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“Fishing” for Trouble?¹: On the Appropriate Limits of a Civil Investigative Demand Issued by the CFPB

I. INTRODUCTION

As its recent consent order involving Wells Fargo demonstrates,² the Consumer Financial Protection Bureau (“CFPB”) looms over the activities of financial institutions. Starting in 2011,³ the agency has had a short and arguably “aggressive history.”⁴ In 2016, however, the CFPB traveled a “bridge too far”⁵ when the United States District Court for the District of Columbia ruled that the CFPB did not have the authority to issue a Civil Investigative Demand (“CID”) to the Accrediting Council for Independent Colleges and Schools (“ACICS”) targeting its accrediting process.⁶ This ruling is notable because the CFPB has encountered very few adverse court decisions in its brief, yet impactful existence.⁷ The case presents an interesting opportunity to examine two issues that are applicable not only to accrediting institutions, but financial institutions as well: the appropriate scope of the agency’s investigative authority,⁸ and who is the appropriate

1. See *FTC v. Nat’l Claims Serv., Inc.*, No. S. 98-283, 1999 U.S. Dist. LEXIS 3312, at *2 (E.D. Cal. Feb. 9, 1999) (“However, an agency may not use its subpoena power to go on a fishing expedition.”); *PHH Corp., CFPB No. 2012-MS-C-PPH Corp-0001*, at 5 (June 12, 2012) (petition to modify or set aside civil investigative demand) [hereinafter *PHH Petition*] (citing *FDIC v. Garner* 126 F.3d 1138, 1146 (9th Cir. 1997)).

2. *Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015 2* (Sept. 8, 2016).

3. Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, WASH. POST: WONKBLOG (Jan. 11, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/11/a-watchdog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau/>.

4. DONALD C. LAMPE, JOE RODRIGUEZ, & AMANDA J. MOLLO, MORRISON FOERSTER, CLIENT ALERT: CFPB SUFFERS FIRST OFFICIAL CID CHALLENGE 3 (Apr. 27, 2016), <https://media2.mofo.com/documents/160427cfpbcidchallenge.pdf>.

5. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 (D.D.C. Apr. 21, 2016).

6. *Id.* at 84.

7. See LAMPE, ET AL., *supra* note 4, at 2 (“[T]he ACICS case is significant because it represent[ed] the first time a court has ruled against the CFPB and limited the agency’s jurisdiction.”).

8. See LAMPE, ET AL., *supra* note 4, at 1.

recipient of a CID.⁹ The circumstances of this case also offer a potential reprieve to recipients from the broad authority of the CFPB, as the decision requires the CFPB to more narrowly define the purpose of the investigation and places a higher burden on the CFPB to prove the reasonableness of its belief that the entity being investigated has information relevant to a violation when there is no “clear nexus between the consumer financial laws it is tasked with enforcing” and the practices they are investigating.¹⁰

This Note examines the limits on the CFPB’s authority to issue CIDs and the potential effects on financial institutions. This Note proceeds in five parts. Part II provides background on the CFPB, the CID, and the recent court ruling.¹¹ Part III examines the appropriate scope of the CID and when it may be considered overly burdensome.¹² Part IV discusses who is subject to a CID.¹³ Finally, Part V concludes the analysis and looks ahead to the future of the CFPB’s investigative authority.¹⁴

II. BACKGROUND ON THE CFPB, THE CID, AND THE DISTRICT COURT RULING

The investigative powers of the CFPB are derived from the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).¹⁵ According to the CFPB, Congress passed Dodd-Frank to “protect consumers from abusive financial services practices.”¹⁶ Under Dodd-Frank, the CFPB’s remit is “to prevent a covered person or

9. See ORI LEV & STEPHEN LILLEY, MAYER BROWN, LEGAL UPDATE: SUBSTANTIAL ASSISTANCE: THE CFPB’S NEWEST TOOL 7 (July 2016), <https://www.mayerbrown.com/files/Publication/6e2a27aa-5015-4b6a-b7fb-a70461679db4/Presentation/PublicationAttachment/6411b9c2-685b-438a-a83f-516c2eb083eb/160718-UPDATE-CFS.pdf> (discussing the case in the context of the CFPB’s ability “to go after parties that might otherwise escape its reach”).

10. See *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. at 83 (explaining why the CFPB was not permitted to issue the CID in this particular case).

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1011, 12 U.S.C. § 5491 (2015).

16. Brief of Petitioner-Appellant at 5, *Consumer Fin. Prot. Bureau v. Accrediting Council For Indep. Colls. & Schs.* (D.C. Cir. Oct. 31, 2016) No. 16-5174 [hereinafter Brief of Petitioner] (quoting Pub. L. No. 111-23, 124 Stat. 1376. 1376 (2010)).

service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law 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.”¹⁷ Among the consumer protection laws that the CFPB enforces are the Truth in Lending Act (“TILA”), the Fair Debt Collection Practices Act (“FDCPA”), and the Fair Credit Reporting Act (“FCRA”).¹⁸ To fulfill its purpose, the CFPB has broad enforcement powers,¹⁹ perhaps the most useful of which is the CFPB’s investigative authority to send out CIDs.²⁰

A. *The Civil Investigative Demand*

According to the CFPB’s director, Richard Cordray (or “Director Cordray”), the CID is “crucial” to the CFPB’s operations.²¹ Broadly, a CID is a “statutorily provided discovery tool[,]” distinguishable from other discovery methods like interrogatories because a government entity may use them to procure information from a recipient before an official proceeding has even begun.²² Indeed, the fact that the CFPB can issue a CID well before any formal administrative procedure helps explain why these demands can be so challenging for recipients to deal with.²³ With the advent of the CFPB, banking entities that had previously not been subjected to CIDs can now

17. Dodd-Frank § 1031(a), 12 U.S.C. § 5531(a).

18. Brief of Petitioner, *supra* note 16, at 5 (*citing* 12 U.S.C. § 5481(12), (14)) (defining “Enumerated Consumer Laws” and “Federal Consumer Financial Law” for the purposes of the CFPB).

19. *See* Dodd-Frank § 1021(c)(4), 12 U.S.C. § 5511(c)(4) (defining one of the primary functions of the agency as “supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law”).

20. Dodd-Frank § 1024(c)(1), 12 U.S.C. § 5562(c)(1) (stating that “the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand . . .”).

21. *See* PHH Corp., CFPB No. 2012-MSC-PHH Corp-0001, at 3 (Sept. 20, 2012) [hereinafter PHH Decision and Order] (decision and order on petition to modify or set aside civil investigative demand).

22. *See* John Niemann, *A Closer Look at the CFPB Civil Investigative Demand*, CFPB J. (July 23, 2016), <http://cfpbjournal.com/issue/cfpb-journal/article/a-closer-look-at-the-cfpb-civil-investigative-demand> (providing an overview of CFPB Civil Investigative Demands).

23. *Id.*

receive one from this young agency.²⁴ Pursuant to Dodd-Frank, the CFPB may issue CIDs to anyone who may have information or documents that pertain to a violation.²⁵ The CID must notify the recipient of the behavior the agency considers to be abusive or contrary to federal consumer law.²⁶ After a CID has been issued, the recipient is obligated to “meet and confer” with the agency investigator either within ten days after receiving it or before the deadline to file a petition disputing the CID (whichever is earlier).²⁷ The meet and confer process, on which the CFPB places a great deal of importance when considering modifications to the CID,²⁸ is there so both parties can solve issues that may arise during the process.²⁹ This requires the recipient at the time of the “meet and confer” with the CFPB to have all “knowledge necessary to resolve any issues relevant to compliance with the demand,”³⁰ otherwise those issues are waived.³¹ During the meeting, the CFPB is permitted to “negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good cause shown, may extend the time prescribed for compliance.”³²

24. Joseph T. Lynyak, III & Rebecca Tierney, *Dealing with Civil Investigative Demands from the CFPB: Rules, Responses, and Practice Considerations*, 130 BANKING L.J. § 9.01 771–72 (2013). Prior to the existence of the CFPB, banks were under the supervision of “federal banking agencies, which possess direct examination and supervision authority and therefore permit the banking agencies to examine practically all books and records of a company without the need to issue a CID.” *Id.* at 771.

