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Feature Comment: False Claims Act Civil Investigative Demands, A Practical Guide For A Powerful Tool

Introduced during the pivotal 1986 Amendments to the civil False Claims Act, the FCA civil investigative demand (FCA CID) is now a commonly used method for collecting documents and information during an FCA investigation. Over the last two-plus decades, Department of Justice attorneys and Assistant U.S. Attorneys have become familiar and comfortable with issuing CIDs as they evaluate claims that fraud has been committed against the U.S. Government.

This Feature Comment looks back on the evolution of the FCA CID, what sets it apart from other tools in the Government's investigative arsenal, the breadth and flexibility of its reach, and the rules that constrain it. It also highlights a small, but growing, body of cases addressing FCA CID challenges and enforcement, and provides practical strategies and best practices for recipients in responding to CID requests.

Created in 1986 and Expanded in 2009, CID Authority Has Reached Maturity—FCA CIDs were first created through the 1986 Amendments to the FCA. See P.L. 99-562, Oct. 27, 1986, 100 Stat. 3153. CIDs are similar to administrative subpoenas and are intended to provide an efficient means for DOJ to collect evidence during a civil fraud investigation. As codified in the FCA at 31 USCA § 3733, DOJ's CID authority includes the power to request documents, seek written responses to interrogatories, and take sworn testimony from

person(s) believed to have relevant information before litigation begins. DOJ evaluates this evidence in determining whether to expend Government resources in pursuing FCA claims. *U.S. v. Markwood*, 48 F.3d 969, 976 (6th Cir. 1995).

For many years, FCA CID authority was exercised only rarely. In its original form, the statute required the Attorney General—personally—to authorize each FCA CID. In 2009, Congress expanded FCA CID authority through the Fraud Enforcement and Recovery Act of 2009 (FERA), P.L.111-21, May 20, 2009, 123 Stat. 1617. Significantly, the FERA Amendments enabled the Attorney General to delegate FCA CID authority to subordinate officials at DOJ. *Id.* at 1623–24. CID authority was then further delegated to the 93 U.S. Attorney's Offices around the country. See 28 C.F.R. pt. 0, subpt. Y and appendix, subsections (c), (d). The practical effect of delegation has been a significant uptick in the issuance of FCA CIDs over the last 10-plus years.

What Can a Recipient Learn from an FCA CID?—As a creature of statute, the FCA CID has some unique identifying features from which a recipient can glean valuable information. Most conspicuously, the first section of an FCA CID discloses the fact that the Government is investigating a potential FCA violation. The CID must state “the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.” 31 USCA § 3733(a)(2)(A).

The FCA CID also will indicate who is conducting the investigation. A CID can issue either from DOJ's Civil Fraud Section or from a U.S. Attorney's Office. The specific Government attorneys and agents leading the investigation are identified as “false claims law investigator(s).” From this information, a CID recipient often can discern whether the investigation is being handled “jointly” between DOJ's Civil Fraud Section and the U.S. Attorney's

Office and what Government agencies are presumed to be affected by the alleged fraud.

Finally, the information requests themselves can yield clues about the focus of the Government's inquiry. Document requests and interrogatories tend to point to specific contracts, transactions, relationships, time periods, and issues of interest. CIDs for witness testimony must set forth a general description of the areas of inquiry.

An FCA CID will not, however, reveal whether the recipient is the focus of the Government's investigation or simply a person or entity with relevant information. It also will not explicitly disclose whether an FCA qui tam lawsuit has been filed under seal pursuant to 31 USCA § 3730(b).

FCA CIDs Are Prepared and Issued by DOJ, and Information May Be Shared with a Qui Tam Relator—A DOJ Trial Attorney or Assistant U.S. Attorney who wishes to issue an FCA CID initiates the process by preparing an FCA CID form consistent with the statutory requirements, and drafting the substantive requests for information, documents, or testimony. The line attorney submits to his or her supervisor the draft form along with a memorandum explaining how the FCA CID will advance the investigation and taking note of any relevant court deadlines.

As a common best practice, the line attorney's memorandum addresses whether the Government intends to share the information obtained with any qui tam relator, an option expressly allowed under the 2009 FERA Amendments. 31 USCA § 3733(a)(1)(D) (“[I]nformation ... may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.”). The sole determination of what is “necessary” lies with DOJ. *U.S. v. SouthEast Eye Specialists, PLLC*, 2021 WL 5150687, at *5–6 (M.D. Tenn. Nov. 5, 2021).

