

UNITED STATES OF AMERICA  
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

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ACCREDITING COUNCIL FOR INDEPENDENT COLLEGES AND  
SCHOOLS' PETITION TO SET ASIDE OR MODIFY THE CIVIL  
INVESTIGATIVE DEMAND

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September 14, 2015

Respectfully submitted by:

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## **Introduction & Summary of Petition**

Pursuant to 12 U.S.C. § 5662(f) and 12 C.F.R § 1080.6(d), the Accrediting Council for Independent Colleges and Schools (“ACICS” or “Council”) hereby moves to set aside or modify the Civil Investigative Demand (“CID”) issued to ACICS by the Consumer Financial Protection Bureau (“CFPB”). The CID was mailed on August 25, 2015 but was not received by the President and Chief Executive Officer of ACICS, Albert C. Gray, until August 28, 2015 at 4:30 p.m. Mr. Gray was leaving for a one week vacation on that day. ACICS respectfully submits that the CID, as set forth in more detail below, should be set aside or modified for several reasons. Initially, as set forth in 20 U.S.C.A. § 1099(b), the Department of Education (“DOE”) is the review body exclusively responsible for the oversight of accrediting agencies such as ACICS. Even if this were not the case, ACICS is not subject to enforcement action by the CFPB because it is not a “covered person,” “affiliate,” or “service provider.” As such, ACICS is not within the jurisdiction of the CFPB. Additionally, the CID fails to identify the nature of the conduct under investigation and is overbroad and unduly burdensome. For these reasons, ACICS respectfully requests that CFPB withdraw the CID.

## **ACICS BACKGROUND**

ACICS, which dates back to 1912, is a not for profit non-stock corporation organized under the laws of Virginia exclusively for educational purposes, with its current principal place of business in the District of Columbia (See Gray Declaration at ¶ 3, attached hereto as Exhibit A). ACICS has been granted 26 U.S.C. §501(c)(3) tax exempt status by the Internal Revenue Service as a nonprofit organization operated exclusively for educational purposes. (Gray Declaration at ¶ 3). ACICS has been recognized since 1956 by the U.S. Secretary of Education as a reliable authority concerning the quality of education and training offered by the educational

institutions that it accredits. (Gray Declaration at ¶ 7). The scope of ACICS's recognition includes private postsecondary institutions offering certificates or diplomas and postsecondary institutions offering associate's, bachelor's, or master's degrees in programs designed to educate students for professional, technical, or occupational careers, including those that offer those programs via distance education. (Gray Declaration at ¶ 3). ACICS accredits 892 postsecondary institutions enrolling 658,274 students. (Gray Declaration at ¶ 3).

ACICS has been and continues to be a voluntary group of educational organizations affiliated for the purpose of establishing and operating an educational accrediting agency in the field of career training. (Gray Declaration at ¶ 4). To aid in the process of accreditation and consistent with its nonstock corporate responsibilities and the criteria of the Department of Education, ACICS has promulgated its Accreditation Criteria: Policies, Procedures, and Standards. (Gray Declaration at ¶ 4). In addition, ACICS is governed by its Bylaws, which are also incorporated into the Accreditation Criteria. (Gray Declaration at ¶ 4). These and ACICS's other policies and procedures are regularly reviewed by the Department of Education for consistency with the recognition criteria of the United States Secretary of Education. (Gray Declaration at ¶ 4).

The accreditation functions of ACICS are carried out by the Council, which consists of 15 Commissioners. The Council includes Commissioners representing both non-degree and degree-granting institutions, as well as at least three Commissioners drawn from the public. The day-to-day affairs of ACICS are overseen by the President, who serves as its Chief Executive Officer. (Gray Declaration at ¶ 5).

The Council enacts, interprets, and applies ACICS's policies and procedures to each institution that has been accredited by it or that seeks accreditation. The Council has the sole and final authority to determine whether an institution is in compliance with ACICS's standards and whether accreditation should be granted, denied or withdrawn. (Gray Declaration at ¶ 6). Through these standards, ACICS monitors the overall quality of education being provided at a particular institution. Through its peer review processes consistent with the Accreditation Criteria, ACICS focuses on the quality of education at the institutions it accredits. ACICS does not make loans to its accredited institutions or their students and plays no role in procuring loans for such students. In addition, ACICS provides no financial aid of any kind to students at ACICS accredited institutions. (Gray Declaration at ¶ 6).