25. Dodd-Frank § 1024(c)(1), 12 U.S.C. § 5562(c)(1).

26. Dodd-Frank § 1024(c)(2), 12 U.S.C. § 5562(c)(2) (“Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”).

27. 12 C.F.R. § 1080.6(c) (2016).

28. *See* 12 C.F.R. § 1080.6(c)(3) (stating that the CFPB “will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process . . .”).

29. *See* 12 C.F.R. § 1080.6(c)(1) (“The recipient must make available at the meeting personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand.”).

30. 12 C.F.R. § 1080.6(c)(1). Examples of measures potentially needed to satisfy this requirement include making available “individuals knowledgeable about the recipient’s information or records management systems and/or the recipient’s organizational structure.” *Id.*

31. *See* 12 C.F.R. § 1080.6(c)(3) (“The Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process . . . and will only consider issues raised during the meet and confer process.”).

32. 12 C.F.R. § 1080.6(d) (“The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good

Following the meet and confer process, if the recipient is still unhappy with the parameters and demands of the CID, the recipient may petition the CFPB to modify or set aside the demand within twenty days of receipt.³³ The recipient can ask for additional time to file the petition, but is unlikely to be granted an extension.³⁴ In its petition, the recipient is obligated to “set forth all factual and legal objections to the [CID], including all appropriate arguments, affidavits, and other supporting documentation.”³⁵ Further, the petition must certify that the recipient had meaningfully participated in the meet and confer process and had been unable to come to an understanding with the CFPB.³⁶ While both Dodd-Frank itself and the CFPB’s own rules allow for CID recipients to engage in this process,³⁷ in practice, the chances of a CID being set aside by the CFPB are slim.³⁸ Pursuant to the agency’s regulations, the CFPB director, a position endowed with broad discretion and removable only “for cause,”³⁹ evaluates these petitions.⁴⁰ Unsurprisingly and perhaps understandably, it is unlikely that the director would “decide to quash a CID issued by his own staff attorneys.”⁴¹ As of February 18, 2017, Director Cordray has denied all

cause shown, may extend the time prescribed for compliance.”).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1052(f)(1), 12 U.S.C. § 5562(f)(1) (2015).

34. 12 C.F.R. § 1080.6(e)(2) (indicating that the CFPB may rule on extensions of time, but also that “[r]equests for extensions of time are disfavored”)

35. 12 C.F.R. § 1080.6(e).

36. 12 C.F.R. § 1080.6(e)(1). The petition must also indicate “the date, time, and place of each such meeting between counsel, and the names of all parties participating in each such meeting.” *Id.*

37. Dodd-Frank § 1052(f), 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6.

38. See J.H. Jennifer Lee, Kaleb McNeely, & Joseph T. Lynyak, *The Long Arm of the CFPB*, CORP. COUNSEL (July 2016), <http://www.corpcounsel.com/id=1202763276703/The-Long-Arm-of-the-CFPB?slreturn=20160725205011> (describing how these petitions are decided under a “low standard”).

39. See BILL MAYBERRY, JASON EVANS, JOSHUA DAVEY & ANITA FOSS, MCGUIREWOODS, SUBJECT TO INQUIRY: D.C. CIRCUIT REBUKES CFPB IN PHH CASE (October 11, 2016), <http://www.subjecttoinquiry.com/financial-institution-regulation/d-c-circuit-rebuked-cfpb-in-phh-case/>. The Circuit Court for the District of Columbia recently ruled that this unique governance structure is unconstitutional over “concern[s] about the lack of protection against arbitrary decision-making and abuses of power by the sole director.” *Id.*; see also *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6–8 (D.C. Cir. 2016). However, the only action that the court took was to strike the provision concerning removal from the statute. *Id.*

40. See MAYBERRY ET AL., *supra* note 39 (citing 12 C.F.R. § 1080.6(3)(4)).

41. Lee, et al., *supra* note 38.

the petitions that he has decided.⁴²

The difficulty of petitioning the CFPB to set aside a CID raises the question of whether recipients should just ignore the demand.⁴³ In those situations, the CFPB may file an action in federal court asking for enforcement, thus taking judgment on the CID out of the CFPB's hands.⁴⁴ However, as Director Cordray has accurately observed, the judiciary traditionally gives agencies a wide berth with respect to their investigations.⁴⁵ While the CFPB has relied on this deference in the past to its benefit, the D.C. District Court's decision in 2016 "reveal[s] a changing tide."⁴⁶

B. CFPB v. ACICS

On August 25, 2015, the CFPB sent a CID to ACICS.⁴⁷ Its stated purpose 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."⁴⁸ The demand asked the organization to testify "regarding ACICS's policies, procedures, and practices relating to the accreditation of seven particular schools."⁴⁹ Further, ACICS had: "(1) to identify all post-secondary educational institutions that ACICS had accredited since January 2010 and (2) to identify all individuals affiliated with ACICS who conducted any accreditation reviews since January 1, 2010 specific to twenty-one particular schools."⁵⁰ When ACICS received the CID, it could not come to an agreement with the CFPB regarding cooperation and thus asked the CFPB to set aside or modify the CID.⁵¹ Director Cordray

42. See Petitions to Modify and Set Aside, CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/policy-compliance/enforcement/petitions/> (last visited Feb. 10, 2017) (displaying all petitions received from CID recipients and CFPB responses).

43. See Lee, et al., *supra* note 38 ("Facing poor odds of setting aside or modifying CIDs, recipients have also pursued the more passive strategy of simply not responding.").

44. Lee, et al., *supra* note 38.

45. See PHH Decision and Order, *supra* note 21, at 4.

46. Lee, et al., *supra* note 38.

47. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 80 (D.D.C. Apr. 21, 2016).

48. *Id.* at 81.

49. *Id.*

50. *Id.*

51. *Id.*

turned down its request and instructed ACICS to engage in the meet and confer process with the agency's attorneys.⁵² When ACICS continued to refuse to comply,⁵³ the CFPB filed a complaint in federal court.⁵⁴

In deciding the case, the Federal District Court for the District of Columbia considered “(1) whether the agency has the authority to make the inquiry, (2) whether the information sought is reasonably relevant, and (3) whether the demand is not too indefinite.”⁵⁵ If the CID met these requirements, it would have been enforceable unless its stipulations were too onerous for the recipient.⁵⁶ While the district court acknowledged that courts historically have given agencies a great deal of latitude in this area,⁵⁷ Judge Leon noted that “where it is clear that an agency either lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must set such inquiry aside.”⁵⁸

In deciding that the CFPB could not issue this particular CID,⁵⁹ Judge Leon focused on the language of the CID's statement of purpose, particularly the clause “to determine whether any entity or person has engaged or is engaging in unlawful acts and practices *in connection with accrediting for-profit colleges*, in violation of . . . [f]ederal consumer financial protection law.”⁶⁰ He acknowledged that the CFPB was aware that “none of these [consumer financial laws] address, regulate, or even tangentially implicate the accrediting process of for-profit colleges.”⁶¹ The court observed that the CFPB “realiz[ed] the absence of a clear nexus between the consumer financial laws it is tasked with enforcing and its purported investigation into accreditation of for-profit schools.”⁶² Instead, the CFPB contended that since it could certainly investigate the activities of for-profit schools, it was also permitted to

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977); *CFTC v. Ekasala*, 62 F. Supp. 3d 88, 93 (D.D.C. 2014)).

56. *Id.*

57. *Id.* at 81–82.

58. *Id.* at 82.

59. *Id.*

60. *Id.* (emphasis original).

61. *Id.* at 83.

