



Responding to a CID

HEALTH CARE COMPLIANCE ASSOCIATION
HEALTH CARE ENFORCEMENT & COMPLIANCE CONFERENCE

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What is a CID?

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What is a Civil Investigative Demand (CID)?

- A demand for documents or information in connection with a federal FCA investigation (31 U.S.C. § 3733)
- Primary tool used by the Department of Justice (DOJ)
 - DOJ, Civil Frauds
 - United States Attorney's Office
- To investigate allegations of fraud and determine whether to file a complaint or intervene in a *qui tam* case
- Issued during investigative stage (*i.e.*, pre-litigation)

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Three Types of CIDs

- Production of Documents
- Written Interrogatory Responses
- Sworn Oral Testimony

- Or a combination of the above

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Who is Subject to a CID?

- Anyone who the government believes is in possession of information relating to a FCA violation
 - Subject, Target, or Witness
- Absent a valid claim of privilege or narrowing the scope of the government's demand, the person **must** respond
- Failure to Comply = Federal Court Enforcement

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How are CIDs used by the Government?

- CIDs are used in different types of investigations
 - FCA Investigations
 - *Qui Tam (whistleblower)* Investigations
 - Generally, during seal period
 - Parallel Investigations
- CID scope is typically broad and comprehensive
 - Government will want to know about your entire organization
 - Government may be investigating different types of allegations
- Information and documents gathered can be shared
 - Amongst different governmental agencies
 - Civil Division investigators share CID results with Criminal Division
 - Info can also be shared with any *qui tam* relator

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Challenging a CID

- Government must follow standards and rules in issuing CIDs
 - Does investigation have a legitimate purpose?
 - Is the information relevant?
 - Is request overly broad and unduly burdensome?
 - Is the information sought already in the government's possession?
 - Was service proper?
 - Was a reasonable amount of time given to comply?
- However, Federal courts have mostly deferred to the judgment of those investigating (DOJ) as to what can be requested through a CID
- Challenges are costly (time, money, and good will)

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Responding to a CID

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Document Hold / Litigation Hold / Document Retention Notice

- Why do you need it?
- Sensitivities regarding language of the notice
- What to do with it?
 - Communicate to proper custodians
 - Communicate to the IT person who can preserve emails
- Any alternatives?

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Communications with the Government

- Timing and scope of CID response
- Who and what is the focus of the investigation?
- Cooperation in FCA Investigations
 - Different than a state survey – should be more defensive and strategic
 - Cooperation and communication do make process smoother, but should be directed by attorney taking direction from client decisionmaker
 - DOJ guidance on corporate cooperation

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Meet with Counsel to Develop a Response

- Requests for Documents
 - Rolling production
 - Document gathering for paper and electronic documents
 - Identify client point person, often compliance officer
 - Tracking document custodians
 - Tracking location of documents (e.g., shared drive, employee's local drive)
 - Method for tracking notes
 - Medical records
 - Electronic health records
 - Paper records
 - Looking for other helpful records (e.g., binders, nursing logs, pharmacy records, anything else to help)

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Meet with Counsel to Develop a Response

- Requests for Documents (continued)
 - Email review and production
 - Search terms
 - Custodians
 - Review for production
 - Other (e.g., voicemail, text messages, etc.)
 - What are they not specifically asking for but that falls within what is requested and that is helpful
 - Relevancy and Privilege Review Prior to Production
- Answering Interrogatories
 - Try to delay until after document review and production
- Depositions
 - Special considerations here to be discussed below

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CID Response and Internal Investigation

- Internal Investigation
 - Do you want to do one?
 - Who conducts it?
 - Communications with staff and others about the CID, including interviews
 - Attorney ethical consideration – Upjohn Warnings
 - Attorney client privilege
 - Attorney work product
 - Method for tracking notes
- Discovering issues or impropriety when responding to CIDs
 - Application of 60-Day Rule and reporting and returning overpayments

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Special Considerations



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Privilege and Confidentiality Issues

- The two realities when responding to CID for documents
 - Reality #1: Government investigative authority is broad
 - Reality #2: A page-by-page relevancy and privilege review is oftentimes impractical
- Types of Protections and Privileges
 - Attorney-Client Communications
 - Simply copying in-house lawyer is not sufficient
 - When privileged information get sent to outside party
 - Attorney Work Product
 - Highly confidential and other proprietary business information
 - HIPAA protected patient health information
- Special Category: Texts Messages
- Special Category: Compliance Advice

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Privilege and Confidentiality Issues (Cont'd)

- Inadvertent Disclosures
 - Clawback Agreements
- The importance of the Privilege Log
- Should privilege ever be **Waived**?
 - Facts and circumstances
 - Waiver is not required to receive cooperation credit

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Testimonial CIDs

- DOJ is limited to one, per person
 - Timing is important
 - Exceptions to the rule
- Voluntary interview vs. CID testimony
 - With a CID, there will be a transcript and/or video
- Does the witness need representation?
 - Attorney ethical obligations
 - Person can have a representative and a lawyer present
 - Former employees

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CIDs and Non-Parties

- Is being a “non-party” or “just a witness” a distinction without a difference?
- Seek assurances from the government throughout the investigation (preferably in writing)
- Cooperation credit
- Be proactive in responding to CIDs
 - Narrow the scope
 - Stress burden and proportionality
 - If costs and resources are an issue, say so
 - Seek court involvement when appropriate
 - Document your response efforts
 - They could be questioned much later

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When is Your Organization “In the Clear”?

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Thank you!

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