ACICS is a nationally recognized accrediting agency by the United States Department of Education. (Gray Declaration at ¶ 7). To achieve that recognition, ACICS periodically goes through a process that is similar to that of institutional accreditation by accrediting agencies. The Secretary of the Department of Education's Recognition Procedures for National Accrediting Bodies are set forth in 34 C.F.R. § 602 et seq. If the Secretary's recognition is granted, the accrediting agency is included in a list published by the Secretary in the Federal Register. See 34 C.F.R. §602.1. Recognition by the Secretary means there has been a finding that the agency is a reliable authority regarding the quality of education or training offered at a particular institution. See id. The Secretary's recognition is granted and the agency is included on the list only when the accrediting agency meets the criteria established by the Secretary.

## ARGUMENT

### 1. STANDARD OF REVIEW

12 C.F.R. § 1080.6(d) provides that if the subject of a CID objects then it may file with the CFPB a petition for an order by the CFPB modifying or setting aside the demand within 20 days of service. The Director of the CFPB has the responsibility to rule on petitions to modify or set aside CIDs. The recognized standard in determining whether a CID should be quashed or limited in scope or breadth was adopted by the Supreme Court in *U.S. Morton Salt Co.*, 338 U.S. 632 (1950). Although the Court enforced the decree in *Morton Salt Co.*, it recognized that “a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *Id.* at 652. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if it is determined that they demand information that is (a) not “within the authority of the agency,” (b) “too indefinite,” or (c) not “reasonably relevant to the inquiry.” *Id.*

The agency subpoena enforcement standard outlined in *Morton Salt Co.* has been consistently applied by the courts. The U.S. Court of Appeals for the D.C. Circuit recognized in *SEC v. Arthur Young & Co.*, “the gist of the protection is in the requirement...that the disclosure sought shall not be unreasonable. Correspondingly, the need for moderation in the subpoena’s call is a matter of reasonableness.” 584 F.2d 1018, 1030 (D.C. Cir. 1978). The court explained further that “the requirement of reasonableness...comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.” 584 F.2d at 1030 (quoting *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946)). The subpoena

request must “not be so overbroad as to reach into areas that are irrelevant or immaterial.” *Id.* at 1028. The court added: “the test is relevance to the specific purpose.” *Id.* at 1031.

## **2. ACICS IS NOT WITHIN THE JURISDICTION OF THE CFPB**

### **A. ACICS is exclusively within the jurisdiction of the DOE**

Accreditation is a process of peer review in which an institution applies for accreditation to an accrediting body which may accredit the institution for a period of time based on evaluation of the institution’s compliance with a series of criteria. *See Peoria School of Business, Inc. v. Accrediting Council for Continuing Educ. & Training*, 805 F. Supp. 579 (N.D. Ill. 1992); *Parsons College v. North Cent. Ass’n of Colleges and Secondary Schools*, 271 F. Supp. 65, 73 (N.D. Ill. 1967). Recognition of an accrediting agency by the Secretary of the U.S. Department of Education (the “Secretary”) is important to the agency’s ability to carry out its functions and to the ability of the institutions accredited by that agency to be able to participate in federal programs, such as federal student aid programs. *See* 20 U.S.C. 1099b. Accreditation by an agency recognized by the Secretary is only one factor in the Department of Education’s determination of institutional eligibility to participate in certain federal student aid programs.

Recognition by the Secretary means there has been a finding that the agency is a reliable authority regarding the quality of education or training offered by a particular institution. *See* 34 C.F.R. § 602.1. The Secretary’s Recognition Procedures for National Accrediting Bodies are set forth in 34 C.F.R. § 602 *et seq.*, which regulations implement the requirements found in the Higher Education Act of 1965 (“HEA”), 20 U.S.C. § 1099b. Pursuant to the HEA, to obtain recognition an accrediting agency must demonstrate, among other things, that: (i) it has the ability and experience to operate as an accrediting agency; (ii) it consistently applies and

enforces standards that ensure that courses or programs of instruction are of sufficient quality; (iii) its standards assess all aspects of the accredited institution, from its curriculum to its fiscal capacity; (iv) it conducts regular on-site inspections of the institutions accredited by it; and (v) it provides procedures throughout the accrediting process that comply with due process requirements. *See* 20 U.S.C. § 1099b. The statute and the regulations promulgated thereunder thus set forth specific and detailed requirements that must be consistently met by an accrediting agency in order to maintain its recognition.