62. *Id.*

examine an organization's activities that could be tied to that potentially illicit conduct.⁶³ It was "this post-hoc justification" that the court considered to be "a bridge too far!"⁶⁴ The court rejected the CFPB's argument that it had the right to investigate its relationship with the schools, even when ACICS had offered a description of its organization that did not support a potential connection with violations of consumer laws.⁶⁵ The court concluded that "[a]lthough it is understandable that new agencies like the CFPB will struggle to establish the exact parameters of their authority, they must be especially prudent before choosing to plow head long into fields not clearly ceded to them by Congress."⁶⁶

III. THE APPROPRIATE SCOPE OF A CID

Perhaps the most crucial issue that the court touched on is the appropriate scope of a CID issued by the CFPB. Put another way, may the CFPB use its investigative authority to go on "fishing expeditions" on the basis of nothing more than mere optimism that its search will reveal violations of federal consumer laws?⁶⁷

A. *The Stated Purpose of the CID*

As mentioned earlier, issues regarding the scope of CIDs can be traced to the fact that these demands are issued *prior* to the start of any official proceeding.⁶⁸ In the CFPB's first decision regarding a petition to modify or set aside a CID,⁶⁹ Director Cordray asserted that although

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 84.

67. See PHH Petition, *supra* note 1, at 5 (citing *FDIC v. Garner* 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, U.S. Dist. LEXIS 3312, at *2 (E.D. Cal. Feb. 9, 1999)).

68. John Niemann, *A Closer Look at the CFPB Civil Investigative Demand*, CFPB J. (July 23, 2016), <http://cfpbjournal.com/issue/cfpb-journal/article/a-closer-look-at-the-cfpb-civil-investigative-demand> (providing an overview of CFPB Civil Investigative Demands).

69. See PHH Decision and Order, *supra* note 21 (decision and order on petition to modify or set aside civil investigative demand). Being the first decision, Director Cordray took note of its "precedential value" and spent no small amount of time trying "to provide more specific guidance for parties assessing their course of conduct in similar circumstances" PHH Decision and Order, *supra* note 21, at 1.

the agency may gather enough information from publicly available sources to issue a CID,⁷⁰ there is usually “a substantial information gap” between the agency and the target at that initial phase.⁷¹ With this in mind, the director stated that the purpose of the CID is to close this gap between the CFPB and the recipient so the agency can decide whether or not to investigate the recipient in more detail.⁷² Director Cordray suggested that this can also work in favor of the recipient, as it may lead to more expeditious resolution of the matter if it turns out that there was no violation.⁷³ However, the director emphasized that at the early stages, the agency is required to broaden the scope of its CIDs in order to adequately familiarize itself with the situation.⁷⁴ Director Cordray adopted a deferential standard of review for petitions to set aside CIDs,⁷⁵ and asserted that the CFPB “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”⁷⁶ Under this interpretation, no CID issued by the CFPB could be considered overly broad as a wide net will either catch some form of unlawful activity or enable the agency to be

70. PHH Decision and Order, *supra* note 21, at 3. Specifically, Cordray determined that these public sources like news stories and consumer complaints would give the agency “reason to believe that ‘a[] person may be in possession, custody or control’ of documents, items or information ‘relevant to a violation’ of federal consumer financial law.” *Id.* (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1052(c)(1), 12 U.S.C. § 5562(c)(1) (2015)).

71. PHH Decision and Order, *supra* note 21, at 3.

72. PHH Decision and Order, *supra* note 21, at 3.

73. PHH Decision and Order, *supra* note 21, at 3. The director also noted that “if the result of the CID process is to substantiate a likely violation of law, then unless the subject desires to adopt a “scorched earth” policy of delay and obfuscation, once again the closing of the information gap between the parties is likely to lead to a more sensible resolution of the matter with less accompanying time and expense.” PHH Decision and Order, *supra* note 21, at 3.

74. PHH Decision and Order, *supra* note 21, at 3.

75. The standard used by the CFPB in these matters is slightly different from what the D.C. Circuit used in *ACICS*. PHH Decision and Order, *supra* note 21, at 4. The standard that the agency uses will reject a petition to set aside a CID if “(1) the investigation is for a lawfully authorized purpose; (2) the information requested is relevant to the investigation; and (3) procedural requirements are followed.” PHH Decision and Order, *supra* note 21, at 4. If the director is satisfied that those three criteria have been met, he will reject the petition “unless the subject demonstrates the CID imposes an ‘undue burden’ or constitutes an abuse of the court’s process.” PHH Decision and Order, *supra* note 21, at 4. Notably, the third factor used by the CFPB differs from the factor used by Judge Leon, which requires that “the demand [be] not too indefinite.” *See* *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 81 (D.D.C. Apr. 21, 2016).

76. *See* PHH Decision and Order, *supra* note 21, at 4.

satisfied that the recipient is conducting itself appropriately.⁷⁷ In this way, the petition process that Congress specifically provided for in Dodd-Frank is rendered essentially meaningless.⁷⁸

Director Cordray made this argument—that the CFPB could initiate an investigation simply for “assurance”—in response to a petition made by PHH Corporation, a financial services company that provides mortgage services to other firms.⁷⁹ Much of PHH’s argument in its petition focused on the broad scope of the issued CID.⁸⁰ It first contended that the CID did not give PHH adequate notice.⁸¹ It argued that unless the conduct leading to the alleged violation is clearly identified, the recipient will not be able to meet the obligations of the demand or compose a coherent challenge to the aspects of the demand that serve no readily ascertainable purpose.⁸² As the scope of the investigation targeted the mortgage lending process generally, PHH contended that the CID’s stated purpose did not “state the nature of the conduct” that was under investigation and therefore did not comply with the stipulations of the statute.⁸³ Second, PHH argued that the CFPB could not use its investigative authority “to go on fishing expeditions.”⁸⁴ The CID asked for all relevant documents pertaining to PHH’s captive reinsurance business, which PHH believed was “equivalent to an open

77. See PHH Decision and Order, *supra* note 21, at 4–5.

78. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1052(f), 12 U.S.C. § 5562(f) (2015) (outlining the CID petition process).

79. PHH Petition, *supra* note 1. On June 12, 2012, PHH Corporation, filed a petition to modify or set aside a CID issued by the CFPB. PHH Petition, *supra* note 1. Earlier that year, the CFPB disclosed to PHH that it was investigating whether the corporation’s practices had violated the Real Estate Settlement Procedures Act. PHH Decision and Order, *supra* note 21, at 4–5. In May of that year, the CFPB requested answers via a CID to twenty-one interrogatories and thirty-three document requests. PHH Decision and Order, *supra* note 21, at 2. PHH would also play an important role in the CFPB’s evolution several years later. MAYBERRY ET AL., *supra* note 39; PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 6–8 (D.C. Cir. 2016).

80. PHH Petition, *supra* note 1, at 1–2, 5–8 (June 12, 2012). The CID claimed that its purpose was “to determine whether mortgage lenders and private mortgage insurance providers or other unnamed persons have engaged in, or are engaging in, unlawful acts or practices in connection with residential mortgage loans” PHH Petition, *supra* note 1, at 2.

