IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. J.G. WENTWORTH, LLC, Respondent.	Civil Action No. 2:16-cv-2773-CDJ

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

A civil investigative demand ("CID") is a legitimate tool of law enforcement. But the investigatory authority of a federal agency is not boundless, and courts play an important role in ensuring that agencies do not act unlawfully—in particular by assuring "'that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency.'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586-87 (D.C. Cir. 2001) (citation omitted). Indeed, another district court recently applied that principle in refusing to enforce a CID issued by the Consumer Financial Protection Bureau ("CFPB") that exceeded its statutory authority. *See CFPB v. Accrediting Council for Indep. Colleges and Schs.*, --- F.Supp. 3d. ---, 2016 WL 1625084 (D.D.C. Apr. 21, 2016) ("*ACICS*") ("[W]here is it 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.").

Respondent J.G. Wentworth, LLC ("JGW") purchases structured settlements and annuities from consumers. It does so by paying a one-time lump-sum to a consumer in exchange for the consumer's assignment of his or her right to a payment stream. *See* JGW Br. Ex. 1 at 2

(providing sample contract terms). JGW advertises its willingness to purchase these payment streams through various media, including through television advertisements. Consumers who enter into these transactions benefit from the immediate access they gain to cash for which they otherwise would have to wait under the terms of their structured settlements or annuities.

In denying JGW's petition to set aside the CID, CFPB Director Richard Cordray did not assert that the CFPB has authority to regulate such purchases. *See* Dec. and Order, CFPB-2015-MISC-001 (Feb. 11, 2016) ("Cordray Dec."). Rather, Director Cordray suggested that the CFPB had authority to issue the CID because JGW may be providing "financial advisory services . . . to consumers on individual financial matters." *Id.* at 3 (citing 12 U.S.C. § 5481(15)(A)(viii)).

But the CID's statement of purpose makes clear that "financial advisory services" are not the focus of the agency's investigation. Moreover, the CFPB cannot exercise jurisdiction over JGW on this basis because there are no reasonable grounds to conclude that JGW is engaged in the business of providing financial advice. The statute requires the provision of a separate financial advisory product that is itself subject to the Bureau's jurisdiction, not mere sales talk relating to a product outside the CFPB's jurisdiction. *See* 12 U.S.C. § 5481(15)(A)(viii). Thus, just as college accreditation was outside the authority of the CFPB in *ACICS*, so too here, JGW's business is outside the CFPB's authority.

A contrary conclusion would render meaningless the carefully crafted limitations that Congress imposed on the CFPB and allow the agency to issue burdensome CIDs to consumer-facing businesses that are not subject to its authority. That also would disrupt the existing regulatory system that Congress actually intended to govern these products, creating harmful regulatory uncertainty in the marketplace.

For all of these reasons, the CFPB's petition to enforce its CID should be denied.

ARGUMENT

THE COURT SHOULD REFUSE TO ENFORCE THE CID.

A. The Court Should Independently Assess Whether The CID Exceeds The CFPB's Authority.

Federal courts play an essential role in ensuring that regulatory investigations do not exceed an agency's legal authority. Regulatory investigations must rest on authority conferred on the agency by statute. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Even agencies with broad authority must be held to the limits imposed by Congress, and it is the courts' responsibility to police those limits.

For that reason, a court may not enforce a CID unless "the investigation will be conducted pursuant to a legitimate purpose." *Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (citing *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)). The "court must 'assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency.'" *Ken Roberts Co.*, 276 F.3d at 586-87 (citation omitted); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

Judicial oversight is particularly important in this context because the CFPB is a relatively new agency that has every incentive to lay claim to as large a regulatory role as possible. *See ACICS*, 2016 WL 1625084 at *3 ("Although 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.").

This Court therefore cannot enforce the CID based on the CFPB's *claim* that the Bureau acted within its authority—as the Third Circuit has observed, the reviewing court is not a "mere rubber stamp." *Wentz*, 55 F.3d at 908 (quoting *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir.

