

The D.C. Circuit Questioned Whether CID Gave "Fair Notice"

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The CFPB appeared to have a tough time this morning defending its issuance of a Civil Investigative Demand (CID) to Accrediting Council for Independent Colleges and Schools (ACICS) during oral argument before the D.C. Circuit. The appeal follows an April 2016 ruling that the CFPB lacked authority to issue a CID to investigate for-profit college accrediting under the Consumer Financial Protection Act (CFPA). Concerned with deficiencies in the CID's "notification of purpose," today's panel did not appear convinced that the CFPB had such authority, either.

The court zeroed in on the CFPA's language requiring CIDs to "state the nature of the conduct constituting the alleged violation...and the provision of law applicable to such violation" and asked CFPB counsel to identify such statements in the CID's notification of purpose. The CFPB claimed that it is not required to state a specific provision of law when it issues a CID.

Yet, the CFPB argued that the language "unlawful acts and practices in connection with accrediting for-profit colleges" is sufficiently broad to include "consumer financial products or services" for which the agency has explicit authority to regulate, such as student lending. As evidence that ACICS could have engaged in deceptive conduct "in connection with" its accreditation practices, the CFPB pointed to a Department of Education compliance report that revealed ACICS had "unmistakable evidence" a for-profit college engaged in fraudulent activities in connection with student loans and accredited that college anyway.

Troubled that the CID gave ACICS no indication of what unlawful conduct the agency was investigating, the court questioned the CFPB about general principles of fair notice, suggesting that it would have been "easy enough" to revise the CID to identify conduct within the definition of "consumer financial product or service."

ACICS had a much easier time today and faced questions on whether the CID was "patently outside the scope" of the CFPB's authority. Counsel for ACICS explained that the relevant question is whether the CFPA grants jurisdiction to the CFPB for the activity outlined in the notification of purpose. ACICS argued that the dispute was not one of semantics, but of authority: Even with a more specific CID, the CFPB would still fail to identify a consumer financial product or service to bring ACICS under its jurisdiction.

The take away is that the CFPB continues to face challenges to its jurisdiction, and the D.C. Circuit, as it did in the PHH Case, may again be poised to limit the Bureau's reach. We continue to closely follow this case for the final decision.

This alert is brought to you by Hudson Cook's Government Investigations, Examinations, and Enforcement Practice Group. For questions, please contact Lucy Morris, lmorris@hudco.com, 202.327.9710.

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