81. PHH Petition, *supra* note 1, at 1.

82. PHH Petition, *supra* note 1, at 2.

83. PHH Petition, *supra* note 1, at 2.

84. PHH Petition, *supra* note 1, at 5 (citing *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat’l Claims Serv., Inc.*, No. S 98-283, U.S. Dist. LEXIS 3312, at *2 (E.D. Cal. Feb. 9, 1999)).

records search of all business conducted by PHH over the last eleven years.”⁸⁵ It further asserted that the CFPB’s request must be appropriately tailored to target specific conduct.⁸⁶ Instead, the CFPB asked for more than a decade’s worth of records based on a hunch that a violation would turn up, according to PHH.⁸⁷

ACICS similarly disputed the scope of the CID.⁸⁸ It argued that the requirement of 12 U.S.C. § 5562(c), that the CID identify the violating conduct, “is vital to the respondent’s ability to understand and respond to the CID, as well as to formulate objections to the same.”⁸⁹ ACICS claimed that the statement of purpose was far too amorphous to comply with, and in fact applied not only to ACICS, but “every accrediting agency, for-profit school and student(s) therein.”⁹⁰ ACICS echoed this argument in court, stating that under the Consumer Financial Protection Act of 2010 (“CFPA”), “[t]he Bureau can only propound a CID that seeks information that is relevant to conduct that could be actionable under a law that the Bureau enforces.”⁹¹ Thus, ACICS contended that the CFPB was ignoring limits that Congress had expressly placed on the agency.⁹²

The CFPB denied both PHH’s and ACICS’s arguments on similar grounds.⁹³ Director Cordray rejected PHH’s argument that the

85. PHH Petition, *supra* note 1, at 7–8.

86. PHH Petition, *supra* note 1, at 8 (citing *U.S. v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2nd Cir. 1996); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977)).

87. PHH Petition, *supra* note 1, at 8 (citing *U.S. v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2nd Cir. 1996); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977)).

88. PHH Petition, *supra* note 1, at 10–11; Accrediting Council for Indep. Colls. and Schs.’s Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 183 F. Supp. 3d 79 (D.D.C. Apr. 21, 2016) (No. 1:15-CV-01838-RJL) 9 [hereinafter Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand].

89. Accrediting Council for Indep. Colls. & Schs., CFPB No. 2015-MISC-ACICS-0001, at 10 (Sept. 14, 2015) (petition to modify or set aside civil investigative demand).

90. *Id.* at 10–11.

91. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 10.

92. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 10.

93. PHH Decision and Order, *supra* note 21, at 1; Accrediting Council for Indep. Colls. & Schs., CFPB No. 2015-MISC-ACICS-0001, at 1 (Oct. 8, 2015) (decision and order on petition to modify or set aside civil investigative demand) [hereinafter ACICS Decision and Order].

CID did not clearly identify the investigation's purpose,⁹⁴ arguing that the CID's intent can be demarcated "quite generally."⁹⁵ Director Cordray also argued that the inquiry was appropriately and reasonably directed to aspects of the corporation "involved in the narrower function of selecting where to direct the company's mortgage insurance business."⁹⁶ According to Director Cordray, "[t]he Bureau has ample reason to believe that its inquiries are relevant to the ongoing investigation, and the courts presume the relevance and appropriateness of the CID unless the requests are 'obviously wrong.'"⁹⁷ With respect to ACICS's petition, the CFPB relied on its own precedent established over the past few years to conclude that the disputed statement of purpose was "functionally equivalent" to those the agency had already determined "satisfied the requirements of the statute and regulations."⁹⁸ Further, the agency emphasized that "a detailed narrative" was not necessary to satisfy the demands of the statute.⁹⁹ Similar to his reasoning in the PHH decision, Director Cordray stated that "the purpose of an investigation is 'to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [Bureau's] judgment, the facts thus discovered should justify doing so.'"¹⁰⁰ Thus, according to the CFPB, ACICS had no defense to a CID because the CID will either justify its issuance by finding unlawful behavior, or will only prove its irrelevance after it has already been complied with.¹⁰¹

In response to the CFPB's similar arguments in district court, Judge Leon had a one word response: "Please."¹⁰² Focusing on the CID's statement of purpose, the court concluded that the CID "said nothing about an investigation into the lending or financial advisory practices of for-profit schools."¹⁰³ Instead, the court noted that the

94. PHH Decision and Order, *supra* note 21, at 5.

95. PHH Decision and Order, *supra* note 21, at 6 (quoting *FTC v. O'Connell Associates, Inc.* 828 F. Supp. 165, 171 (E.D.N.Y. 1993)).

96. PHH Decision and Order, *supra* note 21, at 5.

97. PHH Decision and Order, *supra* note 21, at 7.

98. PHH Decision and Order, *supra* note 21, at 3.

99. PHH Decision and Order, *supra* note 21, at 3.

100. PHH Decision and Order, *supra* note 21, at 3.

101. *See* PHH Decision and Order, *supra* note 21, at 2–3.

102. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F.Supp. 3d 79, 83 (D.D.C. Apr. 21, 2016).

103. *Id.*

language of the statement of purpose (as well as the CID's specific requests) demonstrated the CFPB's intent to "target[] the accreditation process generally."¹⁰⁴ Additionally, Judge Leon dismissed as a "post-hoc justification" the CFPB's argument that it was permitted to investigate ACICS's assertions of fact and evaluate whether or not they were to its liking.¹⁰⁵ Although the court did not explicitly reject the CFPB's general belief that it is entitled to investigate entities simply because it wants assurance that federal consumer laws are being complied with, the implication of the court's holding is that some limit exists to the CFPB's ability to bootstrap its way into an investigation.¹⁰⁶

However, the court's explicit holding in *ACICS* is fairly narrow.¹⁰⁷ Judge Leon did not make any sweeping declarations of law regarding the limits of the CFPB's investigative authority, but limited the holding to the very fact specific nature of this case, simply concluding that the CFPB could not investigate the accreditation process.¹⁰⁸ Indeed, this has led some commentators to believe that "Judge Leon may have provided the Bureau with an alternative remedy."¹⁰⁹ The court seemed to hint at the possibility that the CFPB *could* investigate ACICS's connection with for-profit schools and those institutions' potentially illicit conduct if the agency had only composed the CID appropriately.¹¹⁰ The court may simply have encouraged the CFPB to "consider revising the CID, and its stated purpose, to a more narrowly tailored inquiry into those potential connections."¹¹¹ However, rather than an oversight, this may have been the point. As PHH had previously advocated, the 12 U.S.C. § 5562(c) requirement can be reasonably interpreted as being intended to both increase the likelihood that a recipient will fully comply with the agency's directives and to also permit a recipient to mount a coherent challenge to the CID's request.¹¹² By requiring the CFPB to narrow and specify the

104. *Id.* at 84.

105. *Id.* at 83.

106. *Id.*

107. *See id.* at 84.

108. *Id.*

109. LAMPE, ET AL., *supra* note 4, at 3.

110. LAMPE, ET AL., *supra* note 4, at 3; *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 – 84 (D.D.C. 2016).

111. LAMPE, ET AL., *supra* note 4, at 3.

112. *See PHH Petition*, *supra* note 1, at 2.

purpose of the CID,¹¹³ the court gave recipients a much better chance to prepare themselves for a more meaningful meet and confer process where both parties can actually “resolve all issues regarding compliance.”¹¹⁴ Indeed, the court’s “limitation” on the CFPB’s investigatory authority may actually be to the agency’s benefit because a specific inquiry can aid the recipient in responding to the CID more effectively than a request for a broad survey of the recipient’s activities can.¹¹⁵ It may also help the CFPB avoid situations where the recipient, while trying to decipher what conduct the CFPB is actually targeting, engages in a “policy of delay and obfuscation.”¹¹⁶

B. *Undue Burden*

Another relevant facet in analyzing the appropriate scope of a CID is the degree of the burden imposed on the recipient.¹¹⁷ Both the CFPB and the district court used a framework that would refuse to enforce a CID if it would constitute an undue burden even if all other criteria had been met.¹¹⁸ Proving that a CID is an undue burden has historically been a challenge, however.¹¹⁹ Generally, an administrative subpoena like a CID will only “be deemed unduly burdensome if compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”¹²⁰

Some practitioners have commented that the CID timeline and process pose various difficulties for a recipient.¹²¹ It is not clear,

113. See LAMPE, ET AL., *supra* note 4, at 3.

114. See 12 C.F.R. § 1080.6(c) (2016).

115. See PHH Petition, *supra* note 1 at 2 (June 12, 2012) (The “explicit statutory requirement is crucial to the recipient’s ability to understand and respond to the CID, as well as to formulate appropriate objections and to challenge the overbroad aspects of the CID.”).

