

PUBLICATION

Recent Court Decision Shows Best Way to Handle Civil Investigative Demands

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The United States Department of Justice (DOJ) is authorized by the False Claims Act (FCA) to issue Civil Investigative Demands, commonly known as CIDs. 31 U.S.C. § 3733. The DOJ has made increasing use of CIDs to obtain information from health care providers. The issuance of a CID indicates that the DOJ is investigating potential fraud on the government and is seeking information regarding its fraud investigation. Receiving a CID does not necessarily mean that you are the target of the fraud investigation, but at a minimum it indicates that the DOJ believes you have information relevant to its fraud investigation.

The DOJ may use a CID to request documents, answers to written questions, or oral testimony, and it has wide latitude to obtain a broad array of information related to its fraud investigation. Because CIDs have the potential to impose significant costs and burdens on providers, there may be a temptation to resist or ignore CIDs. However, if the recipient of a CID refuses to comply, the FCA authorizes the DOJ to petition a court to order compliance, and the lenient standards for enforcing a CID make it difficult for providers to avoid one.

Enforcement of CIDs

A recent federal court decision, *United States v. Picetti*, highlights the difficulty of resisting a CID, and suggests that alternative strategies could be more productive for providers. In the *Picetti* case, the DOJ was investigating whether a physician had been involved in billing for allegedly unnecessary services and alleged violations of the Anti-Kickback Statute and Stark Law. The DOJ issued a CID to the physician, seeking documents and testimony regarding its investigation. The physician declined to respond, asserting that the CID exceeded DOJ's authority and the investigation was unreasonable. Then DOJ petitioned a federal court to enforce the CID, and the court later ruled that the physician must comply with the DOJ's request for information.

The court concluded that CIDs may be enforced like any other subpoena issued by a federal agency. In addition, the court noted that under that standard, the scope of its review is "quite narrow" and limited to three basic issues: (1) whether Congress gave the agency the authority to investigate, (2) whether the agency followed procedural requirements, and (3) whether the information requested by the agency is relevant and material to its investigation.

As to the first issue, the court easily concluded that the FCA expressly authorizes the DOJ to investigate fraud on the government through the use of CIDs. While the physician argued that the DOJ was not authorized to use a CID in this case because other parties subject to the same investigation were in settlement talks with the government, the court concluded that the FCA did not restrict the use of CIDs simply because the government was discussing a potential settlement. The court also rejected the physician's complaint that a CID gives the DOJ "unilateral" power to investigate prior to litigation, while the physician was unable to conduct discovery against the government. The court recognized the "imbalance of power," but concluded it was permitted under the FCA.

In addition, the court found that the DOJ had complied with the FCA's basic procedural requirements for issuing a CID because the CID specified the conduct being investigated, the laws that may have been violated, the type of information being requested, the manner in which it must be produced, and the rights of the party receiving the CID.

Finally, the court concluded that the CID requested information relevant to DOJ's investigation. The court underscored the lenient standard of relevance needed to enforce a CID: the information requested by a CID is deemed to be relevant to the DOJ's investigation unless it is "plainly incompetent or irrelevant to any lawful purpose of the agency." In this case, the CID was valid because it requested information relevant to the physician's alleged misconduct under investigation.

Responding to CIDs

Because it is usually difficult to avoid a CID altogether, the preferred strategy is to respond to the CID carefully and intelligently. Initially, you need to find out if you are a target or subject of the government's fraud investigation, or merely a witness who has information regarding another person or company under investigation. Before you respond to a CID you should understand your status in the government's investigation because it will likely affect how the DOJ treats you during the course of responding to the CID.

You will also need to ensure that any documents requested by the CID are not lost, destroyed, or altered. It is important to preserve hard copy records, as well as various forms of electronic information, including emails, text messages, and other types of electronic data. Regardless of whether you are a target, subject, or merely a witness, the loss, destruction, or alteration of documents requested by a CID will almost certainly lead to adverse consequences, including increased scrutiny from the DOJ and a loss of credibility with the government.

It may be possible to narrow the scope of the information requested by the CID, which could significantly reduce the cost and burden of responding to it. For example, it may be possible to narrow the time frame encompassed by the CID. Also, if a provider operates in multiple locations, it may be possible to narrow the geographic scope of the CID. Furthermore, it may be possible to narrow the number of record custodians (employees who may have records) encompassed by the CID. Sometimes the DOJ issues a CID that is overly broad because the government does not have a detailed understanding of which of the provider's documents are relevant to the investigation or which employees of the provider have relevant information. A constructive discussion with the DOJ regarding the true focus of the investigation and the provider's information most relevant to the focus of the investigation may enable the provider to minimize the cost and burden of the CID.

When a CID requests the production of documents, you will be required to give the government a written certification that you produced all of the requested documents. When a CID requests answers to written questions or testimony, you will be required to respond under oath. Because there are adverse consequences for providing incorrect or incomplete information to the government, you must be very careful when responding to a CID.

The Takeaway: It's Best to Respond to a CID

Receiving a CID is never a welcome event, but ignoring a CID is not a useful or recommended strategy. Providers should take steps to manage the costs and burdens of responding to a CID, while preserving credibility with the DOJ so that the government's investigation is resolved as efficiently and effectively as possible.