An International Comparison of Regulatory Capture

and Regulatory Outcomes

John A. Turner[i]
Pension Policy Center
Washington, DC, U.S.

Gerard Hughes
Trinity College
Dublin, Ireland

Michelle Maher
Maynooth University
Maynooth, Ireland

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ABSTRACT

This paper analyzes the effects of complexity in the allocation of government regulatory authority for pensions on regulatory capture. We argue that the less complex allocation of regulatory authority in Ireland may make it more susceptible to regulatory capture than in the United States. While previous analyses of regulatory capture have focused on regulatory capture through influencing the executive branch of government, we argue that it can also occur through influence on the legislative and judicial branches. In the United States, regulatory capture occurs sometimes through "capture" of the legislature providing oversight (House of Representatives) rather than capture of the regulatory bodies in the Executive branch of the government. Ireland has recently completed reforms that may make regulatory capture more difficult, while the U.S. is in the process of a regulatory episode concerning fiduciary duty of advisers, where the regulated industry is attempting to prevent new regulations by lobbying the U.S. Congress. The paper investigates the hypothesis that the extent of regulatory capture of pension regulators can be measured by the discount rates used for valuing defined benefit plan liabilities.

Introduction

The issue of capture of regulators by the regulated industry has a long history in academic research, with a recent edited book summarizing and extending this work (Carpenter and Moss 2014). Regulatory capture refers to the regulated industry having such influence over the regulator that it causes the regulator to act in the interests of the industry, rather than in the interests of the general public. Regulatory capture is sometimes characterized as arising due to self-serving actions of regulators. Regulatory capture can be in the financial interests of regulators, sometimes due to lucrative employment opportunities after leaving employment with the regulator. This paper analyzes regulatory capture in a broader framework, with it arising from the profit making motives of the regulated industry, with no necessary gain occurring for the regulators, and sometimes with it occurring despite the best efforts of the regulators to prevent it.

This paper examines how Ireland and the United States have allocated governmental authority for pensions for private sector employees across government agencies, and the effects of the different approaches on regulatory capture. Ireland and the United States have similar pension systems in that both include defined benefit and defined contribution plans. However, they have taken different approaches to regulators, making their comparison of interest. The choice of the institutional structure of regulation over industry has important implications for power relations, and outcomes for industry and consumers. The comparison of the Irish and American institutional structures of pension regulation identifies two distinct regulatory regimes: an entities based approach and an issues based approach.

After briefly surveying the previous literature, the paper discusses how Ireland allocates regulatory authority for pensions, followed by a section that discusses that issue for the United States. The following section explores whether a simple allocation of regulatory authority is more prone to regulatory capture than is a complex one. The hypothesis that regulatory capture can be measured by the level of allowed discount rates for determining defined benefit plan liabilities is explored. The final section presents concluding comments.

Previous Literature

The first academic to give regulatory capture sustained attention was the political scientist Bernstein (1955). His most salient observation was that after an agency is formed to regulate and provide policy direction for an industry it becomes vulnerable to capture almost immediately. This is because the interests supporting the enactment of the statute establishing the agency are diffuse, and see their task as complete. On the other hand, the industry being regulated is cohesive and seeks to protect its own interests by making the agency subservient.

Economists, too, were preoccupied with the characteristics of regulation, most notably George Stigler who, in an important 1971 article, proposed a general economic theory of regulation. Stigler’s thesis was that in accordance with standard economic assumptions, the regulator was a commodity acquired by the industry and designed and operated primarily for its benefit (Stigler 1971:3).

Using a standard demand-supply model, the regulated industry has a demand for regulatory capture, which can be registered as a schedule of how much it is willing to spend to accomplish regulatory capture. On the supply side, there is a schedule of the cost of obtaining different degrees of regulatory capture. The current paper argues that the cost of regulatory capture is greater when there is complexity in the allocation of regulatory authority than when there is a single agency that is the primary source of pension regulation. Stated alternatively, the supply curve is shifted to the left when there is greater complexity in the allocation of regulatory authority.

Bó (2013) reviews the literature on regulatory capture. He argues that information asymmetry, with the regulated industry having information that it is hard for consumers to obtain, is key to regulatory capture. He argues that a goal of regulatory capture can be for regulators to allow or assist firms in hiding information that would permit consumers to get a better deal.