After the FCA CID package is approved by the relevant DOJ authority, the CID is assigned a number and served on the intended recipient. Service within the U.S. is straightforward: a false claims law investigator (or a U.S. Marshal) can serve the CID in person, or by sending it via registered or certified mail. 31 USCA § 3733(d).

The Federal Rules of Civil Procedure Inform the CID Process, but the Statute Prevails—The Federal Rules of Civil Procedure are referenced throughout the FCA CID statute, but the CID statu-

tory provisions prevail in the event of a conflict. For example, in responding to requests for documents or interrogatory responses, a CID recipient can protect documents and information from disclosure in accordance with the “standards applicable to discovery requests under the Federal Rules of Civil Procedure,”—at least “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.” 31 USCA § 3733(b)(1)(B); see also *id.* § 3733(j)(6) (“The Federal Rules of Civil Procedure shall apply to any petition [to a court] under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.”).

Similarly, testimony pursuant to an FCA CID is given under oath, before a court reporter, “in a manner consistent with, the Federal Rules of Civil Procedure.” *Id.* § 3733(h). The statute, however, prescribes the timeframe for responding to a CID for testimony (seven days or more from the CID receipt date, unless the Government “determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time”), dictates who can (or cannot) attend the testimony, and even stipulates who can receive a copy of the transcript. *Id.* § 3733(a)(2)(F), (h).

This framework recognizes that FCA CIDs, while employed in the context of a civil investigation, are a decidedly one-sided device. Unlike the Rules' regime of reciprocal discovery, the CID statute offers no avenue for private parties to pursue their own requests regarding the Government's investigation.

CIDs Are Not Subject to the Confidentiality Restraints of Grand Jury Subpoenas—Like an FCA CID, a federal grand jury subpoena can be prepared and issued by an Assistant U.S. Attorney, but it is a criminal tool used to compel the production of documents or testimony to a grand jury charged with examining potentially criminal conduct.

Grand jury proceedings, including the issuance of and response to grand jury subpoenas, are governed by the Federal Rules of Criminal Procedure (FRCrP). Significantly, FRCrP 6(e) requires that “matters before the grand jury” be kept confidential by the Government attorneys, the grand jurors, and court personnel. This means that information given in response to a grand jury subpoena generally cannot be shared with those outside the process, including Government attorneys in the civil division who may be investigating related conduct. (In certain situa-

tions, however, criminal prosecutors may seek a court order to allow “6(e) material” to be shared with their civil counterparts.)

By contrast, the Government is not required to keep information obtained through an FCA CID confidential. Records and testimony collected via an FCA CID must be maintained by the false claims law investigator(s). While CID responses generally are not made public, the FCA CID statute expressly provides that the information can be shared with a qui tam relator when “necessary” for the investigation. 31 USCA § 3733(a)(1)(D). And there is no rule or statutory provision that prohibits the Government from sharing with other federal law enforcement attorneys, agencies, or state law enforcement officials.

CIDs Have Broader Jurisdiction Than Agency Administrative Subpoenas—In many FCA investigations, DOJ attorneys work in tandem with Office of Inspector General (OIG) agents from the Government agency alleged to have been harmed by the fraud. Most OIG offices have the authority under the Inspector General Act of 1978 to issue administrative subpoenas for matters within the particular OIG agency’s jurisdiction. For example, the OIG for the General Services Administration can serve an administrative subpoena asking a company to produce records relevant to its GSA contracts. In an FCA investigation, a CID can be a better choice if the conduct being investigated allegedly impacted multiple Government agencies. In other words, in an FCA investigation involving a company’s GSA, Department of Defense, and Department of State contracts, a single, comprehensive FCA CID is likely to be more efficient than three administrative subpoenas from each of the affected agency OIG’s offices.

FCA CIDs also tend to be more flexible than administrative subpoenas in that they can seek responses to interrogatories or compel witness testimony. Most OIGs can only issue subpoenas for documents.

