

Professional Perspective

How a Health-Care Provider Should Handle Civil Investigative Demands

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How a Health-Care Provider Should Handle Civil Investigative Demands

Contributed by [James Holloway](#), Baker Donelson

The U.S. Department of Justice is authorized by the [False Claims Act](#) to issue [Civil Investigative Demands](#), and the DOJ has made increasing use of CIDs to obtain information from health-care providers. As a provider will ignore a CID at its peril, this article will review the basic considerations that provider's counsel should keep in mind when developing and submitting a response to a CID.

Purpose of CIDs

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 a provider is the target of the fraud investigation, but at a minimum it indicates that the DOJ believes the provider has 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, the lenient standards for enforcing a CID make them difficult to avoid. If the recipient of a CID refuses to comply, the FCA authorizes the DOJ to petition a court to order compliance.

Enforcement of CIDs

An April 2019 Order from the Eastern District of California, [United States v. Picetti](#), highlights the difficulty of resisting a CID. In *Picetti*, 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. The physician declined to respond, asserting that the CID exceeded the DOJ's authority and that the investigation was unreasonable. The DOJ then petitioned to enforce the CID, and the court subsequently ordered that the physician must comply with the DOJ's request for information.

The *Picetti* court concluded that CIDs may be enforced like any other subpoena issued by a federal agency, noting that its scope of review was "quite narrow" and limited to three basic issues: whether Congress gave the agency the authority to investigate, whether the agency followed procedural requirements, and 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 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 that it was permitted under the FCA.

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

Finally, the court concluded that the CID requested information relevant to the 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

Determine Provider's Status

Because it is usually difficult to avoid a CID altogether, the preferred strategy is to respond to the CID carefully and intelligently. Initially, provider's counsel should determine whether the provider is a target or subject of the government's fraud investigation, or merely a witness who may have information regarding another person or company under investigation. Before responding to a CID, counsel should understand the provider's status in the government's investigation, because it will likely affect how the DOJ treats the provider during the course of responding to the CID.

Preserve Evidence

Counsel will also need to ensure that any documents requested by the CID are not lost, destroyed, or altered. It is important to preserve both hard copy records and various forms of electronic information, including emails, text messages, and other types of electronic data. Regardless of whether the provider is 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.

Narrow the Scope

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. If a provider operates in multiple locations, it may also be possible to narrow the geographic scope of the CID.

Further, it may be possible to narrow the number of record custodians encompassed by the CID. Sometimes the DOJ will issue 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 nature of 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.

Maintain Credibility

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

Manage the Response, but Respond

Receiving a CID is never a welcome event, but ignoring a CID is not a useful or recommended strategy. Providers and their counsel should take steps to manage the costs and burdens of response, while at the same time preserving their credibility, so the government's investigation is resolved as fairly, efficiently, and effectively as possible.