116. PHH Decision and Order, *supra* note 21, at 3.

117. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 81 (D.D.C. 2016).

118. PHH Decision and Order, *supra* note 21, at 5; *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 81.

119. See PHH Decision and Order, *supra* note 21, at 6 (citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)) (noting that “the courts place a significant legal burden on the party challenging a CID or administrative subpoena on these grounds”).

120. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

121. See, e.g., Dylan W. Howard, *The CFPB’s Uncivil Civil Investigative Demands*, LAW 360 (Nov. 2014), <https://www.law360.com/articles/599019/the-cfpb-s-uncivil-civil-investigative-demands> (discussing the challenges of meeting the requirements for a CID issued by the CFPB).

however, that the timeline demands of the CFPB's CID differ all that much from other federal agencies.¹²² When the agency designed its rules, it drew from existing agency regulations, especially the Federal Trade Commission ("FTC").¹²³ For example, while the FTC does provide four more days for the recipient to fulfill the meet and confer process,¹²⁴ recipients of a CID from the FTC receive the same amount of time to petition a demand.¹²⁵ Also, the FTC similarly states that it will refuse to "consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process."¹²⁶ Some practitioners have argued that while these two agencies have similar rules as written, the "family resemblance stops on paper in many areas."¹²⁷ While the FTC and the CFPB have similar "meet and confer" rules, the FTC "rarely held to a hard and fast meeting within this meet and confer deadline."¹²⁸ Meanwhile, the CFPB "will come expecting a substantive, detailed discussion about concerns regarding process and scope as well as detailed information on the nature and location of the materials sought," which is another departure from the FTC.¹²⁹ With such strict adherence to the letter of the rules, it is perhaps no surprise that PHH and ACICS could not successfully challenge the CFPB on these grounds.¹³⁰

Aside from the onerous processes a recipient can encounter in responding to a CID, there is also the potential burden that comes from seeking to challenge a CID.¹³¹ While the CFPB considers its

122. See e.g., 12 C.F.R. § 1080.1 (2016) (governing the FTC investigative processes); 16 C.F.R. pt. 3; 17 C.F.R. pt. 201 *et seq.* (2016) (governing the SEC investigative processes).

123. Jonice Gray Tucker & Amanda Raines, *CFPB Investigations in Focus: Navigating CIDs*, LAW 360 (July 11, 2013, 12:16 PM), <https://www.law360.com/articles/455982/cfpb-investigations-in-focus-navigating-cids>.

124. 16 C.F.R. § 2.7(k) (2016) ("[A] recipient of Commission compulsory process shall meet and confer with Commission staff within 14 days after receipt of process or before the deadline for filing a petition to quash . . .").

125. Federal Trade Commission Act § 20, 15 U.S.C. § 57b-1(f)(1) (2015) (stating that the recipient of civil investigative demand from the Commission must file a petition "no[] later than 20 days after the service of any civil investigative demand . . .").

126. 16 C.F.R. § 2.7(k) (2016).

127. See Tucker & Raines, *supra* note 123.

128. Tucker & Raines, *supra* note 123.

129. Tucker & Raines, *supra* note 123.

130. See PHH Decision and Order, *supra* note 21, at 6; Brief of Petitioner, *supra* note 16, at 29.

131. See TED KORNOBIS & STEPHANIE C. ROBINSON, K&L GATES: LEGAL INSIGHT: D.C.

investigations to be “non-public, the CFPB has taken the position that petitions to set aside a CID are public proceedings and, absent extraordinary circumstances, it will post a company’s petition on its website shortly after the petition is filed.”¹³² In a recent decision,¹³³ the D.C. District Court noted how the announcement of an investigation might inflict both reputational and financial harm to the recipient, even before the CFPB might find anything wrong.¹³⁴ In a decision arising out of the same matter,¹³⁵ a former corporate officer of a recipient contended that as the entity required “access to hundreds of millions of dollars in capital from banks and private investors,”¹³⁶ public disclosure of the CFPB investigation could lead these lenders to “withdraw their capital access and invest elsewhere.”¹³⁷ The D.C. District Court did leave open the option for recipients of CIDs to ask for confidentiality while they ask the CFPB to set aside the investigative instrument, but these cases help demonstrate how a broad CID can potentially have substantial ramifications.¹³⁸

Finally, as the United States Chamber of Commerce argued in its amicus brief in support of ACICS, the CFPB’s arguable infringement into another agency’s domain (in this case, the Department of Education’s domain) can lead to regulatory uncertainty.¹³⁹ If it is

DISTRICT COURT DECISION SUPPORTS PRINCIPLE ALLOWING COMPANIES TO CHALLENGE CFPB INFORMATION REQUESTS WITHOUT FEAR OF PUBLIC DISCLOSURE OF INVESTIGATION 1 (2015), <http://www.klgates.com/dc-district-court-decision-supports-principle-of-allowing-companies-to-challenge-cfpb-information-requests-without-fear-of-public-disclosure-of-investigation-11-05-20152/>.

132. *Id.* at 3.

133. Plaintiff v. Consumer Fin. Prot. Bureau, 2015 U.S. Dist. LEXIS 141812 (D.D.C. Oct. 16, 2015). The plaintiffs in the case were entities who provided consumer credit counseling. *Id.* at *1. They had sought an injunctive order that would prevent the CFPB from proceeding with a deposition-type hearing after the agency had denied the plaintiff’s counsel to be present at the hearing. *Id.* at *2–3. The court concluded by “decid[ing] to unseal the case, but redact the names of the parties involved.” KORNOBIS & ROBINSON, *supra* note 131, at 4.

134. KORNOBIS & ROBINSON, *supra* note 131, at 4. In contrast, the CFPB had “dismissed identical claims as ‘remote’ and stated that ‘the mere fact that [an entity] would suffer embarrassment as a result of [its] associations with law enforcement investigations is not the type of ‘harm’ that justifies confidentiality.” KORNOBIS & ROBINSON, *supra* note 131, at 4.

135. John Doe Co. No. 1 v. Consumer Fin. Prot. Bureau, 2016 U.S. Dist. LEXIS 78988 (D.D.C. June 15, 2016).

136. *Id.* at *27 (internal quotations omitted).

137. *Id.* (internal quotations omitted).

138. See KORNOBIS & ROBINSON, *supra* note 131, at 5.

139. Brief for Chamber of Commerce of the United States of America as Amicus Curiae

unclear who the regulator is or how many regulators there may be for a certain activity, an entity may seek to evade regulation altogether by “tightening product availability, eliminating features, or exiting particular product categories.”¹⁴⁰ Although the possibility that the CFPB is going beyond its statutory boundaries is troubling in and of itself and will be discussed further, issuing CIDs in these circumstances also can compel entities to alter their compliance policies,¹⁴¹ and may even lead “to higher prices for consumers and reduced choice in consumer financial products.”¹⁴² Banks may be among the most vulnerable to this burden as it was far less common for them to receive CIDs prior to Dodd-Frank.¹⁴³

Both PHH and ACICS argued that the CID imposed an undue burden on their businesses.¹⁴⁴ PHH alleged that the CID required review of any document that “touches on the issue of private mortgage insurance” and would compel the company to incur substantial expenses in responding to the agency’s request.¹⁴⁵ Further, PHH noted that it had offered to turn over a significant number of documents that were already available and to cooperate with the CFPB if the agency deemed that additional documents were relevant.¹⁴⁶ Because the CFPB did not grant PHH’s request “to both produce materials and preserve its objections,”¹⁴⁷ PHH argued that it had been forced into “the untenable position of either filing its petition by June 12, 2012, or waiving its objections.”¹⁴⁸ It concluded that the investigative demand should be more narrowly tailored to reduce its negative impact on the recipient’s operations.¹⁴⁹

ACICS similarly argued that the CID was unreasonably

Supporting Respondent at 16–18, *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. and Schs.*, 183 F. Supp. 3d. (2016) (No. 6-5174).

