Senior Designations for Financial Advisers- CFPB Report

Executive Summary

The Bureau of Consumer Financial Protection's (CFPB or Bureau) Office of Financial Protection for Older Americans (Office) released a report to Congress and the Securities and Exchange Commission (SEC) on April 18, 2013 entitled, *Senior Designations for Financial Advisers: Reducing Consumer Confusion and Risks*. In general, the report considers the use of senior designations in the retirement savings industry and the potential for such designations to increase the risk of consumer harm. As background, senior designations or credentials are voluntarily acquired by individual financial advisers from private conferring entities and generally imply that the financial adviser holding the designation (senior designee) has advanced training or expertise in the financial needs of older consumers (individuals who are 62 or older, hereinafter seniors) who are planning for retirement or who are already retired.

In general, the report findings indicate that there are a myriad of certifications and senior designations in use by financial advisers across multiple financial products, including securities, investment opportunities and insurance products such as annuities and long-term care insurance. Consumers, as well as many financial advisers, are frequently confused by the sheer number of individual designations as well as the distinctions attributable to them. In addition, there is "no simple, clear means" to distinguish between the separate designations, which can have differing qualification requirements and differing levels of rigor to the qualification process. The CFPB states that some financial advisers have used this confusion to mislead consumers or to sell them inappropriate or fraudulent financial products and services.

In its report, the CFPB makes recommendations that the Bureau states are intended to reduce consumer confusion and protect consumers by improving the:

- Dissemination of information and consumer education around senior designations;
- Standards for the acquisition of senior designations;
- Standards for senior designee conduct; and
- Enforcement related to the misuse of senior designations.

Background

The CFPB's report is mandated by Section 1013(g) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the Dodd-Frank Act) and specifically requires the Office to submit to Congress and the SEC "recommendations on the best practices for:

- Disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;

- Methods by which a senior can identify the financial adviser most appropriate for the senior's needs; and
- Methods by which a senior can verify a financial adviser's credentials."

The CFPB's Office of Financial Protection for Older Americans is mandated by Section 1013 of the Dodd-Frank Act for the purpose of facilitating the financial literacy of individuals who are 62 or older (seniors) on "protections against unfair, deceptive, and abusive practices and on current and future financial choices." The Dodd-Frank Act also tasks the CFPB with developing programs that provide counseling to seniors on long term savings and retirement planning, as well as with monitoring the certifications or designations of financial advisers to seniors. To further these goals, the CFPB is to coordinate its consumer protection efforts with other Federal agencies and State regulators to promote "consistent, effective, and efficient enforcement," and seek the input of consumer organizations that work with seniors.

Depending on the product or service provided, a senior designee could be regulated by the SEC, the Financial Industry Regulatory Authority (FINRA), a State securities or insurance regulator, State boards of accountancy, a Federal or State prudential banking regulator or the Federal Trade Commission (FTC). The report adds "and now the Bureau." These regulators currently do not impose uniform rules for providing financial advice, services, or products to seniors.

Section 1027 of the Dodd-Frank Act generally excludes persons regulated by the SEC, state securities commissions and state insurance commissions from the CFPB's authority when they are acting in their regulated capacity. Section 1027(i), however, does state the SEC "shall consult and coordinate, where feasible, with the Bureau with respect to any rule (including any advance notice of proposed rulemaking) regarding an investment product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the Bureau."

Section 1027(f) specifically excludes employee benefit and compensation plans and "certain other arrangements under the Internal Revenue Code or 1986" from the CFPB's supervisory authority. However, the section provides one exception where the Secretary of the Treasury and the Secretary of Labor may request the Bureau to implement consumer protection standards with respect to products or services that relate to any specified employee benefit and compensation plan, including plans subject to the *Employee Retirement and Income Security Act* (ERISA) or they may permit the Bureau to do so at the Bureau's request.

Description

CFPB Report to Congress

Findings

The findings of the CFPB report, *Senior Designations for Financial Advisers: Reducing Consumer Confusion and Risks,* indicate that there are more than 50 different senior designations used in today's marketplace. Entities that confer senior designations include higher education institutions, trade or professional associations, non-profit organizations, and for-profit companies. The distinguishing components among most senior designations include training requirements, qualifying examinations, continuing education requirements, conferring organization oversight, complaint procedures for aggrieved clients, and accreditation. The presence, depth and rigor of these components vary widely among different designations.

The titles and acronyms for the different designations are often similar or nearly identical to other designations, making it difficult for consumers to distinguish the qualifications or "legitimacy" between different designations. For example, the CFPB cites the following three distinct designations conferred by different organizations that have different training requirements: Certified Estate Planners (CEP), Chartered Estate Planning Practitioners (CEPP), and Certified Estate and Trust Specialists (CES). The CFPB observes the similarity of these titles may lead consumers to believe holders of each possess similar qualifications and expertise.