From the recipient’s perspective, administrative subpoenas are opaquer than an FCA CID. Administrative subpoenas typically do not disclose the reason for the requests, which can range from a routine administrative examination of the agency’s operations to a civil fraud matter, and even a criminal investigation. For this precise reason, DOJ and its OIG partners frequently will default to using an OIG administrative subpoena, especially in the early stages of investigation, if they wish their FCA investigation to remain covert.

A Search Warrant (Instead of a CID) Can Be Used to Avoid Destruction of Evidence—Search warrants are another tool that the Government can use to obtain documents and other physical items during an investigation. Indeed, a search warrant may be the best route if there is reason to believe that evidence or information is likely to be destroyed. The warrant authorizes Government agents to enter the specified location, inspect the premises, and remove items that are identified in the warrant. Because execution of a search warrant is invasive, with clear implications for a person’s Constitutional rights, a search warrant must be issued by a judge. The attorney or agent seeking the warrant must demonstrate to the court that there is probable cause to justify the search.

By contrast, upon receipt of an FCA CID, the recipient has at least 20 days to search for responsive documents and information. Moreover, the CID recipient has the opportunity to negotiate with the Government for more time, a narrowing of requests, the assertion of privilege, and other controls over the process.

Search warrants generally are considered criminal investigative tools, but the results of the search can be shared with civil enforcement authorities.

FCA CIDs Cannot Be Used to Conceal a Criminal Investigation—Despite the flexibility for information-sharing that the FCA CID affords, it is improper for DOJ attorneys to use a civil investigative tool to develop information on behalf of a criminal investigation. See *Securities & Exchange Commission v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1325–28 (N.D. Ala. 2003). In other words, an FCA CID cannot act as a stalking horse, or ruse, for a criminal investigation. There must be an open and active civil investigation for the FCA CID to be employed. Such a constraint is of little comfort to potential targets, however, when DOJ actively urges civil and criminal attorneys to work in parallel and collaboratively to investigate potential misconduct.

Challenges to FCA CIDs Rarely Succeed—A motion to quash or limit an FCA CID must be filed within 20 days of service, or before the deadline for responding to the CID, whichever is earlier. 31 USCA § 3733(j)(2). Courts have found that recipients of an FCA CID, as well as some third parties with a legitimate concern for the impact of the CID on their business interests, have standing to challenge an FCA CID request. See, e.g., *Gen. Med., PC v. U.S.*, 2020 WL

7209278, at *2 (S.D. Ill. Dec. 7, 2020) (finding third party standing to challenge CID).

Substantively, though, challenges to an FCA CID are not likely to succeed due to the deference afforded to “the statutory authority of administrative agencies to perform investigative functions.” *Markwood*, 48 F.3d at 977. Courts have also declined to apply state law privileges, pointing to the CID’s federal authority. See *Cleveland Clinic Found. v. U.S.*, 2011 WL 862027, at *1–2 (N.D. Ohio Mar. 9, 2011).

Arguments that an FCA CID is unduly burdensome or abusive because the Government’s investigation has lasted too long have either been rejected or deferred by the courts. See, e.g., *Gen. Med., PC*, 2020 WL 7209278, at *2 (three-year investigation does not present an undue burden sufficient to quash CID despite substantial impact to business); *In re Civil Investigative Demand 15-439*, 2016 WL 4275853, at *4, *8 (W.D. Va. Aug. 12, 2016) (lengthy six-year investigation insufficient to quash CID).

Indeed, DOJ’s authority to issue FCA CIDs persists until—as the statute provides—the Government affirmatively files its own FCA lawsuit or makes a decision whether to intervene in a qui tam case. 31 USCA § 3733(a)(1). In a rare “win” for a CID challenge, a Maryland district court granted a motion to set aside a CID that the Government issued after its FCA lawsuit was dismissed without prejudice; the CID authority expired upon commencement of the litigation and could not be renewed for further investigation. *U.S. v. Kernan Hosp.*, 2012 WL 5879133, at *4–6 (D. Md. 2012). However, courts have separately rejected challenges based on qui tam filings, finding they are irrelevant to the Government’s filing decision. See, e.g., *In re Civil Investigative Demand 15-439*, 2016 WL 4275853, at *4 (citing *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 627 (D.C. Cir. 1989)). Relatedly, courts have also found settlement discussions with related parties insufficient to trigger the end of the Government’s pre-filing investigative stage. See *U.S. v. Picetti*, 2019 WL 1895057, at *3 (E.D. Cal. Apr. 29, 2019).

