² Personal communication with George Gaberlavage, Associate Director, AARP Public Policy Institute, February 21, 2007.

³ For example, Income Solutions enables retiring employees of participating plan sponsors to go a website and seek competing bids from annuity providers.

⁴ U.S.C. 1322 and 1322a. In 2007, single-employer plans will pay up to \$49,500; multiemployer plan limits are calculated based on PBGC-established monthly rates multiplied by years of service.

⁵ To date, the research on lump sums has largely focused on what individuals do when they leave their job and receive their benefits in cash. According to the Employee Benefits Research Institute (EBRI 2007), 46.7 percent of individuals receiving a lump-sum distribution reported rolling over at least some of their most recent distribution to some form of tax-qualified savings (an IRA or another qualified retirement plan), and 10 percent reported using some portion of the distribution for nontax qualified savings (Copeland 2005).

⁶ With the enactment of the Gramm-Leach-Bliley Act of 1999 (P.L. 106-102), repealing the Glass-Steagall Act of 1933 (ch.89, 48 Stat.162), the ability of banks to conduct investment banking activities has further enlarged and complicated the financial markets and the products they may offer.

⁷ Among these states are Michigan, Minnesota, North Carolina, Tennessee, Vermont, and Virginia.

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⁸ The SEC enforces this standard under the antifraud provisions of the Investment Advisers Act § 206, based on the advisers' status as fiduciaries. See discussion of proposed rules at 59 Fed. Reg. 13464 (March 16, 1994) and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

⁹ H.R. 6225, introduced by Congressman Edward Royce of California and S. 2509, introduced by Senator Sununu of New Hampshire. No action was taken on either bill.

¹⁰ Personal communication with Patricia D. Struck, Wisconsin Securities Division Administrator and President, February 5, 2007.

¹¹ Pension Protection Act of 2006, Public Law 109-280, §601 (August 17, 2006).

¹² U.S.C.S. §80a-5(a) (LexisNexis 2000 & Supp. 2005) (providing that an 'open-end' company is a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer).

¹³ *Ibid*; see also, 15 U.S.C.S §80a-2(a) (8) (LexisNexis 2000 & Supp. 2005).

¹⁴ *Zell v. InterCapital Income Securities, Inc.*, 675 F.2d 1041, 1047 (9th Cir. 1982).

¹⁵ U.S.C.S §77r(c) (1) (LexisNexis 1991 & Supp. 2005).

¹⁶ U.S.C.S §80a-1(b) (LexisNexis 1991 & Supp. 2005).

¹⁷ U.S.C.S §80a-8(a) (LexisNexis 1991 & Supp. 2005).

¹⁸ C.F.R. §270.8b-5 (2006).

¹⁹ *Green v. Brown*, 276 F.Supp. 753, 756 (S.D.N.Y. 1967).

²⁰ U.S.C.S. §80a-8(b) (LexisNexis 1991 & Supp. 2005).

²¹ U.S.C. §80a-13(a) (LexisNexis 1991 & Supp. 2005).

²² U.S.C.S. §80a-29 (LexisNexis 1991 & Supp. 2005).

²³ C.F.R. §270.8b-20 (2006).

²⁴ *Burks v. Lasker*, 441 U.S. 471, 482 (1979).

²⁵ U.S.C.S. §80a-10(a) (LexisNexis 1991 & Supp. 2005).

²⁶ U.S.C.S. §80a-2(a) (19) (A) (i)-(vi) (LexisNexis 1991 & Supp. 2005); see also, Government Accountability Office, Assessment of Regulatory Reforms to Improve the Management and Sale of Mutual Funds (GAO 2004a).

²⁷ U.S.C.S. §80a-10(b) (LexisNexis 1991 & Supp. 2005).

²⁸ U.S.C.S §80a-15(c) (LexisNexis 1991 & Supp. 2005).

²⁹ U.S.C.S §80a-15(c) (LexisNexis 1991 & Supp. 2005) (it should be noted that the fund's contract with its investment adviser must also be approved by the shareholders).

³⁰ U.S.C.S §80a-31(a) (LexisNexis 1991 & Supp. 2005).

³¹ U.S.C.S §80a-16(b) (LexisNexis 1991 & Supp. 2005).