The professionals who typically acquire senior designations include investment advisers, broker-dealers, accountants, insurance agents, financial planners and other general financial professionals. Collectively, they offer investment advice for, or sell, a variety of products, such as securities, investment opportunities, financial products, and insurance products like annuities and long-term care insurance. They are also subject to differing regulatory oversight. For example and in general:

- The SEC regulates large investment advisers;
- State securities regulators regulate small and mid-sized investment advisers;
- The SEC, FINRA, and state securities regulators regulate broker-dealers;
- State insurance commissions regulate insurance professionals;
- State boards of accountancy regulate accountants;
- Federal and state prudential banking regulators and the CFPB regulate depository institutions;
- State bars oversee attorneys; and
- The FTC, the CFPB or the States may regulate other persons with senior designations, or those not acting in an otherwise regulated capacity.

These regulators do not impose uniform rules for providing financial advice, services, or products to seniors. Similarly, the conferring organizations do not impose uniform conduct standards across designations nor do they have uniform disciplinary processes.

Based on its Request for Information (released June 2012), two roundtable discussions (2012), and research the CFPB reports that with regard to the use of senior designations:

- Educational events, such as seminars and workshops, that are marketed to seniors are frequently intended only as sales events and generally do not assist seniors in understanding the products being made available;
- Seniors are influenced by a financial adviser's senior designations without any understanding of the underlying qualifications to receive the designation;
- Some financial advisers have mislead seniors with regard to senior designations, the terms or features of products offered, and any bias of a sales professional to sell a specific suite of products;
- An increasing percentage of seniors participate in defined contribution retirement plans, which require them to direct their own investment decisions and increases the likelihood they may turn to an investment professional for advice;
- Seniors do not understand the difference between fiduciary responsibility and suitability standards and "assume, incorrectly, that financial advisers have a

uniform legal duty to make recommendations or sell products that are in the client's best interest;" and

- Industry participants support development of a senior designation rating system.

Recommendations

To begin to address the findings highlighted in the report, the CFPB makes a number of recommendations that are intended to improve the dissemination of information to consumers (including the training, qualifications, education, and standards required for a given designation) and the consumer confusion and related consumer protection concerns surrounding senior designations. The recommendations suggest:

- The SEC might "consider implementing a centralized tool for senior investors to verify a financial advisor's designations."
  - Such a tool should facilitate checking (a) whether the financial advisor actually has the senior designation he/she claims to have and (b) the requirements for obtaining that senior designation. Existing tools currently provide information about an individual's or a firm's professional history, qualifications and disciplinary history but generally do not include information about the nature of advisers' senior designations.
  - The CFPB suggests the SEC might consider coordinating the effort to build a centralized tool with other regulators and build upon existing sources, such as the:
    - SEC's Investment Adviser Public Disclosure;
    - FINRA's *BrokerCheck;*
    - FINRA's *Understanding Professional Designations Database* (CFPB states this is limited as a tool to compare designations); or
    - North American Securities Administrators Association (NASAA) Web site.

- The SEC might "consider establishing a mechanism to capture complaints and enforcement actions data against senior designees and consider reporting the data to designation providers."

- Congress and the SEC might "consider requiring financial professionals with senior designations to provide disclosures to their clients and prospective clients," including:
  - Qualifications;
  - Meaning of senior-specific certifications;
  - Direction on how to obtain additional information on the certification and/or disciplinary history;
  - Fees and compensation, including commission and performance-based compensation;
  - Duty of care and fiduciary responsibilities; and
  - Where appropriate, joint disclosures among regulators.

- The SEC and other policymakers might want to consider:
  - Establishing minimum standards for acquiring senior designations, including training, education and standardized testing;
  - Implementing prohibitions against senior designations from non-accredited conferring organizations; and
  - Developing minimum conduct standards for holders of senior designations, such as prohibitions on:

- Misleading use of the senior designations;
- Certain activities that the CFPB has identified as higher-risk to seniors, such as offering sales of unregistered investment products to seniors at group sales events; and
- Misleading advertising and customer communications.

➢ Engage in increased supervision and enforcement for improper conduct.

- SEC and States should consider increasing the use of existing supervision and enforcement authority to enjoin and penalize misleading or other improper conduct by a holder of a senior designation.
- States should consider providing consumers with a private right to seek appropriate relief for improper conduct in connection with the use of senior designations, where private remedies do not currently exist.