An aspect of regulatory capture can be capture of legislators that oversee regulators. Denzan and Munger (1986) analyze the capture of legislators using the same approach as used earlier for the capture of regulators.

Allocation of Pension Regulatory Authority in Ireland—Primarily an Entities Based Approach

Introduction

In Ireland, employers voluntarily provide occupational pensions, usually following negotiations with trade unions.[1] Self-employed workers and employees who are not covered by an occupational pension can provide for their old age by contributing to retail financial pension products during their working lifetime. Retail pension products operate on a defined contribution basis.

The distinction between retail pension products for individuals and voluntary employer provided occupational pensions has influenced the allocation of regulatory authority in Ireland between the Pensions Board (occupational schemes) and the Central Bank (retail pension products) and dispute resolution procedures between the Pensions Ombudsman (loss of benefits due to mismanagement) and the Financial Services Ombudsman (marketing of retail pension products). The Revenue Commissioners are responsible for all taxation issues relating to both occupational and retail pensions.

Private sector occupational pensions for employees and Personal Retirement Savings Accounts are regulated by the Pensions Board under the Pensions Act 1990. Personal Retirement Savings Accounts are individual pension accounts offered to employees through employers or to those not in the labour force by pension providers. Personal pensions (called Retirement Annuity

[1] The arguments relating to pension regulation in this and the next few paragraphs are based on material in a critical review of pension regulation in Ireland (Department of Social Protection, 2013).

Contracts in Ireland, and similar to Individual Retirement Accounts (IRAs) in the United States) for the self-employed and employees who are not covered by an occupational scheme are regulated by the Central Bank of Ireland.

Pensions Board

Regulatory authority in Ireland over occupational pension schemes, holders of Personal Retirement Savings Accounts and pension providers is allocated to the Pensions Board under the Pensions Act 1990.[2] The Pensions Board is responsible for setting and implementing the funding standard for defined benefit pensions, including regulating the choice of discount rates for determining pension funding. It can initiate legal action against trustees who are in breach of provisions of the Pensions Act. It monitors compliance by trustees of occupational pension schemes and, as an alternative to prosecution in the courts, can impose on the spot fines on trustees who do not conform with the various requirements of the Pensions Act. The Board has had a continuing policy of seeking compliance through co-operation with trustees rather than by recourse to legal action, although such action is taken where necessary (Pensions Board 1998:33, 2011:p. 11).

Central Bank of Ireland

The Central Bank is responsible for both central banking and financial regulation. Consequently, it regulates the life assurance companies and financial intermediaries who provide or facilitate personal pension policies (Retirement Annuity Contracts) for the self-employed or employees who are not covered by an occupational pension scheme. Retirement Annuity Contracts are a particular type of insurance contract, and are regulated in accordance with guidelines set out by the Central Bank of Ireland in the Consumer Protection Code 2012. This code sets out the kind of information which providers of pension products are expected to give to consumers and the general principles which they are expected to observe in conducting their business with consumers.

Revenue Commissioners

The Revenue Commissioners are responsible for granting or refusing tax exempt approval status and for regulating the tax treatment of pensions. In order to qualify for "exempt approved status" a pension scheme must be set up as an irrevocable trust in which the assets of the scheme are held in a trust arrangement which is not under the control of the employer or the employees and "the disposal of the assets or policies of the scheme is governed independently by the constitution of the scheme itself" (Revenue Commissioners (2012).[3] This requirement ensures

[2] Some banks provide PRSAs and they have to meet the standards set down by the Pensions Board and the Revenue Commissioners to be an approved provider.

[3] After an occupational scheme receives exempt approved status the Revenue Commissioners have to ensure that approved schemes remain in compliance with the tax rules e.g. that employer and employee contributions are in accordance with these rules, that maximum allowable benefits are not exceeded, and that individual pension funds do not exceed the lifetime limit on the size of the fund.

that nearly all occupational pension schemes are set up under trust arrangements. Personal Retirement Savings Accounts are individual contracts between providers and consumers and they must be jointly approved by the Revenue Commissioners and the Pensions Board before they can be marketed. The Commissioners are also responsible for approving personal pension products.

