
Proposed Consumer Financial Protection Agency Would Cloud SEC Enforcement

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On June 30, 2009, the Department of Treasury delivered to Congress draft legislation that would create the Consumer Financial Protection Agency (CFPA), as recommended in the Department's [June 17, 2009 report on financial regulatory reform](#). For the most part, the CFPA's jurisdiction would not extend to persons or firms engaged in the securities business, but, in some areas, the proposed legislation would create indeterminate or overlapping authority with the Securities and Exchange Commission.

The CFPA's mandate would be "to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services." Consumer financial products or services include a wide variety of offerings to individuals, such as deposit-taking activities and extending credit and servicing loans would be covered, and the CFPA's mandate also would extend to acting as an investment adviser or financial adviser.

The draft legislation expressly provides that the CFPA would have no authority to exercise any power over persons regulated by the SEC, to the extent that such persons act in a registered capacity. The draft legislation would define such persons to mean broker-dealers, investment advisers, and

investment companies registered with the SEC. The CFPA therefore would have jurisdiction over investment advisers not registered with the SEC (currently a large category), private funds, and any person who should have but failed to register as a broker-dealer, adviser, or investment company. (Note that Treasury's report proposed that advisers to hedge funds and other private pools of capital be required to register with the SEC, and legislation to effect that recommendation already has been introduced.) The CFPA also would have jurisdiction over registered broker-dealers, investment advisers, and investment companies to the extent that those entities were not acting in a registered capacity. Thus, the CFPA theoretically could assert jurisdiction over entities such as small, state-registered investment advisers and hedge funds, venture capital funds, and private equity funds, to the extent they offer their financial products or services to individuals. It also should be noted that the legislation does not preempt state regulatory authority; in fact, it expressly preserves state authority.

The draft legislation expressly provides that it would not alter, amend, or affect the authority of the SEC to adopt rules, initiate enforcement proceedings, or take any other action as to broker-dealers, investment advisers, and investment companies registered with the SEC. At the same time, the draft has provisions giving the CFPA exclusive rulemaking authority and primary enforcement authority in certain areas and explicitly contemplates duplicative federal enforcement investigations by the CFPA and other federal agencies. For unregistered investment and financial advisers traditionally subject to SEC enforcement powers, these new provisions would inject considerable uncertainty, overlap, and cost.

The draft seeks to mitigate some of these problems by providing for inter-agency consultations and coordination. The SEC would be required to

consult with the CFPA when engaged in rulemaking "regarding a 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 CFPA. The CFPA would also be required to coordinate with the SEC, the CFTC, and other federal agencies and state regulators to promote consistent regulatory treatment of consumer and investment products and services.

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