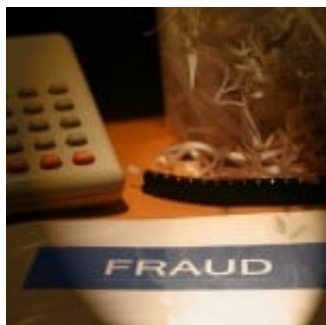


Have You Received a Civil Investigative Demand (CID)? How Should a Health Care Provider or Supplier Respond When Receiving a Civil Investigative Demand?



(March 3, 2020): In recent years, Federal prosecutors around the country have increasingly relied on Civil Investigative Demands when investigating civil False Claims Act matters and cases.^[1] It's easy to see why the government has continued to focus its civil enforcement efforts on alleged violations of the False Claims Act. Let's look at the numbers -- it's been another banner year for the civil False Claims Act. According to the Department of Justice (DOJ), the government secured more than \$3 billion in settlements and judgments in False Claims Act cases for Fiscal Year ending September 30, 2019. More than \$2.6 billion of this \$3 billion is related to health care matters and cases. As DOJ notes, this is the tenth consecutive year that health care False Claims Act settlements and judgments have exceeded \$2 billion. As these statistics show, health care providers and suppliers are the primary targets of both whistleblower and government-initiated actions under the False Claims Act.^[2] To investigate alleged violations of the False Claims Act, Federal prosecutors have been increasingly relying on Civil Investigative Demands as a pre-litigation discovery tool. This article examines the government's current use of Civil Investigative Demands in health care False Claims Act matters and cases and discusses the steps you should take if you are the recipient of one of these administrative subpoenas.

I. What is a Civil Investigative Demand?

A Civil Investigative Demand is a formal administrative subpoena that is issued by an Assistant U.S. Attorney (or a DOJ Civil Division Trial Attorney) in connection with the government's investigation of a False Claims Act matter or case. In the context of a government-initiated False Claims Act investigation, this discovery tool by prosecutors to assist them in deciding whether or not to file suit under the statute.^[3] Alternatively, if a False Claims Act case has already been filed by a whistleblower, DOJ prosecutors may choose to issue one or more Civil Investigative Demands to gather additional information that may be necessary to decide whether or not to intervene in the *qui tam*^[4] case that has been filed. Under 31 U.S.C. § 3729-3733(1)(A)-(D), the government can use a Civil Investigative Demand to require a person:

(A) to produce such documentary material inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

II. The Evolution of Civil Investigative Demands:

- **False Claims Amendments of 1986.**

With the passage of the “***False Claims Amendments of 1986,***” [\[5\]](#) the Attorney General of the United States was given the authority to issue Civil Investigative Demands in connection with the investigation of civil False Claims Act matters. Unfortunately, this discovery tool was only infrequently utilized by DOJ due to the fact that the Attorney General had to personally authorize a Civil Investigative Demand before it could be issued. From a practical standpoint, this restriction made it very difficult for line prosecutors to utilize this discovery tool. In order to do so, an Assistant U.S. Attorney would have to traverse multiple levels of DOJ management in order to even present a Civil Investigative Demand request for the consideration of the Attorney General. Not surprisingly, only significant, large-dollar loss False Claims Act matters typically made it to this level and resulted in the issuance of a Civil Investigative Demand.

- **Fraud Enforcement and Recovery Act of 2009, P.L.111-21 (FERA).**

On May 20, 2009, the “***Fraud Enforcement and Recovery Act of 2009***”[\[6\]](#) was signed into law by President Obama. Among its provisions, FERA greatly modified the rules under which Civil Investigative Demands could be issued. Under FERA:

Delegation of Civil Investigative Demand Issuance Authority – Under FERA, the Attorney General can delegate his / her authority to Issue Civil Investigative Demands in False Claims Act matters and cases. In practice, the authority to issue a Civil Investigative Demand has now been delegated to Assistant U.S. Attorneys investigating alleged violations of the False Claims Act.

Sharing of Information Obtained Using a Civil Investigative Demand with a Qui Tam Relator - FERA permitted the Attorney General (or Designee) to share information obtained

using a Civil Investigative Demand with a qui tam relator if the Attorney General (or Designee) determines it is necessary to do so as part of any False Claims Act investigation.^[7]

The redelegation of authority to issue Civil Investigative Demands from the Attorney General to a designee was immediately met with opposition from a variety of industry groups. By letter dated July 13, 2009, several dozen national associations and large corporate entities (ranging from the American Hospital Association to Exxon Mobile Corporation), wrote to Attorney General Eric Holder to express their concerns that the redelegation of issuance authority may lead to problems with:

“consistency, coordination, institutional memory, and a variety of other issues that overbroad delegation would raise.”^[8]

Ultimately, the Attorney General did, in fact, choose to delegate the authority to issue Civil Investigative Demands to U.S. Attorneys around the country.^[9] U.S. Attorneys have further redelegated this authority to Assistant U.S. Attorneys in their offices.