The Government Can Compel CID Responses in Federal Court and Seek Contempt Findings—Noncompliance with CIDs can lead to the Government initiating enforcement litigation and even contempt proceedings. The FCA CID statute specifically provides that the Government may seek judicial enforcement due to failure to comply or refusal to surrender documents, and may do so with-

out first serving the petition on the CID recipient. See 31 USCA § 3733(j)(1); *Markwood*, 48 F.3d at 981. The courts consider only whether the Government followed the statutory procedures and whether the requests seek information that is “relevant and material to” the investigation. See, e.g., *Markwood*, 48 F.3d at 976–79; *Picetti*, 2019 WL 1895057, at *2.

Courts routinely grant Government enforcement petitions. See, e.g., *Markwood*, 48 F.3d at 972; *U.S. v. Aziz Kamali, M.D., Inc.*, 2020 WL 7074608, at *1 (E.D. Cal. Dec. 3, 2020), report and recommendation adopted, 2021 WL 53276 (E.D. Cal. Jan. 6, 2021); *U.S. v. Kamal Kabakibou, MD, PC*, 522 F. Supp. 3d 1307, 1314 (N.D. Ga. 2020); *U.S. v. Cross Senior Care, Inc., LLC*, 2019 WL 11502849, at *1 (M.D. Fla. Nov. 6, 2019), report and recommendation adopted, 2019 WL 11502798 (M.D. Fla. Dec. 18, 2019), aff’d, 831 F. App’x 944 (11th Cir. 2020); *U.S. v. Hines*, 2019 WL 4491313, at *1 (M.D. Fla. Aug. 14, 2019), report and recommendation adopted, 2019 WL 4479314 (M.D. Fla. Sept. 18, 2019); *Picetti*, 2019 WL 1895057, at *1; *U.S. v. ASG Sols. Corp.*, 2018 WL 3471405, at *1 (S.D. Cal. July 18, 2018). However, courts may defer enforcement where the Government has already conducted a lengthy investigation and document duplication issues arise. *In re Civil Investigative Demand 15-439*, 2016 WL 4275853, at *1 (taking petition to enforce under advisement and directing the parties to meet and confer on production of non-duplicative information). In addition, at least one court declined to enforce a CID request for email communications due to the Government’s failure to identify them with reasonable particularity, which would therefore require testimonial actions by the CID recipient that invoked the recipient’s Fifth Amendment rights. *U.S. v. Sabit*, 2014 WL 1317082, at *4 (E.D. Mich. Apr. 1, 2014) (relying on *U.S. v. Hubbell*, 530 U.S. 27, 41–43 (2000)).

Noncompliance with an FCA CID may result in possible contempt findings if the Government files suit in federal court to have the FCA CID enforced. 31 USCA § 3733(j)(1). At least one court has denied the Government’s motion for contempt where the court had not yet determined the enforceability of the CID. See *Hines*, 2019 WL 4491313, at *4. However, failure to comply with a court order to enforce a CID will all but guarantee a finding of contempt. See *U.S. v. Tomoka Med. Lab, Inc.*, 2021 WL 3500807, at *3 (M.D. Fla. May 5, 2021), report and recommendation adopted, 2021 WL 3500618 (M.D. Fla. May 20, 2021).

Practical Tips for Responding to an FCA CID—So what should recipients do upon receipt of an FCA CID in this new enforcement climate? We offer six steps below to help manage the journey.

Issue a Litigation / Document Hold: An FCA CID provides a recipient direct evidence of a pending Government investigation, therefore triggering an obligation to preserve documents and information. CID recipients should carefully review the requests and identify custodians and locations where responsive information likely will be found. A document hold—one that advises recipients of their preservation obligations and identifies the appropriate channels for raising questions—should be disseminated to relevant employees and implemented through a company’s information technology systems. Routine document destruction policies should be suspended for files and emails that are implicated in the requests.

Document holds are not static. Periodic reminders should be sent to those affected by the hold, and tracked by a responsible person within the company (or its outside counsel). The scope of the hold should also be addressed periodically, to ensure that relevant material is appropriately protected from destruction.