1980)). Rather, this Court should independently determine whether the CFPB is pursuing a "lawful purpose"—*i.e.*, whether the investigation "is within the statutory jurisdiction" of the CFPB.

The Court can readily answer that question by examining the challenged CID and the administrative record. *See ACICS*, 2016 WL 1625084, at *2 ("In the final analysis this case boils down to the answer to one question: Did the CFPB have the statutory authority to issue the CID in question? Unfortunately for the CFPB, the answer is no.").

B. The CID Here Cannot Be Justified By The CFPB's Authority Over Either Extensions Of Consumer Credit Or Consumer Financial Advisory Services.

In *ACICS*, the CFPB sought an order requiring the Accrediting Council for Independent Colleges and Schools to comply with a CID. The CFPB argued that because it had authority to investigate colleges' lending and financial-advisory services, it also had authority to investigate the accreditation of those colleges. *ACICS*, 2016 WL 1625084, at *3. The court rejected this "post-hoc justification" as a "bridge too far." *Id.* The court explained that "the [CID's] statement of purpose and the CFPB's actual requests belie any notion that its inquiry is limited in this way." *Id.* Rather, the "investigation target[ed] the accreditation process generally. This the CFPB was never empowered to do." *Id.*

The CFPB similarly lacks authority here. The CID states that the purpose of the CFPB's investigation is to determine "whether persons involved in advancing funds in exchange for the rights to future payments from structured settlements or annuities" may have violated the Dodd-Frank Act's prohibition on unfair, deceptive and abusive acts and practices or the Truth in Lending Act (TILA).

As an initial matter, for the reasons stated in JGW's brief, TILA is not a basis for the CFPB's jurisdiction because that statute applies only to extensions of credit, and JGW does not

extend credit. *See* JGW Br. 13-16. Indeed, Director Cordray did not attempt to justify the CID on this basis.

Director Cordray instead offered the post-hoc justification that JGW might be "providing consumers with financial advisory services to assist in determining whether a structured settlement transaction is in their best interest." Cordray Dec. 3.[1]

But there are two flaws in this new justification. First, the CID seeks information about the purchase of structured settlements or annuities generally. *See, e.g.*, Pet. to Enf. Ex. B at 4 ("CID") (Interrogatory 2: "Identify all costs or fees associated with each Product."). There is no inquiry about financial advisory services provided by JGW. At most, the CID includes one question (out of over 75, counting subparts) that plausibly relates to the delivery of financial advisory services. *See* CID at 7 (Request for Written Reports qq.: "The identity of any person who provided independent financial advice to the consumer in connection with the transaction."). That single inquiry does not justify the enormous burden the CFPB would impose on a company like JGW.

Second, the CFPB's claim that incidental advice "to assist [consumers] in determining whether a [proposed transaction] is in their best interest," Cordray Dec. 3, constitutes "financial advisory services" subject to the CFPB's authority misreads the statute in a way that would substantially expand the CFPB's jurisdiction. The Dodd-Frank Act itself defines "financial advisory services" as those "provid[ed] . . . to consumers . . . on individual financial matters or

[1] The CFPB's authority over unfair, deceptive, and abusive acts and practices is limited to the offering or provision of consumer financial products or services. *See* 12 U.S.C. §§ 5531, 5536 (limiting prohibition to covered persons and service providers); 5481(6) (defining "covered person" as "any person that engages in offering or providing a consumer financial product or service"); 5481(5)&(15) (defining enumerated "consumer financial product[s] or service[s]"). "[F]inancial advisory services" are one of the enumerated "consumer financial product[s] or service[s]." *See* 12 U.S.C. § 5481(15)(A)(viii).

relating to proprietary financial products or services," and gives as examples the provision of credit counseling or debt settlement services. 12 U.S.C. § 5481(15)(a)(viii).[2] These statutory examples reinforce the conclusion that to qualify as a financial advisory "service" the advice at issue must itself be part of what is transacted for. *See id.*; Black's Law Dictionary (10th ed. 2014) (defining a "service" as "the performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee" and describing it as an "intangible commodity"). Similarly, the CFPB's authority to enforce the Dodd-Frank Act's prohibition on unfair, deceptive, and abusive acts and practices applies only to those acts and practices committed "in connection with a *transaction for* a consumer financial product or service." *See* 12 U.S.C. § 5531(a) (emphasis added).[3] Thus, it is only where the consumer has transacted for the advice—*e.g.*, where a business offers financial advice for a fee—that such advice falls within the CFPB's authority over unfair, deceptive, and abusive acts and practices.

