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Professional Perspective

CIDs are DOJ's Investigatory Tool of Choice

David Robbins and Jason Crawford,
Crowell & Moring

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Contributed by David Robbins and Jason Crawford, Crowell & Moring

On May 23, 2019, the U.S. District Court for the Southern District of Indiana granted a petition for summary enforcement of a Civil Investigative Demands in United States v. Andrew Elsbury, finding that the testimony requested by the Department of Justice was relevant to the government's False Claims Act investigation. 1:19-mc-00029, ECF No. 20 (S.D. Ind. May 23, 2019). The decision is notable in that there have been relatively few cases interpreting the appropriate scope of CIDs because most disputed issues are resolved by agreement between the DOJ and the CID recipient without need for a court's intervention.

Coincidentally, this ruling reinforcing the DOJ's expansive CID authority coincides with the 10-year anniversary of Congress's enactment of the Fraud Enforcement and Recovery Act, which amended the CID provisions of the statute. By authorizing the Attorney General to delegate CID authority within the department to officials with more direct involvement with FCA cases, the 2009 FERA amendments have had a profound impact on the way that FCA cases are investigated and litigated. This article provides an overview of this powerful investigative tool, considers the changes ushered in by the FERA amendments, and discusses the best practices and associated risks in responding to CIDs.

Overview

Pursuant to the authority at 31 U.S.C. § 3733, the Attorney General, or an appropriate designee, may issue a CID if there is reason to believe that a person or entity is in possession of documents or information relevant to an FCA investigation. Under this authority, the DOJ can use CIDs to demand the following:

- Production of documents and electronically stored information
- Written interrogatory responses
- Sworn testimony including "corporate representative" testimony (akin to Rule 30(b)(6) depositions)

CIDs advance the government's ability to investigate FCA cases by obtaining significant discovery before litigation has even started. The government typically issues CIDs after a *qui tam* suit has been filed under seal or after a case has been referred to DOJ by another government agency, such as an investigating agency or an Office of the Inspector General. This process advances the DOJ's ability to evaluate the merits of an FCA case before deciding whether to go "all in" on a specific case.

Specifically, the DOJ uses the information gathered pursuant to the CID to determine whether to begin active litigation by intervening in the case (if filed by a *qui tam* relator), or bringing an affirmative civil enforcement action (if the case was referred by another agency). Notably, a CID can only be utilized prior to the commencement of litigation. United States v. Kernan Hosp., No. RDB-11-2961, 2012 WL 5879133 (D. Md. Nov. 20, 2012). Once the government intervenes or files an affirmative civil enforcement action, the government's ability to obtain unilateral discovery through CIDs ends, and the government must use the mechanisms provided for in the Federal Rules of Civil Procedure.

Background

Today, the vast majority of FCA investigations are initiated by the government's issuance of a CID, but between the time of the seminal 1986 amendments to the FCA and the FERA amendments of 2009, the use of CIDs was generally limited to relatively few, high-profile cases within the DOJ. The CID was a powerful tool, but one that was rarely used because the process of requesting and obtaining the CID was so cumbersome that few DOJ trial attorneys or Assistant U.S. Attorneys could obtain them. Many DOJ attorneys would instead rely on Offices of Inspector Generals to issue their own subpoenas for documents.

This all changed when the FERA amendments broadened the government's FCA investigative powers by authorizing the Attorney General to delegate authority to issue CIDs. Today, pursuant to a directive from the Civil Division, authority to issue CIDs has been delegated to the 93 U.S. Attorney Offices and to the Director of the Fraud Section of the Commercial Litigation Branch (Fraud Section).

Rise in the Issuance of CIDs

As Congress intended with the passage of the FERA amendments, the use of CIDs has proliferated over the past decade because trial attorneys in the Fraud Section and AUSAs can now act more quickly without waiting for the Attorney General's approval. The dramatic increase is borne out in the data. In the two years prior to the FERA amendments, the DOJ averaged less than 50 CIDs per year. In the first fiscal year following the delegation of authority made possible by FERA, the DOJ authorized the issuance of 888 CIDs. Moreover, in the past three years, the Civil Division has authorized well over 400 CIDs per year:

Year	CIDs Authorized by Civil Division
2013	501
2014	397
2015	396
2016	420
2017	655
2018	429

Source: Response to Freedom of Information Act, Request No. 145-FOI-16175, Aug. 24, 2018

These figures account only for the CIDs that were authorized by the Civil Division and do not take into account the number of CIDs authorized by the 93 USAOs. Of course, not every USAO exercises this authority equally. Some offices have extensive expertise in handling FCA investigations and litigation whereas others are less active in authorizing CIDs. Moreover, a number of states have their own false claims statutes and of these more than 30 provide authority for state officials to subpoenas documents and compel testimony.

Why Was My Company Served With a CID?

When a company receives a CID, it generally means one of two things: the DOJ believes the company either has information that is relevant to an FCA investigation or the company is the target of the investigation. Often, the focus of the investigation will be clear from the four corners of the CID because § 3733(a)(2) requires that the CID state the nature of the conduct under investigation, although some CIDs are more descriptive than others.

If there is a pending *qui tam* action under seal, the CID recipient will not have the benefit of knowing the relator's specific allegations unless the government shares a redacted version of the complaint, but the nature of the document requests, the identified custodians, and the interrogatories set forth in the CID will often shed light on the nature of the allegations.

Moreover, knowing which DOJ office issued the CID can be instructive. If a CID was issued from a specific USAO, then the case is typically either delegated—meaning that the USAO is making the key decisions—or the case is being monitored by attorneys at Main Justice, which means that an attorney from the Fraud Section may remain in the background but will need to authorize the filing, closure, or settlement of the suit and will be kept advised of developments by the AUSA responsible for the case.