Analysis of Issues Relating to Complexity of Regulatory Authority in Ireland

Policy Making

Until March 2014, the Pensions Board was responsible for providing advice to the Minister for Social Protection on all pension matters, either on its own initiative or at the Minister's request (Pensions Board 1998, p. 33). These matters included pension policy, legislation, litigation and the enforcement of pension laws. In recent years a number of groups representing pension members, pensioners and consumers expressed concerns about the dominance of pension professionals on the Pensions Board.
In 2012, as part of its Public Service Reform plan, the government undertook a critical review of the case for integrating the regulatory functions of the Pensions Board with the Central Bank and the Pensions Ombudsman with the Financial Services Ombudsman, with a steering group composed of senior representatives of the affected organizations and the Departments of Social Protection, Finance, and Public Service Expenditure and Reform.

The 2013 *Critical Review Report* recognised capture concerns in balancing access and input (p.15), and because of the view in submissions that the interests of the pension industry had become over represented (p.47). The perception of regulatory "capture", and other issues have resulted in a restructuring of the Pensions Board to strengthen the focus on consumer interests and to separate regulatory responsibilities from the advisory role. The Board has been renamed the Pensions Authority and retains regulatory oversight, while a Pensions Council has been established to advise on the formulation of pensions policy. The purpose of the separation of the regulatory and advisory functions is to ensure that regulatory capture of the Pensions Authority does not occur and to give the pension system a far greater consumer focus and to increase consumer confidence in the system.

The Chairperson of the Pensions Council is a former director of the European Consumer Organisation, signaling a stronger emphasis on consumer interests in future policy advice. Overall these changes represent a tightening up and refocusing of regulation in Ireland to meet concerns of regulatory "capture" and lack of consumer focus and a simplification of consumer protection in which complaints about all financial products will be dealt with by one Ombudsman office.

Allocation of Pension Regulatory Authority in the United States—Primarily an Issues Oriented Approach

Introduction

In the United States, national pension laws supersede laws created by the states that affect pensions created by private sector employers. However, for public sector employers, state laws supersede national laws concerning pensions, except for tax law aspects of pensions, where national laws are determinative.

Regulatory authority over private sector pension plans, Individual Retirement Accounts (IRAs), and service providers to those plans is allocated under the Employee Retirement Income Security Act (ERISA), primarily to agencies within the Department of Labor and the Department of Treasury. Thus, these regulatory agencies are part of larger agencies and regulate more than just pensions. Other offices in the Departments of Labor, Treasury, and Justice have responsibilities relating to the development of pension policy, legislation, litigation, and the enforcement of pension laws. This section provides an overview of the structure of regulatory authority for private sector pension plans.

Department of Labor

The U.S. divides authority according to the types of legal issues that arise–an issue oriented approach. A fiduciary issue, a reporting and disclosure issue, or an issue relating to the investment and management of assets (Title I of ERISA), is the responsibility of the Employee Benefits Security Administration (EBSA), which is part of the Department of Labor. EBSA has regulatory authority over fiduciary issues relating to Individual Retirement Accounts (IRAs).

Department of Treasury

If the regulatory issue relates to plan funding, maximum allowable contributions, required minimum distribution of benefits or the tax treatment of plans (Title II of ERISA), it belongs to the Treasury Department. The Treasury Department has regulatory authority over IRAs related to tax issues, such as maximum allowable contributions or asset accumulations. Responsibility for pensions is split among different agencies in the Treasury Department.

The Office of Tax Policy has responsibility for regulations and policy concerning pensions and regulatory oversight of the Internal Revenue Service (IRS, the tax collecting authority) in its role concerning pensions. In the IRS, the Division of Tax Exempt and Government Entities, Office of Employee Plans has responsibility for pension issues. The custodians of Individual Retirement Accounts (IRAs) are regulated by the IRS if they are nonbank custodians.

Regulatory Capture

This section considers whether a simple allocation of regulatory authority facilitates regulatory capture of the regulator by the regulated industry. The analysis in this section continues the comparison between the regulatory regimes of Ireland and the United States by asking which institutional structure affords the better protection against regulatory capture. The analysis also compares the regulation of private sector and public sector pensions in the United States. In addition, it considers whether the presidential versus the parliamentary system of government is more susceptible to regulatory capture.

