

In the
United States Court of Appeals
for the
District of Columbia Circuit

16-5174

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellant,

v.

ACCREDITING COUNCIL FOR INDEPENDENT COLLEGES AND SCHOOLS,

Defendant-Appellee.

ON APPEAL FROM A FINAL DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA, CASE NO. 1:15-CV-01838-RJL
HONORABLE RICHARD J. LEON

**BRIEF FOR *AMICUS CURIAE* ACCREDITING COUNCIL
FOR CONTINUING EDUCATION AND TRAINING, INC.
("ACCET"), ACCREDITING BUREAU OF HEALTH
EDUCATION SCHOOLS, INC. ("ABHES"), COUNCIL ON
OCCUPATIONAL EDUCATION ("COE"), NATIONAL
ACCREDITING COMMISSION OF CAREER ARTS AND
SCIENCES ("NACCAS") AND COUNCIL FOR HIGHER
EDUCATION ACCREDITATION ("CHEA") ON BEHALF OF
DEFENDANT-APPELLEE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the *amicus* parties submit their Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

All parties and amici appearing before the District Court and in this Court are listed in the Brief for Appellant.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases

This matter has not been previously before this Court or any other court. There are no related cases before this Court or any other court.

RULE 26.1 DISCLOSURE STATEMENT

Accrediting Council for Continuing Education and Training, Inc., Accrediting Bureau of Health Education Schools, Inc., Council on Occupational Education, and National Accrediting Commission of Career Arts and Sciences are national accreditors of academic institutions in the United States. None of them has a parent corporation and no publicly held corporation owns 10% or more of their stock. Council for Higher Education Accreditation is national advocate and institutional voice for promoting academic quality through accreditation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES.....	i
RULE 26.1 DISCLOSURE STATEMENT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
RULE 29(c)(5) STATEMENT	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
A. CFPB’s Attempted Intrusion Into Accrediting Agency Decisions Threatens The Viability Of The Long-Standing Peer Review Process	3
B. The Functions Of The Accrediting Bodies Do Not Include Consumer Financial Products Or Services.....	4
CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>*Peoria School of Business, Inc. v. Accrediting Council for Continuing Educ. & Training, 805 F. Supp. 579 (N.D. Ill. 1992)</i>	4
<i>Parsons College v. North Cent. Ass’n of Colleges and Secondary Schools, 271 F. Supp. 65 (N.D. Ill 1967)</i>	4
 Statutes & Other Authorities:	
20 U.S.C. § 1099b(a)(4)(A)	3
20 U.S.C. § 1099(b)(a)(5)	3
20 U.S.C. § 1099c	5

* Authorities upon which we chiefly rely are marked with asterisks.

RULE 29(c)(5) STATEMENT

The *amicus* parties state that:

(A) counsel for the *amicus* parties also serves as general counsel to the Appellee, Accrediting Council for Independent Colleges and Schools, but is not lead counsel for Appellee in this litigation. Accordingly, while counsel that authored the *amicus* brief serves as general counsel to the Appellee, the brief was authored in counsel's capacity as counsel to the *amicus* parties and not in its capacity as general counsel to Appellee;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Accrediting Council for Continuing Education and Training, Inc. (“ACCET”), Accrediting Bureau of Health Education Schools, Inc. (“ABHES”), Council on Occupational Education (“COE”), National Accrediting Commission of Career Arts and Sciences (“NACCAS”), and Council for Higher Education Accreditation (“CHEA”), (collectively “the filing parties”), as *amici curiae*, by and through their undersigned counsel, submit the following in support of Appellee, Accrediting Council for Independent Colleges and Schools (“ACICS”), and hereby represent that all parties in the above-referenced case consent to their participation as *amicus curiae* in this appeal.