³² U.S.C.S. §80a-9 (LexisNexis 1991 & Supp. 2005).

³³ U.S.C.S. §80a-17(h) (LexisNexis 1991 & Supp. 2005).

³⁴ U.S.C.S. §§80a-17(f), (g) (LexisNexis 1991 & Supp. 2005).

³⁵ U.S.C.S §§80a-36, 80a-48 (LexisNexis 1991 & Supp. 2005).

³⁶ *E.I. du Pont v. Collins*, 432 U.S. 46, 54 (1977) (citing §30 of the Public Utility Holding Company Act, 49 Stat. 837, 15 U.S.C. §79z-4, which mandated that the SEC undertake such a study).

³⁷ *Ibid*.

³⁸ U.S.C.S. §80a-17(a) (LexisNexis 1991 & Supp. 2005).

³⁹ U.S.C.S. §80a-17(a) (1) (LexisNexis 1991 & Supp. 2005).

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⁴⁰ U.S.C.S. §80a-35(a) (LexisNexis 1991 & Supp. 2005).

⁴¹ U.S.C.S. §80a-35(b) (LexisNexis 1991 & Supp. 2005).

⁴² Personal communication with Lori Richards, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, March 5, 2007.

⁴³ *Ibid.*

⁴⁴ C.F.R. §§270-83a-1, 275.206(4)-7) (2005).

⁴⁵ Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Headings, 69 Fed. Reg. 22,300 (April 23, 2004) (to be codified at pts. 239 and 274).

⁴⁶ C.F.R. §275.204A-1 (2006).

⁴⁷ U.S.C.S. §77c(a)(8) (LexisNexis 1991 & Supp. 2005) (exempting certain insurance policies and annuity contracts from registration under the 1933 Act); see also *SEC v. Variable Annuity Life Insurance Company of America*, 359 U.S. 65 (1959) (holding that the variable annuity at issue was not an ‘annuity’ within the meaning of §3(a)(8) because the investment risk was assumed by the policyholder, not the insurer).

⁴⁸ U.S.C. §77c(a)(2) (LexisNexis 1991 & Supp. 2005).

⁴⁹ See Table 8-1, summarizing state guaranty association coverage for guaranteed investment contracts and variable annuity contracts.

⁵⁰ U.S.C.S. §80a-3(c)(11) (LexisNexis 1991 & Supp. 2005).

⁵¹ C.F.R. §9.18(a)(2) (2006).

⁵² C.F.R. §9.2(b) (2006).

⁵³ C.F.R. §9.18(b)(1)(i)-(xi) (2006).

⁵⁴ C.F.R. §9.18(b)(2) (2006).

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⁵⁹ C.F.R. §9.18(b)(6)(iii) (2006).

⁶⁰ C.F.R. §9.18(b)(8) (2006) (note that banks are also subject to additional self-dealing and conflicts of interest rules under 12 C.F.R. §9.12).

⁶¹ The term ‘Deposit’ is defined in the Federal Deposit Insurance Act, 12 U.S.C. §1813(l) to include, among other things, ‘the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of indebtedness, or other similar name...’. See also FDIC Opinion Nos. 88-79 (1988) and 90-46 (1990).

⁶² U.S.C.S. §78o(a) (LexisNexis 1998 & Supp. 2005).

⁶³ U.S.C.S. §78o(b)(8) (LexisNexis 1998 & Supp. 2005).

⁶⁴ See, for example, 15 U.S.C.S. §§78i(a), 78j(b), 78o(c)(1), (2); see also 17 C.F.R. §240.15c1-2. (2006).

⁶⁵ U.S.C.S. §§78i(a), 78j(b), 78o(c)(1), (2) (LexisNexis 1998 & Supp. 2005).

⁶⁶ U.S.C.S. §78o-3(b)(6) (LexisNexis 1998 & Supp. 2005).

⁶⁷ National Association of Securities Dealers Rule 2310.

⁶⁸ U.S.C.S. §78aaa (LexisNexis 1998 & Supp. 2005).

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⁶⁹ U.S.C.S. §§78ccc (a) (2) (B), 78ggg (LexisNexis 1998 & Supp. 2005).

⁷⁰ U.S.C.S. §78ddd(c) (LexisNexis 1998 & Supp. 2005).