Opportunity for Capture

Scott (2006:657) argues that the control of a regulator over a regulated industry requires three components: rules, monitoring, and enforcement. Of these three components, the optimum entry point for capture in the process is when regulatory rules are formed. At that point, the salient issues are framed and decisions are made. Actors present in this rule formation space are thus in a powerful position. Their power can be understood within the framework provided by Lukes (1974). He conceived power as having three dimensions. The first is the capacity to achieve a desired end, even if opposed. In other words the person with power is the person who prevails in the decision making process. Building on this is the second dimension of power, the capacity to prevent alternative decisions being considered through control of the agenda. The third dimension involves the capacity to frame decisions cognitively so that others are persuaded the agenda addresses their real interests. A key element to enhancing an actor's capacity in each dimension of power is having expert knowledge of the issue area.

A Framework for Assessing Capture.

The role of the market in supplementary pension provision means that, from an industry perspective, participation in the establishment and operation of regulatory institutions makes economic sense. Theirs is a long term perspective in comparison to that of legislators who have re-election considerations. The Irish political party system produces a single party government or a coalition between one of the main parties and smaller coalition partners. Power is highly centralised in the executive with very little checks and balances. In Ireland, there is no discernible difference between the two main political parties, Fine Gael and Fianna Fáil, in relation to pensions. As Schulze and Moran (2009:796) note, in Ireland it is hard to correlate features of the party system with the process of pension reform. This suggests that the political configuration in power does not influence pension decisions, and the lack of power held by opposition parties does not provide additional opportunity for regulatory capture. In the United States, the separation of powers built into the institutions of government does present additional opportunity for regulatory capture because the power of the regulators can be limited when the party controlling the House of Representatives differs from the party of the President, and thus of the party of the heads of the pension regulatory agencies.

Carpenter and Moss (2014) edited a volume of studies on preventing regulatory capture. The studies analyse the ability of special interest influence in the regulatory process by "asking not just what causes capture and what problems it creates, but what accounts for its relative strength and weakness in real-world situations" (Moss and Carpenter 2014, p.451). The contributors identify widespread defence mechanisms of regulators against capture. An adaptation of their arguments provides a useful mechanism for assessing whether the relatively simple allocation of regulatory authority in Ireland facilitates regulatory capture. The converse can also be examined; does the complex pension regulatory structure in the United States provide a defence against capture by the pensions industry.

The seven broad categories identified as facilitating or hindering regulatory capture are:

1 Requirement for Expertise
2 Competition between Agencies
3 Administrative Procedures
4 Media Coverage and Journalistic Scrutiny
5 Consumer Empowerment
6 Judicial Review
7 Employment Restrictions

Requirement for Expertise

That there is a requirement for expertise in the complex policy area of pensions is unproblematic. However, that the required expertise is provided by a network of professionals from the pensions industry because of their perceived authoritative claim to policy relevant knowledge opens up the potential for regulatory capture. In Ireland, the influence of pension industry experts was institutionalised in the establishment of the Pensions Board in 1990 which largely contained all statutory pension regulation, compliance, and policy advisory functions in a single agency. The Chairperson and the board members were all appointed by the government, and representation was skewed in favour of the pensions industry. Labour had a single representative until 1996 when the Irish Congress of Trade Unions, as well as their employer representative counterpart IBEC, were invited to appoint an additional member each to represent trustees. Completely excluded were the voices of consumers and pensioners until 2002, and the Board never included an advocate for gender equality in pensions. The concentration of all regulatory and advisory functions in the Pensions Board meant that the potential for capture by the industry was made easier once they held significant representation on the Board and across its committees.

Competition between Agencies

A prominent argument in scholarship on capture is that "competition among regulators could reduce the likelihood of collusion between individual regulators and a regulated industry" (Moss and Carpenter 2013:459). Here the American separation of powers system is particularly strong as it "virtually guarantees that the losers, opposing interest groups, will have enough power to participate in some fashion as well" Moe (1995:147).

Competition between regulators, however, can be exploited by the regulated industry. For example, a desired regulation can be impeded by the regulated industry raising issues as to which agency has jurisdiction over the particular issue. This approach has happened in the United States where the industry of financial advisers has argued that the Department of Labor does not have the authority to make regulations concerning IRAs, but instead that is the responsibility of the Department of the Treasury. In turn, the Department of Labor argues that it has authority concerning IRAs in matters relating to fiduciary issues.