The HEA provides that it is the Secretary's role to oversee accrediting agencies and to ensure their compliance with the HEA and its implementing regulations. *See* 20 U.S.C. § 1099b(n). Specifically, the HEA requires that the Secretary "conduct a comprehensive review and evaluation of the performance of all accrediting agencies or associations which seek recognition by the Secretary in order to determine whether such accrediting agencies or associations meet the criteria established by this section." *Id.* If the Secretary finds that an accrediting institution is not in compliance with the statutory and regulatory requirements, he may take disciplinary action against the agency, including limiting, terminating, or suspending his recognition of the agency. *See* 20 U.S.C. § 1099b(l). The Secretary's recognition of an accrediting agency may not be for a period of more than 5 years, thus ensuring that the agency will be subject to continuous and on-going oversight and review by the Secretary in order to obtain re-recognition. *See* 20 U.S.C. § 1099b(d).

The statutory and regulatory scheme makes it clear, therefore, that oversight and review of accrediting agencies is to be performed exclusively by the Secretary of the U.S. Department of Education. The courts have confirmed this legislative intent by repeatedly finding that the HEA does not create a private right of action against an accrediting agency. *See, e.g., Thomas W.*

*Cooley Law School v. The American Bar Association*, 459 F.3d 705, 710 - 711 (6<sup>th</sup> Cir. 2006); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 - 1485 (9th Cir. 1995). As the *Cooley* Court stated, “[i]mplying a private right also would be contrary to the legislative scheme, as the statute explicitly provides for enforcement through an administrative action brought by the Secretary.” *Cooley*, 459 F.3d at 711. Similarly, the *Parks School* Court concluded that “[t]he implication of a private cause of action would seriously undercut, rather than complement, the Secretary’s enforcement powers.” *Parks School*, 51 F.3d at 1485.

Moreover, the jurisdictional provision contained in the HEA makes it clear that the role of the federal courts is to review only decisions “involving the denial, withdrawal, or termination of accreditation.” See 20 U.S.C. § 1099b(f). That limitation is consistent with the holdings by the courts that there can be no private right of action to enforce the recognition requirements of the HEA. It is also consistent with a recent Fourth Circuit holding which confirmed that accreditation agencies’ “expertise and knowledge merits a measure of deference from the generalist federal courts.” See *Professional Massage Training Center, Inc. v. Accrediting Commission of Career Schools and Colleges*, 781 F.3d 161 at 171 (4th Cir. 2015). The Court in *Professional Massage* recognized the unique nature of the accreditation process and noted that “although judicial oversight of the accreditation process surely has its place, it is not realistic to think courts possess either the expertise or the resources to perform the accreditation function *ab initio*.” *Professional Massage*, 781 F.3d 161 at 172. The Court further stated “[W]hen adjudicating common law due process claims against accreditation agencies, courts should focus primarily on whether the accrediting body’s internal rules provide[d] a fair and impartial procedure and whether it [followed] its rules in reaching its decision.” *Id.* Hence, the purpose of the jurisdictional provision is to give federal courts exclusive jurisdiction over accreditation



disputes, which are reviewed pursuant to common law due process principles. *See Cooley*, 459 F.3d at 712.

It is clear from the foregoing statutory scheme that the Department of Education is responsible for accreditation oversight, yet the CID clearly ventures into that area. Indeed, the very wording of the CID makes clear that its purpose is to investigate acts, ‘in connection with accrediting for-profit colleges.’” From that plain language there can be no dispute that CFPB is delving into accreditation oversight, not consumer financing, and is overstepping its bounds into an area that is exclusively under the control of the Department of Education.

#### **B. The Authority of the CFPB**

In accordance with 12 U.S.C §§ 5531, 5536, the CFPB is restricted to taking enforcement action against “covered persons,” “service providers,” and “any person who knowingly or recklessly provides substantial assistance to a covered person or service provider.” A covered person is defined as (a) any person that engages in offering or providing a consumer financial product or service; and (b) any affiliate of a person described in subparagraph (a) if such affiliate acts as a service provider to such person. 12 U.S.C § 5481(6). ACICS cannot be considered a covered person under subsection (a) because it is not in the business of providing a consumer financial product or service. 12 U.S.C § 5481(12) provides a number of activities that are defined as a “financial product or service,” including: extending service or credit loans, lease-to-own financing, real estate settlement services, taking deposits or acting as custodian of funds, issuing store valued credit, creating consumer reports or credit histories and collecting consumer debt. As discussed above, ACICS does not provide loans or any other financial service to the institutions that it accredits. The institutions are solely responsible for procuring financial

assistance from the Department of Education for its students. ACICS does not play a financial role in this loan procurement process.