Currently, cases exceeding $10M are not normally delegated to USAOs, and these cases will generally be personally or jointly handled or monitored by the Fraud Section. Civil Division Directive No. 1-15. The Fraud Section can also determine that a case will not be delegated for the following reasons:

- The matter could control or adversely influence the disposition of other claims totaling more than $10M
- A novel question of law or a question of policy is presented
- The agencies involved are opposed to the matter or case

Accordingly, if the CID was issued by the Director of the Civil Fraud Section, that is often a good indication that a trial attorney from Main Justice will play a more active role in the investigation, as is the presence of a Main Justice official on conference calls concerning the scope of CID or the pace and substance of the response.

Related Risks

The recipient of a CID must take into account several attendant risks. First, he or she should generally proceed as if there is a *qui tam* case under seal focused on the recipient. CID recipients should consider conducting an initial investigation based on the information requested in the CID to assess potential exposure. Second, the FERA amendments made it easier for the DOJ to share information with *qui tam* relators under § 3733(a)(1)(D) so long as the information is "necessary to the investigation."

Accordingly, even if the government declines to intervene in the *qui tam* suit, the information produced to the DOJ pursuant to the CID could be turned over to relator's counsel and used to amend the complaint thereby increasing the chances that the complaint will clear the heightened pleading requirements of Rule 9(b) for alleging fraud which would allow the complaint to survive a motion to dismiss.

Third, information provided in response to the CID can be shared with other federal, state, and local agencies which can result in additional investigations, audits, or enforcement actions. Fourth, if there is a parallel criminal investigation, information produced pursuant to the CID could lead to exposure for the company and individuals. Relatedly, if a corporate representative invokes their Fifth Amendment protections this can trigger adverse inferences in the civil proceeding.

Practical Tips

Responding to a CID can be time-consuming and often disruptive for a company, requiring employees to assist in identifying documents and answering questions. The scope of the investigation may necessitate a large data collection, and the CID recipient has an obligation to conduct a thorough analysis of all potential locations of responsive documents and make a good faith effort to make a full and complete production. There are, however, certain practical steps a company can take to reduce disruption and expenses associated with CID compliance.

For starters, companies should consult experienced outside counsel to develop a comprehensive response strategy. As noted above, CIDs are typically used when the government is deciding whether to intervene in a *qui tam* case or file an affirmative civil enforcement action. A company's response to a CID and the interactions with the government can influence the government's decision to move forward with the case which—when done correctly—could potentially result in cost and time savings over the long run.

In developing a CID response strategy, companies will generally want to engage with the government early to understand collection priorities and to seek appropriate extensions. The standard CID typically requests the production of documents within 20 days as set forth in § 3733, but the DOJ will typically agree to extra time and allow for rolling productions. Reflecting the FCA's *period of repose,* CIDs will often use a 10-year look back when defining the relevant time-period. This date range is one of several areas that may be subject to negotiation, but it is imperative that companies identify custodians who may have responsive material and issue legal holds to avoid spoliation of evidence.

Enforcement of CIDs

Questions surrounding the scope of specific CID requests are rarely litigated, but as seen in *Elsbury*, the DOJ is willing to seek enforcement when CID recipients fail to cooperate, and the courts will enforce the CID where the information sought is reasonably relevant to the investigation and not unduly burdensome. See, e.g., In re Civil Investigative Demand 15 – 349. No. 5:16-mc-3, 2016 WL 4275853, (W.D. Va. Aug. 12, 2016). In *Elsbury*, the Fraud Section issued a CID to the owner of a company selling medical devices for use in spinal surgeries.

A separate CID was issued to Elsbury's top revenue-generating customer, an orthopedic surgeon in California. Elsbury refused to provide testimony to the government pursuant to the CID. In his opposition to the petition for summary enforcement, Elsbury argued that the DOJ was improperly using the CID process to "extract a settlement" from his company. Noting that a CID can only be utilized prior to the commencement of litigation, Elsbury argued that the DOJ had already determined that a basis existed for bringing an action under the FCA—because the government had previously raised the possibility of settlement—and so the DOJ should no longer be able to use the CID procedure. *Elsbury*, 1:19-mc-00029, ECF No. 14 (S.D. Ind. Apr. 24, 2019).

Rejecting this argument, the court found that there was no dispute that the DOJ had not commenced its own FCA proceeding under Section 3730(a) or made an intervention election under Section 3730(b). Moreover, finding that the CID sought information that was relevant to the investigation and complied with all applicable statutory requirements, the court found that the CID was enforceable and ordered Elsbury to provide testimony to the government.

Best Practices

- As noted above, CID recipients are well advised to conduct a parallel internal investigation to gain a substantive understanding of the issues to include interviewing witnesses (with appropriate *Upjohn* warnings) and identifying key documents to understand areas of exposure and form defenses.

- Be transparent about document collection and review methodology and memorialize the process in writing in case there are any disputes down the road. Discuss need for claw-back agreement if privileged or confidential material is inadvertently produced.

- From the outset, establish credibility by demonstrating the company's good-faith intention to comply with the CID. Use CID-related interactions as an opportunity to engage with the DOJ attorneys, to put unhelpful documents in context, and preview defenses in an effort to convince the government not to go forward with a case or to negotiate favorable settlement terms.

Lastly, in cases where an underlying *qui tam* complaint lacks substantial merit, companies should consider drawing upon § 4-4.111 of the Justice Manual, which set forth factors for DOJ attorneys to consider when deciding whether to exercise DOJ's statutory dismissal authority under § 3730(*c*)(2)(A). If companies are successful in educating the government as to why the facts of the case do not support a viable action, they might convince the government to not only decline intervention but also to move to dismiss—the brass ring for an FCA defendant.