

Longstanding BCFP Tactic in Jeopardy After Two Circuits Strike Down CIDs

Article By:

Theodore R. Flo

The BCFP has historically taken the position that it can use investigations to conduct compliance “sweeps” of entire industries. Indeed, a version of the Bureau of Consumer Finance Protection's (BCFP) Enforcement Policies and Procedures Manual made available to the public through a FOIA request in 2016 stated that: “It is not necessary to have evidence that a law has in fact been violated before opening a formal investigation. That means, for example, that the Bureau could conduct a ‘compliance’ sweep to investigate whether industry participants are complying with a law or regulation.”

The BCFP has historically used Civil Investigative Demands (CIDs) and investigations to supervise industries over which it otherwise lacked supervisory authority—imposing huge costs on industry participants without justification. On September 6, 2018, the Fifth Circuit took a dim view of that tactic. In its [opinion](#) in the *The Source for Public Data, L.P.* case, the Fifth Circuit struck down a CID apparently issued as part of such an industry sweep. “Simply put,” the court held, “the CFPB does not have the ‘unfettered authority to cast about for potential wrongdoing.’”

Dodd-Frank requires the BCFP to include a “Notification of Purpose” in every CID stating “the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” The BCFP has historically read this requirement very loosely. Paraphrasing, most Notifications of Purpose said no more than: “The purpose of this investigation is to determine whether anybody did anything wrong.” They generally gave CID recipients *no* information whatsoever as to the conduct under investigation. Sometimes it was possible to guess based on the document requests and interrogatories included in the CIDs, but the Notifications of Purpose were not generally specific enough to allow recipients to meaningfully negotiate the scope of the CID or to know whether they were targets of an investigation or only third-party witnesses. The BCFP has taken and endorsed this approach even under Mulvaney, who [recently denied a request](#) to modify or set aside a CID containing a broad Notification of Purpose.

The Fifth Circuit acknowledged this as a real problem. It found that such broad Notifications of Purpose did not allow courts to meaningfully evaluate whether the information requested by the BCFP was “reasonably relevant” to the matter under investigation—the standard courts apply to government requests for information. As a result, the Fifth Circuit found that it could not enforce the CID and, reversing the lower court, struck the CID down entirely. In doing so, the Fifth Circuit joined

with the D.C. Circuit which, in 2017, rejected a similarly broad Notification of Purpose in the [ACICS](#) case. In striking the CID, the Fifth Circuit held that “[t]here are consequences to ‘the absurdity of giving a notification that notifies of no purpose whatsoever.’”

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