Double-Check That the Statutory Requirements Have Been Met: Was the FCA CID properly served? Does it state the nature of the conduct constituting the alleged violation of a false claims law, and the applicable provision of law alleged to be violated? Is there a potential nexus between the request and a past or pending FCA lawsuit? Has a witness already given FCA CID testimony in connection with the same investigation? A careful review of the type of request being made in the CID (e.g. documents, interrogatories, or testimony) against the statutory provisions that apply to that particular request, can uncover a technical basis for pursuing a legal challenge to the CID.

Clarify and Negotiate the Scope of Document Requests and Interrogatories and the Time for Responding: In the interests of efficiency, and mindful of the burdens and disruptions on recipients, most DOJ attorneys issuing CIDs will negotiate the scope and timing of responses to requests for documents. Defense counsel should consider the internal and external resources required to collect, review, and produce responsive documents, and develop a realistic timeline for a response. Rolling or phased priority productions are a common strategy for addressing voluminous requests. As with discovery in civil litigation, FCA CID

interrogatory and testimony requests may also present questions and ambiguities that should be resolved before responding. Agreements on scope, timing, and logistics should be promptly memorialized in writing.

Consider Separate Counsel for Individuals Providing Testimony Pursuant to a CID: The FCA CID statute authorizes taking testimony from individuals and expressly limits who may attend the examination. 31 USCA § 3733(h)(2). Significantly, the statute does not guarantee a right for corporate counsel to be present; rather, the Government and the person giving the testimony must agree to allow the participation of anyone not specifically identified in the statute. See *In re Oral Testimony Of A Witness Subpoenaed Pursuant To Civil Investigative Demand No. 98-19*, 182 F.R.D. 196, 203-04 (E.D. Va. 1998). And an employer need not be given any notice of a CID served on a current or former employee.

Accordingly, when a company learns that an employee has been served with a CID for testimony, it may wish to consider asking the Government and witness if the company’s attorney may attend in order to protect corporate privileges and protections during the testimony. Alternatively, a company may decide to provide the employee with his or her own counsel for purposes of giving testimony. While counsel’s duty is to protect the interests of the individual employee, he or she can also be cognizant of areas where the employee is obligated to protect corporate privilege.

Determine Whether to Notify Insurers and Seek Defense Costs: Responding to an FCA CID can be costly, even when the Government’s investigation does not lead to an FCA lawsuit. CID recipients should consider whether their insurance policies may provide reimbursement for defense costs, and be mindful of the importance of providing timely notice to their insurer. A recent Superior Court of Delaware decision found an insurer was required to advance about \$18 million in defense costs incurred in defending an FCA investigation into federally backed mortgage insurance programs. The Court concluded that an FCA CID was a “claim” under a management liability policy that defined claim as “a civil, administrative, or regulatory investigation against the Insured.” See *Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 3662269, at * 2 (Del. Super. Ct. Aug. 18, 2021). Insurance coverage is often a nuanced issue, but early notice is a key foundation for successful claims.

Investigate, Review, and Produce Your Responses: Before turning over information or documents to the

Government, an FCA CID recipient should carefully review its responses to protect applicable privileges and protections. Where a recipient seeks to perform a more targeted review of documents (for example, by reviewing only documents hitting on screening privilege terms), it should consider entering into a non-waiver and inadvertent disclosure agreement with DOJ under Fed. R. Evid. 502.

Perhaps most importantly, an FCA CID recipient should evaluate whether the Government's requests—and the company's responses thereto—indicate potential exposure under the FCA. Outside counsel can be instrumental in assessing whether the company faces liability, by helping to interpret the requests themselves, by engaging with the DOJ attorneys to understand the Government's focus and concerns, and by conducting a privileged, internal investigation of the matters implicated in the CID. Additionally, counsel can assist a company in formulating appropriate litigation hold protocols for the matter, coordinating counsel for employees as needed, and developing information to respond to potential qui tam litigation.

In Conclusion: CIDs Today Are More Frequently Encountered and Difficult to Chal-

lenge—Today's Government contractor must be savvy to the evolution of FCA investigation and enforcement, and the increasing potential to encounter a CID at some point. CIDs are simply more commonly used now than they were 15–20 years ago. Assuming the Government has followed the authorizing statute's clear procedures, recipients will find it difficult to challenge CIDs—and there are consequences for noncompliance. Because CIDs clearly signal that an FCA investigation is underway in some form, Government contractors should promptly engage legal counsel to assist in navigating their CID responses.



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