Most of the filing parties are accreditors and are thus similarly situated to ACICS and perform essentially the same functions for their institutional members as ACICS performs for its members. The only non-accreditor among the filing parties, CHEA, is national advocate and institutional voice for promoting academic quality through accreditation. It is the largest institutional higher education membership organization in the United States. The filing parties therefore have a substantial interest in the actions being taken by CFPB against ACICS, as those actions will not only impact the operations of ACICS, but will have a direct impact on the system of accreditation as a whole and the manner in which all accrediting bodies perform their significantly-regulated functions. It is critical for the Court to

consider the magnitude of CFPB's attempt to insert itself into the realm of accreditation oversight, and it is for that purpose that the filing parties submit this brief. The filing parties fully support and join the arguments set forth by ACICS in its Brief, and offer the additional perspectives set forth herein to assist the Court in fully considering the scope of CFPB's actions.

ARGUMENT

A. CFPB's Attempted Intrusion Into Accrediting Agency Decisions Threatens The Viability Of The Long-Standing Peer Review Process

By statute, accrediting agencies “ensure that the courses or programs of instruction, training, or study offered by the institution of higher education, . . . are of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered.” 20 U.S.C. § 1099b(a)(4)(A). Each accrediting agency is independently responsible for assessing numerous aspects of an institution, including, but not limited to, the success of student achievement in relation to the institution's mission, curricula, faculty, and facilities; fiscal and administrative capacity; student support services; recruiting and admissions; academic calendars, catalogs, and publications; and records of the institution's complaints and compliance. *Id.* § 1099(b)(a)(5).

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). Accrediting agencies rely on volunteer participation by qualified evaluators to meticulously review the operations of accredited institutions to ensure that those institutions are in compliance with all accreditation criteria. The launch of a federal investigation by CFPB has the potential to significantly hamper accrediting agencies' ability to perform their functions, as individual volunteers may not want to be exposed to unbounded CFPB action. The established framework for oversight by the Secretary is well-known and clearly defined. CFPB's initiation of a probe into accreditation, however, is completely open-ended and unpredictable. Accreditation evaluators will be justifiably hesitant to involve themselves in a process that includes an unrestrained and indiscriminate risk of being pulled into a federal investigation. The accreditation process operates within well-known parameters, and CFPB's actions in this matter fall far outside of those parameters, and those actions are therefore improper.

B. The Functions Of The Accrediting Bodies Do Not Include Consumer Financial Products Or Services

As is set forth in ACICS's Brief and supporting materials, CFPB's jurisdiction is limited to matters involving consumer financial laws. Like ACICS, the filing parties do not engage in consumer lending, do not provide substantial assistance in

connection with financial products or services, and do not otherwise engage in conduct that falls within the scope of consumer financial laws. CFPB, therefore, has no jurisdiction over accrediting bodies.

Accrediting bodies do not assist or support their accredited institutions in procuring and maintaining loan grants from the Department of Education, and they do not provide any service to their accredited institutions in connection with their financial aid and loan programs. Rather, accrediting bodies deal with the educational quality of the institutions and not the lending process. It is the Department of Education that, by statute, independently determines the eligibility of an institution of higher education to participate in federal funding programs. *See* 20 U.S.C. § 1099c. It is a far stretch to assert, as CFPB does in this action, that accrediting agencies have any involvement in consumer financial products or services when the statutory scheme and detailed regulations clearly establish that the accrediting agencies do not play that role.

The filing parties affirm that the positions and arguments set forth in the ACICS Brief apply equally to the accrediting bodies represented herein, and yield the conclusion that CFPB has no authority to pursue its investigation.

CONCLUSION

Accreditation of institutions of higher education is fully regulated and the existing process of oversight of accrediting agencies is thorough and active. CFPB has no role in that process and the action it is attempting to take only serves to undermine the effectiveness of the accreditation process. Significantly, CFPB's efforts to investigate ACICS will not only impact that body, but will greatly impact all accrediting bodies in the field. CFPB's actions exceed its own jurisdiction, and intrude upon the jurisdiction of the Department of Education. For all of the reasons set forth herein, as well as those set forth in the Brief filed by ACICS, the filing parties respectfully request that the ruling by the District Court be affirmed.

Respectfully Submitted,

/s/ Michael C. Gartner

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 1,432 words, as determined by the word count function of the Microsoft Word 2010 word processing program, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2016, I electronically filed the foregoing Brief with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that counsel for the parties in the case (listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, pursuant to this Court's Rule 31, eight paper copies of this Brief will be filed with the Clerk of this Court.

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