

Client Alert

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CFPB Suffers First Official CID Challenge

By Donald C. Lampe, Joe Rodriguez, and Amanda J. Mollo

On April 21, 2016, Judge Richard J. Leon of the United States District Court for the District of Columbia ruled on the first judicial challenge to the Consumer Financial Protection Bureau's ("CFPB," or "Bureau") authority to issue and enforce a civil investigative demand ("CID"). The Bureau had issued to the Accrediting Council for Independent Colleges and Schools ("ACICS") a broad-ranging CID, which the respondent first challenged before the Bureau. As has been the case with all such challenges, the Director rejected the respondent's arguments and upheld the agency's issuance of the CID. ACICS then filed suit in the Federal District Court in Washington, D.C. to challenge the CID. The Court held that the CFPB did not have the authority to issue a CID regarding "the process for accrediting for-profit schools."

CIVIL INVESTIGATIVE DEMAND

Procedurally, this case began on August 25, 2015, when the CFPB issued its CID to ACICS, the stated purpose of which was to "determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges. . . ."

The CID required ACICS to designate a company representative to appear and give oral testimony regarding ACICS's policies, procedures and practices relating to the accreditation of seven particular schools. This testimony would be similar to a deposition under Rule 30(b)(6) of the Federal Rules of Civil Procedure. In addition, the CID required ACICS to respond in writing to two interrogatories requesting (1) identification of every post-secondary educational institution that ACICS has accredited since January 2010, and (2) identification of all individuals affiliated with ACICS who conducted any accreditation reviews related to twenty-one specific schools since January 1, 2010.

ACICS petitioned the Bureau to set aside or modify the CID, but CFPB Director Richard Cordray denied the petition on October 8, 2015. ACICS continued to object to the CID and submitted a motion to reconsider to the CFPB, which the Bureau declined to consider. Shortly thereafter, the CFPB filed a petition for enforcement with the U.S. District Court for the District of Columbia.

STANDARD

Relying on legal precedent, the Court determined that the test to determine whether to enforce the CID requires due consideration of whether:

- (1) The agency has the authority to make the inquiry;
- (2) The information sought is reasonably relevant; and
- (3) The demand is not too indefinite.¹

¹ See *United States v. Morton Salt Co.*, 228 U.S. 632, 652 (1950); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977); *CFTC v. Ekasala*,

Client Alert

As long as a CID that passes this test is not overly burdensome, a court should enforce it. The Court noted that its role at this stage in the proceeding is limited and further indicated its understanding that agencies are generally accorded broad deference in regard to investigative demands, their related scope of authority and the relevance of information requested.

However, the Court also noted that where it is clear that an agency lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must not enforce the CID. This statement foreshadowed the rest of the opinion, as the Court's analysis turned entirely on the answer to the question of whether the CFPB had authority to issue the CID.

THE CHALLENGE

The Court noted that that CFPB has the authority—indeed, the broad mandate—to take action to prevent a covered person or service provider from committing or engaging in an unfair, deceptive or abusive act or practice in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Nevertheless, the Court also found that the accreditation of for-profit schools was beyond the scope of that mandate and outside the scope of the Bureau's authority:

- [T]his case boils down to the answer to one question: Did the CFPB have the statutory authority to issue the CID in question? Unfortunately for the CFPB, the answer is no.²
- As respondent points out, and the CFPB does not deny, none of these laws address, regulate, or even tangentially implicate the accrediting process of for-profit colleges.³

The Court further rejected the CFPB's argument that it was entitled to determine for itself the accuracy of ACICS's stated description of its accreditation process and interaction with the activities of the schools it accredits, noting that the stated purpose of the CID and its specific requests all suggest a focus on the accreditation process generally rather than that more limited focus: "Put simply, this post-hoc justification is a bridge too far!"⁴ The Court finally cautioned that, while it may be "understandable" for the CFPB, as a new agency, to "struggle to establish the exact parameters" of its authority, the proper course of action is to be "especially prudent before choosing to plow headlong into fields not clearly ceded to them by Congress."⁵

KEY TAKEAWAYS

The CFPB has aggressively pursued matters that are arguably at the edge of, or just beyond, its jurisdiction, including a recent enforcement action against Dwolla, Inc., in which the Bureau used its UDAAP authority to address datasecurity concerns, an area where there has been some question as to the scope of the CFPB's authority. Accordingly, the ACICS case is significant because it represents the first time a court has ruled against the CFPB and limited the agency's jurisdiction. It is further particularly noteworthy because it comes in the context of a petition to set aside a CID, a matter of limited judicial review and one where the courts have historically given agencies wide discretion to investigate potential areas of concern. It will be interesting to see if this decision

62 F. Supp. 3d 88, 93 (D.D.C. 2014).

² Slip Op. p. 4.

³ Slip Op. p. 6.

⁴ *Id.*

⁵ Slip Op. p. 8.

Client Alert

emboldens more entities to challenge the Bureau's jurisdiction.

That said, Judge Leon may have provided the Bureau with an alternative remedy. By suggesting that the Bureau “may be entitled to learn whether ACICS is connected in any way to potential violations of consumer financial laws by the schools it accredits . . . ,” the Bureau may simply consider revising the CID, and its stated purpose, to a more narrowly tailored inquiry into those potential connections.

However, in light of its aggressive history, it seems unlikely that the CFPB would want to let this order stand as precedent in future actions against the Bureau around the country. Rather, the CFPB is likely to appeal the matter to the D.C. Circuit (although it certainly faced a hot bench from that court during the recent PHH oral arguments). Stay tuned for further updates.

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