140. *Id.* at 17 (citing *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006)).

141. *Id.* at 18.

142. *Id.* at 17.

143. See Linyak & Tierney, *supra* note 24, at 771–72.

144. PHH Corp., CFPB No. 2012-MSC-PHH Corp-0001, at 8 (June 12, 2012) (petition to modify or set aside civil investigative demand); Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 7.

145. PHH Petition, *supra* note 1, at 8.

146. PHH Petition, *supra* note 1, at 9.

147. PHH Petition, *supra* note 1, at 9.

148. PHH Petition, *supra* note 1, at 9.

149. PHH Petition, *supra* note 1, at 10 (citing *U.S. Commodity Futures Trading Comm’n v. The McGraw-Hill Companies, Inc.*, 390 F. Supp. 2d 27, 35–36 (D.C. 2005)).

burdensome, stating that “the CID imposes a burden on ACICS that extends well beyond the financial impact and time commitment of responding to the broad information request.”¹⁵⁰ It illustrated how the CID requested the names of “volunteer evaluators who serve in an academic capacity at a peer institution or other institution of higher education, including instructors, professors and adjunct professors who have ‘day jobs,’ but volunteer their time for the accrediting process.”¹⁵¹ ACICS argued that enforcement of the CID would have a chilling effect on those who would otherwise choose to volunteer their time.¹⁵² The council even went as far as to assert that “some evaluators have expressed their intention to no longer participate in the accrediting review process.”¹⁵³

The CFPB rejected both of these arguments.¹⁵⁴ Director Cordray argued that PHH “offered little to no detail to make the kind of showing required to substantiate these claims.”¹⁵⁵ As a general rule, the CFPB requires that “in order to meet its legal burden, the subject must undertake a good-faith effort to show ‘the exact nature and extent of the hardship’ imposed and state specifically how compliance will harm its business.”¹⁵⁶ Director Cordray concluded that PHH had not met its burden here, claiming that it had offered only generalized grievances in support of its claim.¹⁵⁷ With respect to ACICS’s argument, the CFPB in its brief dismissed it as “speculation.”¹⁵⁸ The CFPB contended that the ACICS’s argument concerning the potential chilling effect of the CID on the evaluator pool did not “suggest[] that compliance with the CID would ‘unduly disrupt’ or ‘seriously hinder’ ACICS’s normal business

150. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 16.

151. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 16–17.

152. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 17.

153. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 17.

154. See PHH Decision and Order, *supra* note 21, at 6; Brief of Petitioner, *supra* note 16, at 29.

155. PHH Decision and Order, *supra* note 21, at 6.

156. PHH Decision and Order, *supra* note 21, at 6. (quoting *FTC v. Markin*, 391 F. Supp. 865, 870–71 (W.D. Mich. 1974), *aff’d*, 532 F.2d 541 (6th Cir. 1976)).

157. PHH Decision and Order *supra* note 21, at 6.

158. Brief of Petitioner, *supra* note 16, at 29.

operations.”¹⁵⁹

The court in *ACICS* had the opportunity to comment on whether or not the CID in question was overly burdensome, but declined to do so.¹⁶⁰ While Judge Leon mentioned that the CFPB was requesting “a list of *all individuals involved in the accreditation* of twenty-one enumerated schools,”¹⁶¹ he did so to emphasize that this was something that the CFPB was not “empowered to do” and not to comment on the potential strain put on *ACICS*.¹⁶² Judge Leon may have sidestepped the “undue burden” issue because of potential doubts about *ACICS*’s argument that the CID’s chilling effect on the future participation was actually an undue burden,¹⁶³ or simply because he wanted to focus on the CFPB’s authority in this case rather than analyze whether this particular CID was “unduly burdensome.”¹⁶⁴ However, limiting the overall scope of a CID may lift the burden on institutions when they comply with the demand.¹⁶⁵ A broader CID will almost certainly be more demanding on a recipient.¹⁶⁶ For instance, PHH asserted that the CFPB’s “fishing expedition” would “require the production of voluminous amounts of irrelevant material, and will require PHH to conduct an unreasonable search of all PHH facilities.”¹⁶⁷ Under the court’s holding, recipients of a CID should have more success contesting the latitude of a CID’s purpose rather than speculating on the potential disruptions to its business.¹⁶⁸

159. *Id.*

160. *See generally*, *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79 (D.D.C. 2016).

161. *Id.* at 83–84.

162. *Id.*

163. *See* *Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand*, *supra* note 88, at 17.

164. Since the legal standard used by the court only considers the burden of the CID if the three initial requirements are met, the court may have considered it unnecessary to address the burden on *ACICS* since it had already found that the CFPB did not “have the statutory authority to issue the CID in question” *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 82.

165. *See* PHH Petition, *supra* note 1, at 8.

166. *See* PHH Petition, *supra* note 1, at 8.

167. PHH Petition, *supra* note 1, at 8.

168. *See Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 84 (ruling that the CFPB overstepped its authority by issuing the CID, but choosing not to conduct an analysis of the burden that the CID would impose on *ACICS*).

IV. WHO IS THE APPROPRIATE RECIPIENT OF A CID?

The ACICS decision also offered an opportunity to look at who the appropriate subject of a CID is.¹⁶⁹ As discussed earlier, the language under Dodd-Frank is broad, permitting the CFPB to issue the investigative instrument when the agency believes that an entity possesses information that relates to a violation of consumer laws.¹⁷⁰ Indeed, this language suggests that the investigative authority of the CFPB is far broader than its enforcement authority under the CFPA, which concerns “covered persons”¹⁷¹ as well as those who “provide substantial assistance” to a covered person.¹⁷²

“Substantial assistance” is an “enforcement tool” that the CFPB has been using with increasing regularity.¹⁷³ The provision has broad implications as “it applies to ‘any person;’ it applies ‘notwithstanding any provision of this title;’ and it allows imposition of liability equivalent to that imposed on the recipient of the assistance.”¹⁷⁴ While it is tempting to conclude that the CFPB will use “substantial assistance” only in scenarios where it seeks to go after companies that “do not themselves qualify as covered persons or service providers” (like ACICS), financial institutions should be aware of their potential liability under this provision.¹⁷⁵ First, the agency can use “substantial assistance . . . as one of multiple bases asserting jurisdiction in an enforcement action.”¹⁷⁶ For instance, in a consent order issued to Citibank N.A. the CFPB claimed that Citibank had committed a violation not only because it had “engaged in unfair acts and practices,”

169. *See id.* at 82–83.

170. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1052(c)(1), 12 U.S.C. § 5562(c)(1) (2015).

171. Dodd-Frank § 1002(6), 12 U.S.C. § 5481(6) (defining a covered person as “any person that engages in offering or providing a consumer financial product or service”).

172. Dodd-Frank § 1036, 12 U.S.C. § 5536 (stating that it is unlawful for “any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 1031, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided”).

173. *See* LEV & LILLEY, *supra* note 9, at 6.

174. LEV & LILLEY, *supra* note 9, at 2. For reasons that will become significant later, the “any person” coverage has been deemed to apply “generically.” *See* Lee, et al., *supra* note 38.

175. *See* LEV & LILLEY, *supra* note 9, at 6.