In a different strategy involving two agencies, the industry of financial advisers has argued that government regulation over them is too complex because they are regulated by the Securities and Exchange Commission (SEC) for advice relating to nonpension investments and by the Department of Labor for advice relating to pension investments.

Because the single agency structure in Ireland is only now being modified, it will take the passing of time to establish if the diffusion of power between the Pensions Authority (regulatory and monitoring functions) and the Pensions Council (advisory function) reduces the potential for capture.

Some aspects of pension regulation in the United States do not involve the possibility of competition between agencies. The Department of Labor is responsible for assuring that employer contributions to defined contribution plans are made within a specified time period. This is a major aspect of Department of Labor enforcement. However, if it finds instances of violation all it requires is payment with interest. It does not levy penalties. Thus, its approach is extremely weak, suggesting regulatory capture, at least on this issue.

Administrative Procedures

A study by Croley (2008) points to how autonomy of regulators from legislators through administrative procedures ends up levelling the playing field across weak and strong interests, and thus reducing the likelihood of capture. This happens when procedures require greater openness and broader input through public notice and public comment (quoted in Moss and Carpenter 2013:461). In Ireland, submissions are invited from the public and interested groups in reviews, such as the 2013 *Critical Review.* Such invitations do not always ensure that a diversity of opinion and independent expertise makes it into policy. This can be illustrated by reviewing the National Pension Policy Initiative which led to the current blueprint for pensions policy in Ireland, the 2010 *National Pensions Framework*.

The Pension Policy Initiative's aim of stimulating debate around pensions was laudable. Less so was the over representation of the pensions industry within the Initiative. The twenty-one members of the Initiative's committee were predominantly drawn from the Pensions Board and the pensions industry, leaving only minor representation from unions and employers, and no representation for other stakeholders in the pension system such as consumers, older people or those most disadvantaged by existing pension policy such as women. As it was this group that contemplated the submissions made about the future of the Irish pensions system, it is not altogether surprising that their policy legacy remains one of increasing coverage through private provision.

Media Coverage and Journalistic Scrutiny

While easily dismissed by its targets as "muckraking", the role of the press in alerting the public to problems can be a significant protection against capture. To this end, freedom of information regulations are extremely important. In the future, with the decline of newspapers in an electronic age, the role of the investigative reporting of newspapers may be weakened.

Consumer Empowerment

Consumers can constitute a valuable counterweight to concentrated industrial interests (Moss and Carpenter 2014:462). While traditional capture theory sees diffuse public interests as too weak to mobilise against capture, this is disputed by a 2012 empirical study by Gunnar Trumbull. His study demonstrates that diffuse interests are capable of organising, can exercise a great deal of influence and ultimately play a powerful role in preventing capture by concentrated interests. He argues that diffuse interests prove influential because of their considerable legitimacy (Trumbull 2012).

In Ireland, the conditions for consumers and other diffuse interests to organise is being created through the newly created advisory body, the Pensions Council because the remit for membership is to represent the full range of stakeholders in the pension system. As previously noted, the success of this positive step to empower consumers remains to be seen.

Judicial Review

In comparison to regulators, Moss (2014: 464) argues that judges are less likely to be susceptible to capture because of their life long tenure and their greater independence from political actors once they are appointed. This reasoning lends substance to an argument that courts are well placed to act as an additional control against regulatory capture. However, this requires a judiciary that is independent of the political system. Judicial review levels the playing field between the well funded and the less well funded. While resources are required to initiate a judicial review by filing a law suit, this can be considerably less than the resources required to successfully capture a regulatory agency. Its weakness as a hindrance to regulatory capture lies in the fact that it is a reactive process in that it can only take place after an event, and requires a challenger. Also, well-financed industry efforts at regulatory capture are likely to involve more talented legal representation than poorly financed consumer efforts to prevent regulatory capture.