These limitations make sense. The Bureau's authority over "financial advisory services" extends to: (a) non-individualized advice to consumers regarding proprietary financial products and services; and (b) individualized advice to consumers on a wider range of individual financial matters. 12 U.S.C. § 5481(15)(a)(viii). In both cases, the advice itself must be an element of the transaction entered into by the consumer. Otherwise all marketing statements in connection with

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[2] JGW's product is not a "financial product or service," and therefore cannot be a "proprietary financial product or service." *See* 12 U.S.C. § 5481(15). *See also* Cordray Dec. 3 (omitting reference to proprietary financial products or services).

[3] This authority, for example, allows the CFPB to bring an enforcement action for deceptive conduct "in connection with a transaction" for a mortgage, or other financial product or service within the CFPB's authority. *See* 12 U.S.C. § 5531(a). However, even if such misrepresentations had an advisory character—*e.g.*, by recommending a mortgage based on certain characteristics that it did not actually possess—that would not transform the marketing statements into a "financial advisory service." Rather, they would be actionable because of the CFPB's authority over companies that provide extensions of credit. *See* 12 U.S.C. § 5481(15)(A)(i).

every consumer transaction—from refrigerators to home sales to cars—would be regulated by the CFPB.

That the CFPB is reading the definition too broadly is evident from the only request in the CID remotely relevant to JGW's provision of "advice." *See* CID at 3 (Request for Documents 4: "All documents, including any advertisements or illustrations provided to consumers, reflecting a comparison of any Product to any other product or service."). The only possible way to connect that request to the delivery of financial advisory services is a theory that making comparative statements when marketing a product somehow constitutes a financial advisory service. But that theory is not reasonable. Marketing a product is not a "service." *See* Black's Law Dictionary (10th ed. 2014). The CFPB thus cannot justify its CID on the basis of an inquiry into mere sales talk regarding a product otherwise outside the CFPB's authority.

C. Enforcing The CID Would Expand The CFPB's Authority Far Beyond The Limits Established By Congress.

Allowing the CFPB to rely on its broad authority to issue CIDs and a virtually unlimited definition of the term "financial advisory services" would grant the CFPB vast authority to burden companies outside its jurisdiction with expansive and intrusive investigatory demands. For example, the CFPB could demand that a retailer provide a full accounting of the price, manufacturing costs, and anticipated electricity costs of each washing machine it sells, and then justify its inquiry based on the possibility that the salesperson might provide "financial advisory services" to consumers regarding the promised cost savings associated with the most efficient models—or, in Director Cordray's words, "financial advisory services to assist in determining whether a [particular washing machine] is in their best interest." But at that point, the CFPB's jurisdiction would be limited only by the dimensions of the consumer marketplace—no connection to a covered financial product or service would be required. Congress never intended

such a result in creating the CFPB.

Indeed, Congress was precise in delimiting the products and services over which the CFPB may exercise its authority. It would be contrary to Congress's intent to render meaningless those various statutory limitations. Three such limitations demonstrate this point.

First, Congress built the CFPB's authority to enforce the Dodd-Frank Act's prohibition on unfair, deceptive, and abusive acts and practices around the "offering or providing" of enumerated consumer *financial* products or services. *See, e.g.*, 12 U.S.C. § 5481(6).[4] Interpreting the term "financial advisory services" to reach advice with a financial element offered in connection with transactions unrelated to a consumer financial product would make this structure irrelevant.