ACICS also cannot be considered a covered person under subsection (b) of 12 U.S.C § 5481(6) because ACICS does not fall within the definition of an affiliate of the institutions it accredits. An affiliate is defined by 12 U.S.C § 5481(1) as any person that controls, is controlled by, or is under common control with another person. ACICS does not in any way “control” the institutions that it accredits. ACICS does provide a set of accreditation standards by which accredited institutions must abide by in order to maintain their accreditation status. Notably, if ACICS takes an adverse action against an institution that it accredits, such as withdrawing accreditation for violation of the accreditation standards, the institution has a right to file an objection and challenge ACICS’s action. Accordingly, ACICS can in no way be considered an affiliate since it is an accreditor requiring that standards be met with the potential of the loss of accreditation if they are not met. Furthermore, with respect to “control,” there is no corporate legal connection between ACICS and the institutions that it accredits. The accredited institutions have the freedom to select from a number of accrediting agencies across the country and can leave ACICS at their discretion.

Finally, ACICS does not qualify as a “service provider” under 12 U.S.C § 5481(26). A service provider is defined as any person that provides a material service to a covered person **in connection with the offering or provision by such covered person of a consumer financial product or service.** [Emphasis added]. The Statute further provides specific examples as to what constitutes such material service: “participating in designing, operating or maintaining the consumer financial product or service” and “processes transactions relating to the consumer financial service.” Accordingly, the definition of service provider is directly tied to the provision

of **financial services** to the covered person and not services generally. This makes plain sense considering the legislative history establishing the CFPB and its need for protecting consumers from financial fraud.

As stated, ACICS does not assist or support its accredited institutions in procuring and maintaining loan grants from the Department of Education. Simply put, ACICS does not provide any service to its accredited institutions in connection with their financial aid and loan programs. ACICS only deals with the educational quality of the institutions and not the lending process. Therefore, ACICS cannot be categorized as a service provider under 12 U.S.C § 5481(26).

### **3. THE CID FAILS TO IDENTIFY THE NATURE OF THE CONDUCT UNDER INVESTIGATION AND IS OVERBROAD AND INDEFINITE**

12 U.S.C § 5562(c) requires a CID to “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” This clear statutory requirement is vital to the respondent’s ability to understand and respond to the CID, as well as to formulate objections to the same.

Despite this clear statutory directive, the CID in the instant matter fails to state the nature of the conduct at issue. The CID only states that the purpose of the investigation is 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 sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C §§ 5531, 5536, or any other Federal consumer financial protection law.” This statement is incredibly broad and “too indefinite.” Moreover, the scope of the inquiry is far broader than just ACICS – the statement “any entity or person engaged or engaging in unlawful acts and practices in connection with accrediting for-

profit colleges” extends to every accrediting agency, for-profit school and student(s) therein. With respect to ACICS, as stated, the Council accredits 892 institutions enrolling 658,274 students.

The broad nature of the inquiry also creates an undue burden for ACICS as it cannot advise its staff or other participants in the accreditation process (which may be subject to deposition pursuant to the CID) what the topic of the inquiry is with any certainty. At the very least, the CFPB must narrow the scope of its inquiry to identify the particular concern associated with the institutions in question.

Moreover, the CID in and of itself demonstrates a misunderstanding of the relationship between accreditation agencies and the Department of Education. As stated and explained, the review of accreditation actions by the government is specifically vested in the Department of Education and the courts which recognize a wide level of discretion making by accrediting bodies. CFPB’s unprecedented effort to intrude in the accreditation process threatens to upend the process laid out and followed by the Congress and the Department of Education since the 1950’s. Such an exercise can only create an undue burden and expense to accrediting agencies which are not wealthy, are non-profits and are already burdened with the many other issues involved in accreditation. The CFPB seems entirely unaware of the cost and burden it will be creating since it has been insisting on a costly formal process of review rather than an informal direct process. It has to date refused to give any indication of what prompted its effort to interfere with the accreditation or recognition process of the Department of Education. ACICS is more than willing to meet with the Department of Education to review any legitimate concerns.

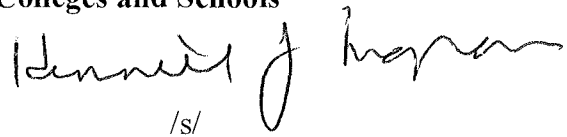
Accordingly, for the reasons set forth herein, we respectfully submit that the Director of the Consumer Financial Protection Bureau should set aside the CID issued to ACICS.

### **STATEMENT OF CONFERENCE**

Counsel for ACICS, Ken Ingram, timely conferred by telephone with counsel for the CFPB, Benjamin Konop, in a good faith effort to resolve the matter. Specifically, on September 4, 2015, Mr. Ingram called Mr. Konop to discuss the matter, but the two were unable to speak until September 8, 2015. Thereafter, Mr. Ingram and Mr. Konop had a conversation on September 8 and two conversations on September 11, 2015.

