

Civil Investigative Demands in False Claims Act Investigations: What They Are and Strategies for Response

Authors



Sean Bosack
414.287.9431
sbosack@gklaw.com



Allison Reimann
608.284.2625
areimann@gklaw.com



Nina Beck
414.287.9633
nbeck@gklaw.com

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

Part two in our False Claims Act series explores the Civil Investigative Demand (CID) as the powerful tool of choice for the U.S. Department of Justice (DOJ) in investigating potential violations of the False Claims Act (FCA).

What is a CID?

Simply stated, a CID is a request for records and information issued by the U.S. government in connection with a federal FCA investigation. 31 U.S.C. § 3733. Make no mistake — the CID is a powerful pre-litigation tool that enables the government to investigate potential FCA violations and determine whether sufficient evidence exists to warrant filing an action or intervening in a *qui tam* case. Moreover, because CIDs are issued outside of litigation — and targets may be reluctant to challenge the scope of the government's investigation for fear of appearing uncooperative or having something to hide — there is little guidance on the scope or limitations of CIDs.

A CID can be broad, invasive, time-consuming and expensive. A CID may compel:

1. The production of documents;
2. Interrogatory responses;
3. Sworn oral testimony related to the documents or information requested; or
4. Any combination of the above.

The stakes are high. To the extent that the recipient is a target of the investigation, and not merely a witness, the recipient may face the possibility of treble damages, significant civil penalties, reputational harm, potential exclusion from federal health care and other government contracting programs, and more.

When can a CID be issued?

A CID can be issued when the government has reason to believe that any person or entity may be in possession, custody, or control of any documentary material or information relevant to an FCA investigation. A CID obligates the recipient to produce the requested information absent a valid claim of privilege or narrowing, either by agreement or by order of a court.

Importantly, a CID can only be issued prior to the commencement of formal civil proceedings under the FCA or making an election under the FCA. 31 U.S.C. § 3733(a) (1). Once litigation is underway, the government must rely on traditional discovery tools (*i.e.*, written discovery, subpoenas).

What makes a CID so powerful?

The breadth of the CID in and of itself makes it a powerful tool. While there are some limits on the CID's authority,¹ in practice few parameters have been defined. And, to the extent that parameters for enforcement have been defined, courts have embraced broad

¹ For example, 31 U.S.C. § 3733(b)(1)(B), incorporates "the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section."

standards applicable to administrative subpoenas. For example, in *U.S. v. Anthem, Inc.*, No. 1:18-mc-00379-GBD (S.D.N.Y. Nov. 13, 2018), a magistrate judge enforced a CID for deposition testimony, concluding that all of the following factors were met:

1. The investigation would be conducted for a legitimate purpose;
2. The inquiry may be relevant to that purpose;
3. The information sought is not already in the government's possession; and
4. Requisite administrative steps were followed.

Under that standard, courts defer to the government's relevancy determination provided that it is "not obviously wrong."

Unsurprisingly, in the rare instance that a CID is challenged in court, federal judges have largely deferred to the judgment and law enforcement expertise of the DOJ and other government agencies.

A case decided by the District Court for the Western District of Virginia provides one exception to that trend. There, the court addressed two issues on a motion to quash a CID in *In re Civil Investigative Demand 15-349*, No. 5:16-mc-00003-MFU (W.D. Va. Aug. 12, 2016):

1. Did the government's six-year investigation, massive document collection and participation in settlement discussions constitute a de facto commencement of a formal civil proceeding such that the CID was no longer a proper tool of information gathering?
2. Was the CID overly burdensome because it requested information that the government already had in its possession?

With respect to the first question, the district court held that the CID was proper for the fundamental reason that no action had ever been filed. The length of the government's investigation and amount of evidence gathered was irrelevant.

With respect to the second question, however, the district court clarified that the courts must enforce a CID only when (among other requirements) "the information sought is reasonably relevant to the investigation" and "where the information sought is not unduly burdensome." On the "unduly burdensome" prong, the district court stated that CIDs and the like are enforceable only to the extent that the "information sought is not already in the DOJ's possession." There, because the CID potentially covered documents already in the government's possession, the court ordered the parties to "meet and confer on categories of relevant, non-duplicative documents to be produced."

