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Enforcement

CFPB May Give Probe Targets More Details Due to Court Ruling

BNA Snapshot

- D.C. Cir. says CFPB subpoena invalid
- Narrow ruling doesn't address scope of agency authority

By Chris Bruce

A federal appeals court April 21 invalidated an investigative order issued by the Consumer Financial Protection Bureau but stopped short of questioning the agency's authority to issue it (*Cons. Fin. Protection Bureau v. Accrediting Council for Indep.* , D.C. Cir., 16-cv-05174, 4/21/17).

The ruling by the U.S. Court of Appeals for the District of Columbia Circuit, though narrow in one respect, may affect all CFPB investigations and prompt the agency to provide more information to companies under scrutiny, a former CFPB deputy enforcement director told Bloomberg BNA.

“The agency is notoriously tight-lipped when subjects of investigations ask what an investigation is about,” Ori Lev, a former CFPB deputy enforcement director and now a partner with Mayer Brown in Washington, told Bloomberg BNA. “This will potentially lead to a little more insight on that, along with the corollary benefit of potentially narrower requests if the notification of purpose has to be more narrowly drawn.”

The case was seen by many as an important test of the CFPB's power to launch certain investigations. The CFPB appealed a district court ruling that said the agency exceeded its powers by issuing a civil investigative demand (CID) to the Accrediting Council for Independent Colleges and Schools (ACICS), an accreditor of for-profit colleges.

A D.C. Circuit three-judge panel affirmed the district court decision in favor of ACICS, but did so without addressing the CFPB's authority. The panel decided the case on narrower grounds, holding the CID itself didn't include provide enough information to ACICS to pass muster under federal law.

“Because we can easily answer the issue on a narrower basis, and because the invalidity of the CID makes it unnecessary to reach the broad determination of the Bureau's authority to investigate the area of accreditation at all, we will not reach the broad question answered by the district court,” Judge David Sentelle said for the court.

“We have the court's decision and understand it, and we will make careful efforts to conform to the ruling in our further investigations, whether in this case or any other case,” CFPB Director Richard Cordray said in a statement to Bloomberg BNA. ACICS did not immediately respond to a request for comment.

Not Enough Information

According to Sentelle, the CID's statement of purpose – that it was issued to probe possible “unlawful acts and practices” in connection with accrediting for-profit colleges – never explained what “unlawful acts and practices” means.

“We conclude that, as written, the Notification of Purpose fails to state adequately the unlawful conduct under investigation or the applicable law,” Sentelle said.

Rewriting the Playbook

Lev said the decision has wide impact because the language in the ACICS CID is “absolutely standard” language that the CFPB uses in other CIDs.

“The D.C. Circuit says it's ruling on narrower grounds than the district court, and that's true from a legal perspective,” Lev said. “But from a practical perspective, this decision will have a much broader impact on the CFPB because it affects all of their investigations, not just those at the edge of their jurisdiction. This is re-writing the playbook for all CFPB investigations.”

Ruling in 2016

The appeal came from a 2016 decision by Judge Richard J. Leon of the U.S. District Court for the District of Columbia. The CFPB, which has investigated student loan practices at for-profit colleges, asked the ACICS for information on its dealings with particular schools and for testimony by an ACICS representative.

Leon ruled for ACICS on its challenge to the CID, saying the nature and scope of the CFPB's demand for information revealed a wider but unauthorized effort to target the accreditation process in general. “This the CFPB was never empowered to do,” Leon said.

ACICS is represented by Allyson B. Baker, Andrew Hernacki, Benjamin E. Horowitz, and Kimberly C. Cloyd of Venable in Washington and San Francisco, and Kenneth J. Ingram of Whiteford, Taylor & Preston in Washington.

The agency is represented by attorneys John R. Coleman and Lawrence DeMille-Wagman of the CFPB.

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