176. *See* LEV & LILLEY, *supra* note 9, at 6.

but because it had “provided substantial assistance to covered persons engaged in deceptive acts or practices by overstating the annual percentage rate (APR) for accounts in Sales Files . . . [that] it provided to debt buyers.”¹⁷⁷ Therefore, in certain situations, the CFPB can use “substantial assistance” as an additional jurisdictional hook even when an entity is already covered.¹⁷⁸

More significantly, however, the CFPB has attempted to use the “substantial assistance” provision to target entities that are not normally under its purview.¹⁷⁹ The *ACICS* case is a prime example as the accreditation of for-profit schools is “not a financial product or service.”¹⁸⁰ Instead, “[t]o get over this hurdle, the CFPB sought to assert that by accrediting for-profit schools, the accrediting body was providing substantial assistance to potential UDAAPs¹⁸¹ committed by those schools in connection with private student loans.”¹⁸² In court, the CFPB contended that it was well within its authority to issue the CID because it “is empowered to take action” under the substantial assistance provision.¹⁸³ As Director Cordray commented, “[i]f an accrediting agency is *facilitating* for-profit colleges’ misleading consumers, treating them unfairly and deceptively, then that’s something we should look at.”¹⁸⁴

In response to the CFPB’s allegations, *ACICS* argued that it “does not offer *any* assistance in the area of student finance to its accredited institutions, let alone *substantial* assistance.”¹⁸⁵ It denied any participation in “any . . . financial arrangement between its accredited institutions and students.”¹⁸⁶ *ACICS* also rejected the notion that the

177. Consent Order at 1, Citibank N.A., CFPB No. 2016-CFPB-003 (Feb. 23, 2016).

178. *See id.*

179. *See* LEV & LILLEY, *supra* note 9, at 6.

180. *See* LEV & LILLEY, *supra* note 9, at 6.

181. Unfair, deceptive, or abusive acts or practices. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1031(a), 12 U.S.C. § 5531(a)(2015).

182. LEV & LILLEY, *supra* note 9, at 6.

183. LEV & LILLEY, *supra* note 9, at 7.

184. LEV & LILLEY, *supra* note 9, at 7 (citing Michael Stafford, *CFPB Chief Defends Investigation Involving College Accreditation*, INSIDE HIGHER ED (Oct. 29, 2015), <https://www.insidehighered.com/quicktakes/2015/10/29/cfpb-chief-defends-investigation-involving-college-accreditation>).

185. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 14.

186. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 14.

CFPB had made a showing that “ACICS ‘in some sort associated [itself] with the venture, . . . that [it] sought by [its] action to make it succeed.’”¹⁸⁷ Furthermore, ACICS claimed that its status as a non-profit eliminated any potential “economic motivation to assist for-profit schools in alleged deceptive practices that in turn lead to students taking out private loans to attend for-profit colleges.”¹⁸⁸ In addition, because ACICS did not make or fund student loans, it argued that “it cannot be said that the alleged practice of deceiving students into taking out private loans is the ‘direct or foreseeable result of ACICS’s accreditation process.’”¹⁸⁹ In conclusion, ACICS argued that the CFPB alleged conduct “that could never be actionable under any consumer financial law, including the Bureau’s UDAAP authority.”¹⁹⁰

While the term “substantial assistance” is notably absent from Judge Leon’s ruling, the opinion does address the issue.¹⁹¹ The court acknowledged that the investigation of “the lending practices of for-profit schools” was a legitimate aim for the CFPB.¹⁹² Thus, if ACICS was “knowingly or recklessly provid[ing] substantial assistance to” these for-profit schools and their potentially illegal lending practices, it would in theory fall under the CFPB’s jurisdiction.¹⁹³ However, the CFPB’s argument failed for two reasons.¹⁹⁴ First, as discussed above, the scope of the CID was far too broad.¹⁹⁵ The demand in question concerned the general process of “accrediting for-profit colleges”¹⁹⁶ and did not contain an allegation that ACICS was aiding these schools in the

187. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 14 (citing *S.E.C. v. Grendys*, 840 F. Supp. 2d 36, 46 (D.D.C. 2012)).

188. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 14.

189. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 15.

190. Opposition to the CFPB’s Petition to Enforce Civil Investigative Demand, *supra* note 88, at 10–11.

191. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 82–84 (D.D.C. 2016).

192. *Id.* at 84 n.4. Indeed, the court specifically indicated that it was aware that the investigation of “for-profit schools for suspected violations of the consumer financial laws in connection with their lending and financial-advisory services” was ongoing. *Id.* at 84.

193. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 2010(a)(3), 12 U.S.C. § 5536(a)(3) (2015).

194. *See Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 84 n.4.

195. *Id.* at 82.

196. *Id.* at 81.

violation of consumer protection laws.¹⁹⁷ Even more broadly, the CID “sa[id] nothing about an investigation into the lending or financial-advisory practices of for-profit schools.”¹⁹⁸ The CFPB mentioned its investigation of for-profit schools in federal court,¹⁹⁹ but this justification was not included in its investigative purpose,²⁰⁰ or in its decision to deny ACICS’s petition.²⁰¹ Second, it appears that Judge Leon accepted ACICS’s argument that the facts did not support a plausible allegation of substantial assistance.²⁰² The court agreed with ACICS’s assertion that “the accreditation process simply has no connection to a school’s private student lending practices.”²⁰³ Further, Judge Leon pointed out that “ACICS is *not* involved in the financial aid decisions of the schools it accredits, which means it plays no part in deciding whether to make or fund a student loan.”²⁰⁴ Thus, the absence of any explicit reference to substantial assistance in the opinion is logical, because the CFPB itself did not invoke the term in its CID²⁰⁵ and the CFPB could not point to actions taken by ACICS that could qualify as substantial assistance.²⁰⁶

The court’s discussion of the “absence of a clear nexus” between the consumer financial laws under the care of the CFPB and the accreditation of for-profit schools begs the question:²⁰⁷ should the CFPB’s investigative authority with respect to facilitators be on par with its authority to investigate violators themselves?²⁰⁸ One interpretation of *ACICS’s* holding is that since the accreditation of schools is not within the purview of the CFPB, the agency was not

197. *See id.* at 82.

198. *Id.* at 83.

199. *See* Memorandum in Support of Petition to Enforce Civil Investigative Demand at 5, *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79 (D.D.C. 2016) (No. 16-5174).

200. *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 83.

201. *See* ACICS Decision and Order, *supra* note 93, at 3.

202. *See Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 84 (stating that “the investigation target[ed] the accreditation process generally”).

203. *Id.* at 83.

204. *Id.*

205. *Id.* at 82.

206. *Id.* (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1052(c)(2), 12 U.S.C. § 5562(c)(2) (2015)) (“These CIDs must ‘state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violations.’”).

207. *Id.* at 83.

208. *Lee, et al.*, *supra* note 38.

permitted to investigate the process under the substantial assistance provision on these facts.²⁰⁹ While the D.C. Circuit may shortly offer additional guidance, the district court's holding implicitly proposes a sliding scale of judicial deference that skillfully balances both the agency's interest in locating and finding violators and the CID recipient's interest in avoiding unreasonable "fishing expeditions."²¹⁰ Under this sliding scale, the judiciary's deference to the CFPB will be at its greatest when there is "a clear nexus" between the CFPB's mandate and the recipient;²¹¹ in other words, when the CFPB attempts to investigate potential violations of a "covered person" and the service it is offering to the public.²¹² When, however, the CFPB purports to investigate an entity not for its own product or practices, but because the CFPB is arguing that the entity is aiding another person in violating consumer laws, a court would require the CFPB to make more of a prima facie case that it actually "has reason to believe" the recipient has information "relevant to a violation."²¹³ Under this standard, it would be more difficult for the CFPB to initiate an investigation when the recipient of the CID has a tenuous relationship to consumer financial protection laws and has made a coherent, "fact-based argument" that the recipient is either not under the jurisdiction of the CFPB or has not violated one of the laws that the CFPB is mandated to enforce.²¹⁴

209. *See id.*

210. PHH Petition, *supra* note 1, at 5 (citing *FDIC v. Garner* 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, 1999 U.S. Dist. LEXIS 3312, at *2 (E.D. Cal. Feb. 9, 1999)).

211. *See Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 83 (suggesting that since there was not a "clear nexus" here, the CFPB was not entitled to issue a CID and investigate for itself whether ACICS's characterization of the accreditation process, which the court deemed accurate, was satisfactory or not).

212. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1002(6), 12 U.S.C. § 5481(6) (2015) (defining a covered person as "any person that engages in offering or providing a consumer financial product or service.").