More recently, in *Lexington Foot and Ankle Center, PSC et al. v. U.S.*, No. 5:18-cv-00283-DCR (E.D.K.Y.), the recipient of five CIDs successfully challenged the DOJ's CIDs issued after the DOJ had declined to intervene in an FCA *qui tam* action.² Lexington's argument hinged on the fact that the government had elected not to participate in the relator action; thus, the CIDs did not comport with § 3733(a)(1) because they were issued after litigation had commenced. Within three days of the court challenge, the DOJ rescinded all five CIDs, prompting Lexington to voluntarily dismiss its challenge.

Potential Abuse of the CID.

Recipients of a CID must be cognizant of the fact that the government may be investigating more than just FCA violations. Oftentimes in the health care context, the government will conduct parallel investigations, such as violations of the Controlled Substances Act or criminal health care fraud. Indeed, civil investigators can — and will — share information gathered pursuant to a CID with their criminal counterparts.

However, courts have made it clear that criminal investigators may not manufacture, manipulate or abuse the civil investigation process for their own uses. Information gathered in a civil investigation may be used in a criminal investigation if the subject had notice that the information might be used in criminal proceedings and there is no evidence of government bad faith. *U.S. v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008). Courts have found bad faith where criminal investigators gave direction to civil investigators in an ongoing matter. *E.g., U.S. v. Scrusby*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005); *SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298 (N.D. Ala. 2003).

² The FCA allows private parties to file *qui tam* actions alleging that defendants defrauded the federal government. A private party who initiates the suit is called a "relator."

I received a CID. Now what?

So, what should you do if you are served a CID under the FCA?

Immediately contact your legal department (if applicable) and seek outside counsel experienced in FCA matters. In reviewing options for outside counsel, consider the familiarity and experience of counsel with the investigators in question (which may include a local Assistant U.S. Attorney as well as an attorney from the DOJ in another city or state). Also take into account counsel's experience with the relevant underlying subject matter, for example, health care matters versus government contracting. Fulfilling a CID also can be a long and, at times, stressful process, so look for counsel with whom you have a good rapport and who has a track record of managing lengthy, complex investigations.

Promptly after receiving a CID, the recipient should issue a legal hold to ensure that relevant documents are preserved. Your outside counsel also should contact the government to discuss receipt of the CID, begin to establish a dialogue with the investigators and discuss an extension to the initial response deadline. This initial outreach will provide counsel an opportunity to begin learning about the nature and focus of the investigation and whether the recipient is a target or a witness.

Your counsel also should carefully review the CID with the recipient and key custodians to formulate a response plan, including what requests can be fulfilled quickly without significant burden and what requests will be extremely burdensome to fulfill. Counsel can use that information to attempt to negotiate the timing and scope of the response with the investigators, such as narrowing the scope of broad requests, delaying fulfillment of particularly burdensome requests, and agreeing on custodians or search terms with respect to document requests. Such conversations are most effective when the recipient makes clear its good-faith intention to comply with the CID and, at the outset, describes in practical and specific terms the time and resources it would take to comply with the CID as drafted.

Next, begin collecting and producing documents and information responsive to the CID. Document collection in response to CIDs can be burdensome and technically challenging, so ensure that you have the necessary support for tasks such as collecting email and text messages, imaging laptops, and scanning documents. Begin the collection process immediately. Meet all deadlines unless an extension is granted. Stay in communication with the investigators about progress and any problems that arise that may justify further negotiating the scope of the response. Also consider whether providing certain categories of information or testimony early may help the investigators justify further limiting the scope of the response.

Throughout all of this, your counsel should map out a defense plan — both as it relates to efforts to persuade the government not to file suit or intervene, and with respect to strategy if the matter moves into civil litigation, such as arguments for a motion to dismiss or avenues for further discovery. Fact witnesses (including current employees and agents as well as, at times, former employees) should be interviewed to help understand the underlying issues, identify potentially helpful documents, and formulate defenses. Also consider the need for one or more expert witnesses (e.g., a damages expert or a billing, coding or medical expert in the health care field) and begin vetting potential experts early.

Conclusion

CIDs are serious and, oftentimes, unnerving and daunting to the recipient. But the receipt of a CID can also present an opportunity to open a respectful and productive dialogue with the government, negotiate different (and, hopefully, less arduous) parameters for the CID and, where appropriate, educate the government why it may be barking up the wrong tree.