In Ireland, public decisions made by administrative bodies and the lower courts may be judicially reviewed by the High Court. The process must be instigated by a challenger who, if unsuccessful, may have to pay all legal costs. In a judicial review, in Ireland generally the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process, that is, how the decision was made and the fairness of it (2012: Citizens Information Board). While judicial review can be conceived as being a deterrent against regulatory capture, the organisational and financial costs of mounting a challenge render it largely unrealistic as a measure against capture. In the United States, the judicial review by the Supreme Court focuses primarily on the constitutionality of laws. Yet judicial review does impact the Irish pension regulatory environment because EU membership requires compliance with the decisions of the ECJ. A 2013 ruling in the case of Waterford Crystal means that Ireland now has to regulate to better protect pension rights in cases of the double insolvency of a defined benefit schemes and the sponsoring employer.

In the United States, regulatory capture has occurred through the judiciary system. It has occurred through the appointment of sympathetic judges and the blocking of appointment of unsympathetic judges. It has occurred through well-financed plan sponsors and service providers hiring more talented lawyers than plan participants can afford, and as a consequence obtaining favorable judicial decisions that become part of common law. Federal courts have denied ERISA benefit claimants the right to take discovery normally permitted in civil actions, the right to trial by jury, and even, in most cases, the right to a trial in open court involving the examination and cross-examination of witnesses (DeBofsky 2014).

Limiting Employment Opportunities in the Regulated Industry.

One way that regulatory capture can occur is by the regulated industry offering high paying jobs to key employees of the regulator after those employees leave the government, so long as those employees engage in regulations favorable to the industry during their tenure with the government. This arrangement generally is an implicit understanding, rather than a formal *quid pro quo*.

U.S. Government ethics provisions prohibit high government officials from contacting their former agencies within two years following their employment with those agencies (U.S. Office of Government Ethics 2014). These rules are an attempt to limit the industry's influence on those persons while they are employed by the government.

The Irish Government proposes to restrict or impose conditions for up to one year on designated public officials taking up certain employments in the private sector where a possible conflict of interest exists with their former area of public employment (Regulation of Lobbying Bill 2013).

Finally, another way that regulatory capture occurs is for a regulated industry to contribute to the campaign of a presidential candidate, and then for the regulated industry to provide key employees to the regulator. This practice in the U.S. is not subject to the same limits as above.

The U.S. presidential style of government has built-in checks and balances, making capture a more complex and expensive endeavor. In a parliamentary system, it depends on the voting system. A Westminster first past the post system usually produces a majoritarian single party government. This means that there is only a single entity to capture, and fewer veto players when policy is being made for industry to capture (veto players defined as the range of actors whose agreement is necessary to agree policy change). A proportional electoral system like Ireland's tends more towards coalition government, leading to power being diffused and consensus being pursued. That in turn introduces veto players into the equation.

A Metric for Measuring Regulatory Capture: Discount Rates for Defined Benefit Plans

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While regulatory capture has been studied extensively, it has proven to be elusive to measure. This section discusses possible metrics for measuring regulatory capture of pension regulators. Possible measures would include the number of people in the pension enforcement office relative to the number of participants, plans or amount of assets. Another class of measures would be the severity of penalties that could be levied and the severity of penalties actually levied. While defined benefit pension liability valuations are affected by mortality rate assumptions and other assumptions, the metric we have chosen is the discount rate used for valuing defined benefit plan liabilities for determining required levels of pension funding. The discount rate is arguably the key assumption, and is readily comparable across regulatory regimes.

Using the discount rate as a metric for the extent of regulatory capture, the higher is the discount rate the greater is the extent of regulatory capture. The higher is the discount rate, the lower are measured liabilities and the lower are required pension contributions. While other regulatory factors affect the adequacy of funding, including the time period permitted for amortizing unfunded liabilities, presumably those other factors are correlated with the discount rate in terms of their effects on the amount of required pension funding.

In the case of state and local government plans in the U.S., the politicians have a conflict of interest, which is that they want to minimize pension contributions by the government during their term in office so as to keep tax rates down. Thus, they want and get high discount rates. This motivation is in conflict with the long-term interests of plan participants and future tax payers.

Bagchi (2014), using data from the state of Pennsylvania, finds that when there is greater competition between the two political parties in the United States in municipal elections, there is greater pressure to keep taxes low, but also to provide generous pension benefits to public sector employees. These two effects result in higher discount rates.