III. Can Information Obtained Through a Civil Investigative Demand be Shared with Criminal Prosecutors?

The short answer is **“Yes,”** documentary materials, answers to interrogatories and transcripts of oral testimony obtained under a Civil Investigative Demand can be shared with criminal prosecutors. In fact, all of the information gathered through a Civil Investigative Demand can be used for **“official use”** in **“furtherance of a Department of Justice investigation or prosecution of a case.”^[10]**

A common concern expressed by defendants in a case is that perhaps the government is using the civil investigative process (such as the issuance of a Civil Investigative Demand) as a **“stalking horse”** to obtain information, answers to interrogatories and civil testimony in a case that would be unavailable (or not easily obtainable) if the case were pursued criminally. Unless a defendant is able to show that a civil action has been brought solely to obtain evidence for a criminal prosecution, courts have not been sympathetic to the stalking horse argument.^[11]

For additional guidance on the risks presented when dealing with parallel civil and criminal

investigations, you may wish to review our [article](#) titled ***“A Civil Investigative Demand Issued to You or Your Medical Practice is Serious Business. Understand Your Level of Risk Before Responding to the Government’s Investigation.”***

IV. How Should a Health Care Provider or Supplier Respond When Receiving a Civil Investigative Demand?

Upon receipt of a Civil Investigative Demand, you should immediately contact experienced legal counsel to guide you in your response. When selecting legal counsel, it is essential that that ensure that the attorney representing you is both experienced and knowledgeable with respect to the use of the Civil Investigative Demands and the government’s use of the False Claims Act. For example, is the attorney a former Assistant U.S. Attorney? Is the attorney an experienced False Claims Act lawyer? Has the attorney recently represented physicians and other health care providers in responding to a Civil Investigative Demand? Does the attorney have experience managing large, complex document productions in a cost-effective fashion? Has the attorney provided a thorough explanation of the subpoena response process? Once you have selected a qualified, experienced attorney to represent your interests, legal counsel will likely take the following actions:

- **Instruct you to refrain from engaging in any document destruction activities until the full scope of the government’s inquiry can be determined. You want to avoid taking any action that could be misconstrued as obstruction of justice.**
- **Carefully review the specifications of the Civil Investigative Demand and work with you to determine where responsive documents, electronic records and other materials may be located.**
- **Contact the issuing Assistant U.S. Attorney and obtain an extension (if necessary) so that you can comply with the government’s requests. Your legal counsel may also be successful in getting the government to narrow the scope of documents being sought and may be able to learn how the government views your role (and potential exposure) in the current False Claims Act case. For instance, does the government view you as a target, a subject or a witness of their investigation.**
- **Conduct a privileged, internal review of your business arrangements, medical records, coding and billing practices (the nature of the internal review will depend in large part on the focus of the government’s investigation as reflected by the specification of the Civil Investigative Demand). To the extent that you do, in fact, have a problem, your attorney will likely want to obtain a clear picture of the nature and scope of any overpayment or improper conduct so that remedial action can be taken.**
- **Depending on the internal review findings, is there potential criminal exposure in this case?**

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Liles Parker attorneys have extensive experience representing health care providers and suppliers in government audits and investigations. Several of our attorneys are former prosecutors and are highly experienced handling False Claims Act matters and cases. If you are the recipient of a Civil Investigative demand it is imperative that you immediately contact qualified, experienced counsel to represent you when responding to this administrative subpoena. **For a free consultation, please give us a call at: 1 (800) 475-1906.**



Robert W. Liles serves as Managing Partner at the health law firm, Liles Parker, Attorneys and Counselors at Law. Liles Parker attorneys represent health care providers and suppliers around the country in connection with False Claims Act issues and investigations. Are you the recipient of a Civil Investigative Demand? If so, we can help. [For a free initial consultation regarding your situation, call Robert at: 1 \(800\) 475-1906.](tel:18004751906)

[1] 31 U.S.C. § 3729-3733.

[2] Notably, most of these False Claims Act recoveries were generated by whistleblower actions. A total of 633 new whistleblower cases were filed in FY 2019. In contrast, the government filed 146 new False Claims Act cases in FY 2019 (where no whistleblower was involved).

[3] A Civil Investigative Demand can only be issued by a Federal prosecutor prior to the government filing of a False Claims Act case or making a decision whether to intervene or not intervene in a case. After a case is filed or an election is made, the government may only utilize traditional civil litigation discovery tools.

[4] In a “Qui Tam” action, a private party, referred to as a “Relator” (or more commonly as a “Whistleblower”) files a case under the civil False Claims Act on behalf of the government. If a qui tam action is successful, the Relator can receive up to 25% of the recovery (in an intervened case) or up to 30% of the recovery (in a non-intervened case).

[5] Public Law 99-562, 100 Stat. 3153 (October 27, 1986), reprinted in, 10A USCCAN (December 1986). A copy of the *False Claims Act Amendments of 1986* can be found at:

<https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3153.pdf>

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[6] Public Law 111-21, 123 Stat. 1616 (May 20, 2009). A copy of the *Fraud Enforcement and Recovery Act of 2009* can be found at: <https://www.congress.gov/bill/111th-congress/senate-bill/386/text>

[7] Prior to the passage of FERA, the Attorney General was only able to share information obtained using a Civil Investigation Demand after obtaining authorization to do so from a U.S. District Court, after showing “substantial need” that the sharing of the information was in “furtherance of its statutory duties.”

[8] Letter from associations and industry representatives to Attorney Eric Holder, dated July 13, 2009.

<https://www.nacdl.org/getattachment/746c7dca-6386-4e47-a980-717132ee21e0/cidscoalitionletter.pdf>

[9] 28 C.F.R. Part 0, Subpart Y and Appendix. https://www.law.cornell.edu/cfr/text/28/appendix-to_subpart_Y_of_part_0

[10] 31 U.S.C. § 3733(l)(8).

[11] See *United States v. Kordel*, 397 U.S. 1, 11 (1970). Also see *United States v. Stringer*, No. 06-30100 (9th Cir. Apr. 4, 2008). In the Stringer case, the 9th Circuit reversed a lower court decision to dismiss a criminal indictment based on the government’s alleged violation of the defendant’s due process rights resulting from improper behavior when conducting a parallel civil / criminal investigation.