Other Regulatory Actions

In March, 2013 the SEC published a request for data and other information that is intended to assist the agency in considering whether to establish new rules to govern the standards of conduct and regulatory obligations for broker-dealers and investment advisers when they provide personalized investment advice about securities to retail customers. The SEC notes that currently, broker-dealers and investment advisers provide retail customers with many of the same services, and engage in many of the same activities related to providing personalized investment advice about securities, though they are subject to different regulatory oversight with regard to those retail customers. That is, the SEC states, broker-dealers are not uniformly considered fiduciaries with regard to their customers while investment advisers are.

Through July 5, 2013, the SEC is requesting data and other information from the public and interested parties about the benefits and costs of the current standards of conduct for broker-dealers and investment advisers when providing advice to retail customers, as well as alternative approaches to the standards of conduct. The SEC is particularly interested in receiving empirical and quantitative data and other information, though it states it will also welcome qualitative and descriptive analysis of the benefits and costs of potential approaches and guidance.

Separately, recent press statements have highlighted consumer risks associated with pension advances, a consumer financial product that is fundamentally a variation on payday loan and deposit advance products. Pension advances have similar characteristics (e.g., high fees, short repayment terms, limited underwriting, and claims against future payment streams) and are targeted primarily to certain consumers with need for short-term, small dollar loans and streams of pension-related retirement income, including servicemembers and seniors. The CFPB has not identified pension advance products as a possible "larger participants" nonbank supervision market, though the close relationship to payday loans and deposit advances ensures CFPB scrutiny on a "risk-basis" as part of its efforts to protect servicemembers, seniors and other consumers, generally, from unfair, deceptive, or abusive acts or practices (UDAAP) violations. It may also serve as access to the retirement savings industry more generally.

Earlier Actions

- The North American Securities Administrators Association (NASAA) and the National Association of Insurance Commissioners (NAIC), adopted model rules in

2008 that would prohibit the misleading use of senior-specific designations in connection with the sale of securities or insurance products, respectively, or related investment advice. The CFPB indicates that as of June 2012, 28 states and the District of Columbia had adopted the NASAA model rule (or close variant) and 30 states and the District of Columbia had adopted an identical or similar version of the NAIC rule through statute or administrative regulation.

- The SEC, FINRA and NASAA issued a report in 2008 and updated it in 2010, to detail examples of best practices that financial firms could adopt to increase senior investor protection.
- FINRA conducted a survey of retail broker-dealer firms in 2011 and found widespread use of senior designations among broker-dealers. Based on the survey, FINRA released a list of sound practices which they recommended broker-dealers adopt.

Commentary

The CFPB's report notes that commenters to its July 2012 Request for Information on Financial Education generally expressed concerns that the misleading use of senior designations is a long-standing consumer protection concern. Regulators like the SEC, FINRA and NASAA have guidance dedicated to financial issues for seniors and relevant to retirement-oriented financial products and services on their Web sites.

But it is the unique consumer protection mission of the CFPB and its dedicated Office of Financial Protection for Older Americans that is now bringing attention to the risks of consumer harm that seniors face. And importantly, the CFPB reports that the population of seniors is expected to double between 2000 and 2030, increasing from 35 million to 72 million individuals, making it a market with enormous potential.

However, the CFPB generally does not have specific authority to write rules, conduct examinations, or take enforcement actions (except through a very narrow provision in Section 1027(f) that permits the CFPB to write consumer protection standards for employee benefit and compensation plans with permission from the Departments of Treasury and Labor) against providers of financial investment advice or sales of securities or insurance, including related retirement savings products and services; so it will be interesting to see how the recommendations of the CFPB are received and potentially employed in the industry where the individual regulators have each invested time and resources to address senior issues. Industry participants that cross-sell retirement products, insurance, savings products or credit protection products through related entities that fall under the CFPB's supervisory authority should be cognizant of any potential for those cross-selling activities to expand the jurisdiction of the CFPB's authorities.

At a minimum, the CFPB's recommendations regarding senior certifications and designations might resonate among the regulators to help define or limit the list of permissible senior designations (e.g., permit only the use of senior designations from accredited conferring organizations that have a disciplinary program for senior designees) or the supervisory expectations regarding the use of senior-specific credentials (e.g., require only professionals with senior-specific certifications or designations to offer investment advice or sell certain retirement savings products). It may also be that the CFPB's report highlights the need for consumer protections in specific areas (e.g., such as disclosures, marketing, and suitability) at risk for violation of the CFPB's UDAAP rules or the unfair and deceptive acts or practices (UDAP) rules under the *Federal Trade Commission Act*, as appropriate), setting the stage for a potential increase in enforcement activity. And, it is possible that the CFPB's interest to set standards may not be limited to just the CFPB, but may encourage other agencies and regulators to work individually or together to develop consistent and broader senior-specific guidance, conduct standards or fiduciary standards of care.

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