The argument for private sector plans is different. It can be argued that CEOs may also have a short-term perspective. They want to maximize their compensation, which may involve maximizing short-term profits. Profits can be increased by using high discount rates for valuing pension liabilities, which make defined benefit plans appear to be better funded than they really are and which minimize contributions.

A more complete theory of the relationship between discount rates and regulatory capture would include other factors that affect the choice of discount rates. For example, in the Netherlands, pension benefits are the main source of retirement income--more important than public pension (social security) benefits. Thus, it may be felt that it is more important to protect them. In addition, the Netherlands does not have a pension benefit insurer, which the U.S. does but Ireland does not. A pension benefit insurer insures the benefits of defined benefit plans in the case of the bankruptcy of the plan sponsor.

State and local government pension plans in the United States often use discount rates of 7 or 8 percent (Munnell 2012). Discount rates for private sector pension plans in the United States are based on long-term high grade corporate bond discount rates, which would be about 4.7 percent in 2013, with lower rates being used for shorter duration liabilities (Waite 2013). However, legislation in 2012, explained below, raised the rates so that the acceptable discount rates for short-term. middle-term, and long-term liabilities in 2014 were 4.43 percent, 5.62 percent, and 6.22 percent (Internal Revenue Service 2014a). The IRS specifies a range around these rates that is permissible. For the third segment, discount rates above 9 percent are permitted. These changes were temporary, but legislation passed in 2014 extended their effective date through 2017 (Towers Watson 2014).

At the same time, the premiums that defined benefit plan sponsors must pay to the Pension Benefit Guaranty Corporation (PBGC) were raised. This change will strengthen the financing of the PBGC and may offset to some extent the increased risk to participants of plans having insufficient funding.

By comparison, the discount rate in 2014 for long duration pension liabilities in the Netherlands was about 2.6 percent (Preesman 2014). In Ireland, in 2014, pension liabilities for workers were valued using a discount rate of 7.0 percent and liabilities for retirees were valued using a discount rate of 4.5 percent (Pensions Authority 2014).

In Ireland, until June 2014, a committee of the Society of Actuaries (SofA) recommended to the Pensions Regulator what the required discount rates should be. Since June 2014, the Pensions Regulator has had sole responsibility for the choice of discount rates. This change occurred, according to some commentators, because the Society of Actuaries felt that the Regulator was choosing discount rates that were too high, and thus did not want to be associated with that outcome. Thus, this change may be evidence of regulatory capture by interest groups who either benefit from the lower contribution requirement, such as employers, or the additional tax take from higher profits not directed towards the pension scheme, such as government finance department officials.

In the United States, legislation was passed by Congress in 2012 that raised the allowable discount rates. Instead of being based on current interest rates, that were low, as previously had been done, defined benefit plans can use 25-year averages, that are substantially higher (Internal Revenue Service 2014a,b). Pension plan sponsors wanted this change so that they could contribute less to their defined benefit plans. The Federal Government wanted the change because it reduced tax deductions and thus resulted in more tax revenue (Pension Rights Center 2014). Thus, regulatory capture was facilitated by the government's need for more revenue during a period of a relatively weak economy (Yu 2014). As an example of its effect, in 2014 the AARP defined benefit pension plan would have had a funding ratio of 83 percent without the legislation and with the use of a two-year average of interest rates , but with the legislation, and with the use of a 25-year average of interest rates, the funding ratio was 111 percent, due to the use of the higher discount rates (AARP 2015).

Discussion

The entities based pension regulatory regime in Ireland, with its simple construct concentrating advisory, regulatory and monitoring powers largely within a single agency leaves it vulnerable to capture by the pensions industry. This has been explicitly acknowledged by the Irish government and addressed by implementing recommendations in the 2013 *Critical Review* report. The requirement for expertise opens up the primary route by which capture can occur. The industry was able to consolidate their influence by populating the majority of positions of the Pensions Board and across its committees. The lack of a competing agency to dilute such influence compounded the potential for capture. Administrative procedures invite submissions on pension proposals from interested parties and the general public, but the opaqueness of the review process, and the over representation of the industry in reviewing submissions means outcomes are predictable. This opaqueness remains impenetrable because of the restrictive freedom of information regime currently operating in Ireland.