⁷¹ U.S.C.S. §78ccc(a) (2) (A) (LexisNexis 1998 & Supp. 2005).

⁷² U.S.C.S. §78ccc(a) (2) (A) (ii). See also, 15 U.S.C.S. §78ccc(a) (2) (A) (i), (iii) (LexisNexis 1998 & Supp. 2005).

⁷³ See their brochure for consumers, 'Cutting through the Confusion,' that is designed to guide investors through the process of choosing an investment services provider by explaining the difference between brokers, investment advisers and financial planners and identifies key questions to ask when choosing an adviser (Coalition for Investor Education 2006).

⁷⁴ Personal communication with Lori Richards, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, March 5, 2007.

⁷⁵ *SEC v. Credit First Fund*, No. 05 Civ. 8741 (C.D. Cal. December 22, 2006); *SEC v. U.S. Gas & Electric*, No. 06 Civ. 22440 (S.D. Fl. December 11, 2006); *SEC v. Peter J. Dawson*, No. 06 Civ. 6360 (E.D. N.Y. November 30, 2006); *SEC v. Spiro Germentis*, No. 06 Civ. 6153 (E.D. N.Y. November 21, 2006); *SEC v. Viper Capital Management*, No. 06 SI 6966 (N.D. Cal. November 8, 2006); *SEC v. Gari Aldridge*, No. 06 Civ. 5645 (N.D. Ill. October 18, 2006); *SEC v. Joseph Y. Zumwalt*, No. 06 Civ. 61407 (S.D. Fl. October 3, 2006); *SEC v. C. Wesley Rhodes, Jr.*, No. 06 Civ. 1353 (D. Or. September 28, 2006); *SEC v. Seaforth Meridian*, No. 06 Civ. 4107 (D. Kan. September 14, 2006); *SEC v. Dennis Watts*, No. 02 Civ. 109 (N.D. Tex. September 8, 2006); *SEC v. One Wall Street*, No. 06 Civ. 4217 (E.D. N.Y. September 5, 2006); *SEC v. Jon W. James*, No. 06 Civ. 4966 (C.D. Cal. August 24, 2006); *SEC v. Renaissance Asset Fund*, No. 06 Civ. 661 (C.D. Cal. July 17, 2006); *SEC v. Pittsford Capital Income Partners*, No. 06 Civ. 6353 (W.D.N.Y. July 14, 2006); *SEC v. ETS Payphones*, No. 00 Civ. 2532 (N.D. Ga. July 6, 2006); *SEC v. Sherwin P. Brown*, (D. Minn. March 29, 2006); *SEC v. Marion D. Sherrill*, No. 05 Civ. 21525 (S.D. Fla. May 26, 2006); *SEC v. David L. McMillan*, No. 06 Civ. 0951 (D. Ariz. April 13, 2006); *SEC v. Unlimited Cash*, No. 06 Civ. 594 (N.D. Tex. April 4, 2006); *SEC v. Reinhard*, No. 06 Civ. 997 (E.D. Pa. March 6, 2006); *SEC v. Edward S. Digges, Jr.*, No. 06 Civ. 137 (M.D. Fla. February 23, 2006); *SEC v. Viatical Capital*, No. 03 Civ. 1895 (M.D. Fla. February 9, 2006); *SEC v. Latin American Services, Inc.* No. 99 Civ. 2360 (S.D. Fla. Filed January 20, 2006).

⁷⁶ While this would seem to be an obvious partnership to forge, various barriers to state and federal cooperation on regulatory enforcement can exist. Planning and coordination of different applicable laws can require careful organization and cooperation at both levels of government.

⁷⁷ The EBRI/ICI Participant-Directed Retirement Plan Data Collection Project, which describes its work as the world's largest collection of information about individual 401(k) plan participant accounts, does not separately list annuities as an investment.

⁷⁸ Pension Protection Act of 2006, Public Law 109-280 (August 17, 2006).

⁷⁹ This Interpretive Bulletin can be found on the Department of Labor's Employee Benefits Security Administration's website [United States Department of Labor (DOL 1995)].

⁸⁰ See Hueler Investment Services, Inc (2007) and ELM Income Group (2007).

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