Respectfully submitted,

**Accrediting Council For Independent  
Colleges and Schools**



/s/

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Date: September 14, 2015

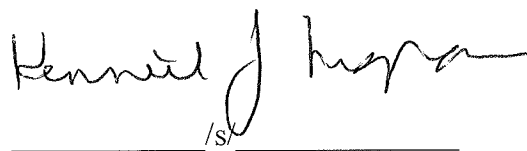
**Certificate of Service**

I hereby certify that on this 14<sup>th</sup> day of September, 2015 a copy of the foregoing Petition to Modify or Set Aside Civil Investigative Demand was sent to the Executive Secretary of the Consumer Financial Protection Bureau, the Assistant Director of the Office of Enforcement and to Bureau Counsel Benjamin Konop, Esq. by electronic mail to the addresses listed below:

ExecSec@cfpb.gov

Enforcement@cfpb.gov

Benjamin.Konop@cfpb.gov

A handwritten signature in black ink, appearing to read "Kenneth J. Ingram", is written over a horizontal line. Below the line, the text "/s/" is printed.

Kenneth J. Ingram, Esq.

**Exhibit A**

**BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU**  
**ACCREDITING COUNCIL FOR INDEPENDENT COLLEGES AND SCHOOLS'**  
**PETITION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND**

**DECLARATION OF ALBERT C. GRAY**

Pursuant to 28 U.S.C. § 1746, I, Albert C. Gray, declare as follows:

1. I am an adult citizen of the United States and am competent to testify as to the matters set forth in this Declaration. The information contained in this Declaration is from my own personal knowledge.

2. I am the President and Chief Executive Officer of the Accrediting Council for Independent Colleges and Schools ("ACICS"), and I have held that position at all times relevant to this action.

3. ACICS, which dates back to 1912, is a not for profit non-stock corporation organized under the laws of Virginia exclusively for educational purposes, with its current principal place of business in the District of Columbia. ACICS has been granted 26 U.S.C. §501(c)(3) tax exempt status by the Internal Revenue Service as a nonprofit organization operated exclusively for educational purposes. ACICS has been recognized since 1956 by the U.S. Secretary of Education as a reliable authority concerning the quality of education and training offered by the educational institutions that it accredits. The scope of ACICS's recognition includes private postsecondary institutions offering certificates or diplomas and postsecondary institutions offering associate's, bachelor's, or master's degrees in programs designed to educate students for professional, technical, or occupational careers, including those that offer those programs via distance education. ACICS accredits 892 postsecondary institutions

enrolling 658,274 students.

4. ACICS has been and continues to be a voluntary group of educational organizations affiliated for the purpose of establishing and operating an educational accrediting agency in the field of postsecondary and higher education. To aid in the process of accreditation and consistent with its nonstock corporate responsibilities and the criteria of the Department of Education, ACICS has promulgated its *Accreditation Criteria: Policies, Procedures, and Standards*. The *Accreditation Criteria* may be reviewed by anyone on the ACICS website - [www.acics.org](http://www.acics.org). In addition, ACICS is governed by its Bylaws, which are also incorporated into the *Accreditation Criteria*. These and ACICS's other policies and procedures are regularly reviewed by the Department of Education for consistency with the recognition criteria of the United States Secretary of Education.

5. The accreditation functions of ACICS are carried out by the Council, which consists of 15 Commissioners. The Council includes Commissioners representing both non-degree and degree-granting institutions, as well as at least three Commissioners drawn from the public. The day-to-day affairs of ACICS are overseen by the President, who serves as its Chief Executive Officer.

6. The Council enacts, interprets, and applies ACICS's policies and procedures to each institution that has been accredited by it or that seeks accreditation. The Council has the sole and final authority to determine whether an institution is in compliance with ACICS's standards and whether accreditation should be granted, denied or withdrawn. Through these standards, ACICS monitors the overall quality of education being provided at a particular institution. Through its peer review processes consistent with the *Accreditation Criteria*, ACICS focuses on the quality of education at the institutions it accredits. ACICS does not make loans to

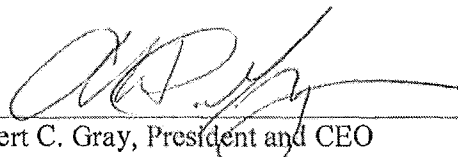


its accredited institutions or their students and plays no role in procuring loans for such students. In addition, ACICS provides no financial aid of any kind to students at ACICS accredited institutions.

7. ACICS is, and has been since 1956, a recognized accrediting agency by the United States Department of Education.

Under penalty of perjury, I declare pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: September 14, 2015

  
Albert C. Gray, President and CEO  
Accrediting Council for  
Independent Colleges and Schools

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