Second, Congress authorized the CFPB to expand its jurisdiction by rule *if* it determines that a product or service meets specific characteristics. *See* 12 U.S.C. § 5481(15)(A)(xi). That statutory provision alone is the appropriate mechanism for expanding the CFPB's authority. The CFPB may not accomplish that goal by interpreting "financial advisory services" to reach any conversation about the financial benefits of a product or service otherwise outside its jurisdiction.

Third, Congress explicitly prevented the CFPB from exercising authority over certain categories of businesses except to the extent those businesses engage in offering or providing consumer financial products or services. Thus, the CFPB generally lacks authority over realtors, retailers of manufactured and modular homes, persons regulated by state insurance regulators, and most merchants, *except* when such persons are engaged in offering or providing any consumer financial product or service. 12 U.S.C. §§ 5517(a)(2), (b)(2)(A), (c), (f).

[4] Congress also granted the CFPB authority to enforce certain "enumerated consumer laws," including TILA. *See* 12 U.S.C. § 5481(12). Those laws have no application to the purchase of structured settlements or annuities.

Interpreting the term "financial advisory services" to capture any discussion of benefits of transactions otherwise outside the CFPB's authority would deprive those limitations of meaning. For example, under the CFPB's theory, it could demand all the business records of a manufactured home retailer on the theory that it might have provided advice to consumers comparing the relative financial merits of purchasing or renting a home. In that and other circumstances, the CFPB not only would impose unjustified burdens on entities outside its jurisdiction, but it would disrupt regulatory regimes that have been established by the state and federal regulators that *do* have jurisdiction.

The CFPB's overreach in this case would lead to just such regulatory disruption. Here, Congress chose not to give the CFPB authority over JGW and similarly situated companies, preferring instead a hybrid system for regulating the purchase of structured settlements. Congress used the tax code to incentivize purchasers of structured settlements to ensure that a state court determines that the purchase "is in the best interest of the payee." *See* 26 U.S.C. § 5891(b)(2). The state laws on which Congress based this approach provide for statutory cooling-off periods and other protections. *See, e.g.*, Cal. Ins. Code §§ 10136 et seq. Moreover, the FTC has authority over such purchases. *See* 15 U.S.C. § 45(a)(1). *See also, e.g.*, *What to Know Before Selling Your Disability Payments*, https://www.consumer.ftc.gov/articles/0517-what-know-selling-your-disability-payments (Sept. 2014) (educating consumers on relevant issues).

As in *ACICS*, where the CFPB would have displaced the Department of Education from its role as the relevant primary regulator, the CFPB's efforts to regulate the structured settlement purchasing industry would displace the regulatory regime established by Congress. The existence of such an alternative regulatory structure further confirms that the CFPB's efforts to stretch its authority conflicts with congressional intent. The CFPB already has a vast realm of authority

over the nation's financial system. There is no justification for it to also seek to police those markets for which Congress assigned regulatory authority elsewhere.

Knowing which agencies may regulate a market segment is a key element of regulatory certainty for companies. The intrusion of an unauthorized regulator will disrupt settled expectations and require companies to reevaluate their regulatory compliance programs. Indeed, companies benefit from regulatory certainty. Where legal requirements are unclear, businesses may avoid risk by tightening product requirements, eliminating features, or exiting a product category. *See, e.g.*, *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (noting that "regulatory uncertainty . . . may discourage investment and innovation"). Costs will rise for companies and, ultimately, for consumers, resulting in reduced product choice. *See id.*

Furthermore, it is no answer to say that a subsequent decision regarding any enforcement action will cure any investigatory overreach. First, complying with a CID is itself a burdensome and expensive exercise that companies should not have to undergo where an agency lacks the requisite authority. Second, companies often settle enforcement actions because of the financial and other costs of litigating against a regulator, regardless of an agency's lack of authority.

The CFPB therefore should not be permitted to rely on an unduly broad definition of "financial advisory services" to inject itself into matters within the responsibility of other regulators. Instead, until and unless Congress acts, the CFPB must satisfy itself with its current authorities as set forth in the Dodd-Frank Act.

CONCLUSION

The CFPB's petition to enforce the civil investigative demand should be denied.

Dated: August 17, 2016

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