213. *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d at 83 ("[T]he accreditation process simply has no connection to a school's private student lending practices.").

214. ACICS Decision and Order, *supra* note 93, at 2; *see also Lee et. al.*, *supra* note 38 (suggesting that "these issues also hinge[] on whether courts will recognize that a distinct policy exists—given the specific Dodd-Frank limitation to enforce consumer protection laws against 'covered persons'—to distinguish CIDs from the administrative subpoenas of other agencies (like the SEC and FTC), thereby warranting a higher standard for the CFPB than otherwise exists for federal agencies").

V. CONCLUSION

As mentioned earlier, the ACICS case was the first time that the judiciary had stood in the way of the CFPB's authority.²¹⁵ In a sense, a result such as this one should offer encouragement to financial institutions.²¹⁶ Moreover, the result may lead more entities to challenge CIDs issued by the CFPB.²¹⁷ The long term practical effects of the ruling, however, remain to be seen.²¹⁸ In response to the decision, the CFPB has elected to appeal to the D.C. Circuit,²¹⁹ with both parties reiterating their positions in oral argument in early February.²²⁰ Thus, more clarification on the scope of the CFPB's investigative authority should be on the way.²²¹ In the meantime, the CFPB has continued filing CID enforcement actions in federal court against entities disputing the agency's jurisdiction.²²² 2017 will thus be a momentous year not only with respect to the agency's investigative powers, but also in other areas as well.²²³

215. LAMPE ET AL., *supra* note 4, at 2.

216. Soyong Cho & Ted Kornobis, *A Bridge Too Far: CFPB's Authority Grab Rejected by Federal Judge*, K&L GATES: CONSUMER FIN. SERV. WATCH (Apr. 22, 2016), <https://www.consumerfinancialserviceswatch.com/2016/04/a-bridge-too-far-cfpbs-authority-grab-rejected-by-federal-judge/> (discussing Judge Leon's legal analysis).

217. LAMPE ET AL., *supra* note 4, at 2.

218. See Chris Bruce, *CFPB Files Appeal from April Ruling Saying Agency Lacked Power to Issue CID*, 106 Banking Rep (BNA) No. 25, at 926 (June 13, 2016) (reporting that CFPB plans to appeal the District Court's decision).

219. *Id.*

220. Barbara S. Mishkin, *D.C. Circuit Hears Oral Argument on CFPB Authority to Issue CID to College Accrediting Organization*, CFPB MONITOR, BALLARD SPAHR LLP (Feb. 8, 2017), <https://www.cfpbmonitor.com/2017/02/08/d-c-circuit-hears-oral-argument-on-cfpb-authority-to-issue-cid-to-college-accrediting-organization/>.

221. See LEV & LILLEY, *supra* note 9, at 7.

222. Ori Lev, *If at First You Don't Succeed, Try, Try Again: The CFPB Pushes its Jurisdiction Once More*, MAYER BROWN: CONSUMER FIN. SERV. REV. (June 9, 2016), <https://www.cfsreview.com/2016/06/cfpb-cid-enforcement-action/> (discussing CFPB's efforts to enforce its CIDs despite the setback in ACICS case); see also *Consumer Fin. Prot. Bureau v. J.G. Wentworth*, No. 2:16-cv-02773-CDJ (E.D. Pa. June 7, 2016) (ongoing litigation regarding another CFPB CID).

223. In addition to appealing the *PHH* case, the CFPB will also have to contend with a Donald Trump administration and "Republicans on Capitol Hill who want a different leadership model and an end to a Dodd-Frank funding arrangement designed to encourage independent action by the CFPB." Chris Bruce, *CFPB Faces Challenges in Courts, Congress in 2017*, [2016] Banking Daily (BNA) No. 245 (Dec. 21, 2016). Indeed, House Republicans are believed to have "[l]egislation in the works [that] would limit the bureau's enforcement authority, reduce its ability to make rules and repeal its consumer complaint system." Alan Rappeport, *Consumer Watchdog Faces Attack by House Republicans*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/consumer-financial->

Although the CFPB's process may not be more onerous than investigative processes at other federal agencies,²²⁴ complying with a CID issued by the CFPB is still "a tall order for any organization."²²⁵ Pursuant to its own precedent, the CFPB can use a CID to initiate a broad-ranging investigation²²⁶ and can do so without "a detailed narrative" delineating the violating conduct.²²⁷ The potential burden on financial institutions is exacerbated by the CFPB's increasingly frequent use of the substantial assistance tool, which not only expands the purview of the agency's authority,²²⁸ but also can serve as an additional basis of jurisdiction for entities already covered under the statute.²²⁹ Finally, the CFPB has rejected each recipient's attempt to set aside a CID,²³⁰ due at least in part to its broad interpretation of the judiciary's typical deference toward administrative subpoenas.²³¹ The *ACICS* decision, however, demonstrates that judicial review does have some "bite" when it comes to reviewing the CFPB's investigations,²³² and more importantly, offered two solutions to these issues.²³³ By honing in on the language of the CID's statement of purpose, the court was able to distinguish the agency's internal analysis from its own review,²³⁴ and offered the CFPB an opportunity to narrowly tailor its investigation

protection-bureau-republicans.html?_r=0. Curbing the agency's powers in such a manner would also presumably minimize the permitted scope of a CID, as the plans include "blocking it from being able to go after businesses engaged in deceptive practices and restricting its oversight of big publicly traded companies that are already regulated by agencies such as the Securities and Exchange Commission." *Id.*

224. Compare CFPB Rules Relating to Investigations, 12 C.F.R. § 1080.6; FTC Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.1-3.40; SEC Rules of Practice, 17 C.F.R. § 201.100-201.900, with Jonice Gray Tucker & Amanda Raines, *CFPB Investigations in Focus: Navigating CIDs*, LAW 360 (July 11, 2013), <https://www.law360.com/articles/455982/cfpb-investigations-in-focus-navigating-cids>.

225. Dylan W. Howard, *The CFPB's Uncivil Civil Investigative Demands*, LAW 360 (Nov. 25, 2014), <https://www.law360.com/articles/599019/the-cfpb-s-uncivil-civil-investigative-demands>.

226. See PHH Decision and Order, *supra* note 21, at 3.

227. ACICS Decision and Order, *supra* note 93, at 3.

228. LEV & LILLEY, *supra* note 9, at 1.

229. LEV & LILLEY, *supra* note 9, at 6.

230. LEV & LILLEY, *supra* note 9, at 1.

231. See PHH Decision and Order, *supra* note 21, at 4-5.

232. See *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 (D.D.C. 2016).

233. See *id.* at 82-83.

234. See *id.* at 83 (using a similar standard to the one used by Director Cordray when he rejected the ACICS petition).

rather than create a broad and self-fulfilling CID.²³⁵ Further, the court implicitly suggested that entities that are not themselves alleged to be conducting deceptive and abusive practices with respect to consumer financial laws should be afforded more deference when they assert fact-based arguments disputing the germaneness of the issued CID.²³⁶ These solutions correctly balance the CFPB's interest in narrowing the information gap between itself and its targets "who can best give [the information] and who are most interested in not doing so,"²³⁷ with the recipients' interest in avoiding costly "fishing expeditions."²³⁸

E. SYLVESTER KISLUK*

235. *See id.* at 84 (suggesting that the CFPB could be allowed to investigate the connection between ACICS and potential consumer financial law violations using a narrowing CID).

236. *See id.* at 82–84 (dismissing the CFPB's argument that "it is not obligated to accept at face value ACICS's generalized description of its interaction with the schools it accredits . . . but rather it has the right to investigate and determine for itself whether these assertions are true.").

237. Brief of Petitioner, *supra* note 16, at 15 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950)).

238. PHH Petition, *supra* note 1, at 5 (citing *FDIC v. Garner* 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, 1999 U.S. Dist. LEXIS 3312, at *2 (E.D. Cal. Feb. 9, 1999)) (petition to modify or set aside civil investigative demand).

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