However, the expansion of the regulatory structure in Ireland by separating regulation and advisory functions has the potential to introduce diverse and formerly diffuse opinion into the policy advice arena. This departure from the norm does not constitute a move to the more complex issues based regime prevalent in the United States. It remains to be seen if it is a step in the right direction to provide effective protection of the Irish pension regulator from regulatory capture.

Both U.S. and Irish experience indicates that when large financial interests are at stake, the regulated industry will spend large amounts of money and time attempting to limit the ability of the regulator or the government to enact regulations that the industry views as being adverse to its interests. In 2013, 2014, and 2015, in the U.S. the Department of Labor attempted to enact regulations raising the level of responsibility that financial advisers have to pension plan sponsors and pension plan participants. The regulated industry appealed to Congress to prevent the regulations from being implemented.

In Ireland, documents secured by Kirby (2001) under the Freedom of Information Act revealed that, "The pension companies lobbied hard against … a maximum charge" for the Personal Retirement Savings Account which the Department of Social and Family Affairs wished to introduce. The companies succeeded in getting a compromise which resulted in the introduction of a standard PRSA with a maximum charge and a non-standard PRSA with no maximum charge. This was a way, as Kirby (2001) points out, for the companies "to earn higher margins and to reward their commission-paid brokers."

In the United States, the Governmental Accounting Standards Board (GASB) that is instrumental in determining government policy for state and local government pension funds provides a comparison to the nature of regulation for private sector pension funds. The GASB is a single entity that was established with the participation of the regulated entities, and thus appears to be a clear example of regulatory capture. It has established a more lenient rule for determining funding than has been used by U.S. private sector pension plans or by Canadian and European public pension funds (Andonov et al. 2012). That rule allows defined benefit pension funds to use the expected rate of return on their investments to determine the discount rate. The Financial Accounting Standards Board (FASB), which regulates U.S. private sector funds concerning accounting reporting, requires use of the considerably lower rates of return on high-grade corporate bonds. The rule used by GASB, which has been criticized by academic financial economists (e.g., Biggs and Smetters 2013), allows state and local government pension funds to set aside considerably less for funding than is required of private sector pension funds. Thus, it appears that this single entity provides an example of regulatory capture.

The U.S. experience also suggests that the risk of regulatory capture may depend on the political party of the President, and thus of the heads of the regulatory agencies. It may also be affected by which political party controls Congress. The Republican Party is typically more pro-business than the Democratic Party. The Democratic Party is arguably more concerned about protecting the rights of pension participants and beneficiaries.

The regulated industry may find that regulatory capture cannot be obtained at the level of the pension regulator, but can be obtained through its influence on Congress. Obtaining regulatory capture through Congress would be an example of the regulated industry forcing a result on the regulator, rather than simply influencing the regulator. In 2015, to prevent the Department of Labor from promulgating a regulation, referenced above, concerning fiduciary duties, Senator Oren Hatch, a Republican, indicated his intent to introduce a bill in Congress moving the regulatory responsibility for fiduciary issues, which the Department of Labor has had since 1974, to the Treasury Department. An example suggesting that this practice is long standing dates back to 1986. The U.S. Tax Reform Act of 1986 was initially intended to claw back tax concessions in order to restore public finances. But the Republican chair of the Senate Finance committee Robert Packwood stopped the initiative in its tracks, and his hard line stance was "backed by a powerful coalition of insurance companies, business groups and labor unions bent on preserving the tax subsidized private welfare system..." (Blackburn, 2006 p. 94).

Conclusions

In Ireland, a single regulator handles most pension issues. A separate agency handles all participant complaints. Thus, pension participants and plan sponsors have a much simpler situation for having their pension issues resolved. While the simple structure of regulatory authority in Ireland clearly has advantages, it may also facilitate regulatory capture, where the regulated industry has undue influence on the agency regulating it. That situation also appears to be the case for the regulation of state and local government pension funding in the United States. The more complex structure of regulatory authority in the U.S. may make regulatory capture more difficult. Nonetheless, U.S. experience indicates that when large financial interests are at stake, the regulated industry will spend large amounts of money attempting to limit the ability of the regulator to enact regulations that the industry views as being adverse to its interests. While the executive branch of government is the direct target of regulatory capture, and that has been the focus of previous studies, we argue that regulatory capture can also occur through influence on the legislative and judicial branches of government.

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