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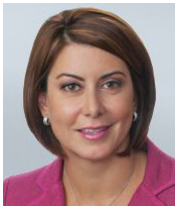
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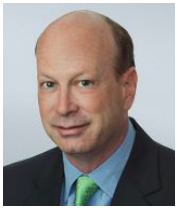
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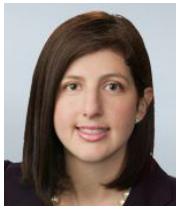
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# Top Ten Things the Health Care Industry Should Know about Civil Investigative Demands

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Civil Investigative Demands, or CIDs, are a favorite tool of the Federal Government to get information from all types of providers who bill federal payors. This information could form the basis of a civil or criminal lawsuit. CIDs are used by the government more frequently than ever before. Here are ten (10) things the health care industry should know about them:

**1. Civil Isn't Necessarily Limited to Civil.**
The Justice Department may serve a CID where there exists "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a False Claims Act investigation . . . ." 31 U.S.C. § 3733(a)(1). A CID is similar to a grand jury subpoena, but the government has more flexibility in using the information obtained pursuant to a CID because it could be shared with a qui tam whistleblower or government investigator looking into a potential criminal case, too. Therefore, documents or testimony produced in response to a CID could be used against a health care provider in a criminal case.

**2. There Could be a Whistleblower in the Background.**
A CID could be served because a qui tam lawsuit has been filed by a whistleblower under the federal False Claims Act. A whistleblower or "relator" could be anyone with special knowledge supporting a claim that false claims were submitted to the government for payment. The whistleblower brings the action—referred to as a qui tam action—on behalf of the government. The government keeps the funds recovered, but shares with the whistleblower a percentage of the recovery. These actions can be lucrative and have grown to be one of the top tools used by the government to recover monies wrongfully paid. A whistleblower lawsuit could be filed under seal so the provider would not be aware of it when a CID arrives. A CID could request information that may be shared with the whistleblower and could be used by the government to determine what approach, if any, to take with the lawsuit. The government could decide to join in the lawsuit and to provide more resources for the lawsuit. Even if the government does not decide to intervene, the lawsuit could continue with only the whistleblower's resources. Whistleblowers could be former employees, patients, health care providers, or anyone with special information concerning a false claim to the government.

**3. Consider a Team Approach.**
Because CIDs can involve numerous legal issues and have criminal and civil implications, one way to respond is to have the health care counsel coordinate the activities of any experts and other counsel. For example, you may need criminal law advice, advice related to evidentiary privileges, and substantive health law advice. You may only need consulting advice from a

defense lawyer in the beginning, but that counsel needs to be aware of and provide input as to what is ultimately produced to the government to manage any potential criminal exposure. Having a lawyer on your team well-versed in which privileges may apply to certain documents and information is also important. Additionally, knowing the substantive health care law is critical because it is the prism through which your response must be made. Consider the level of experience of those lawyers handling CIDs and their approach and organization. It is helpful if they have done this before, have a plan, and know what to expect.

**4. Establish a Good Rapport with the Assistant United States Attorney.**

The Assistant United States Attorney issuing a CID may have the ability to make this a more or less miserable process for the health care provider. It is important that your counsel contact the Assistant United States Attorney assigned to your CID early on to establish a good rapport and working relationship. This will be useful for seeking extensions, asking for reasonable limitations of the scope of a CID, settlement negotiations, and trial if you have to go there. Zealous advocacy can also include skillful diplomacy; this is incredibly important when the government has such a massive ability to crush a health care business with fines, penalties, repayments, exclusions, and even imprisonment.

**5. You May be Able to Limit the Scope of the Requests.**

CIDs can contain broad requests, and gathering the information can be very onerous for a provider in the time frames requested. Most federal prosecutors are open to requests in good faith to extend the time and limit the scope for the production in response to a CID. In approaching the prosecutors, it is important to be reasonable and have done your homework as to how much time you realistically need to respond. In order to lessen the burden, a health care provider's legal counsel may also want to seek a rolling discovery plan that produces certain categories of documents over time or as obtained. You may also ask the government to limit the requests to certain documents or information because once those documents or information are produced, the government may not need a broader production.

**6. You May be in it for the Long Run.**

Responding to CIDs can take months or even longer if the Assistant United States Attorney allows a longer period for production. After that, even if the provider produces the documents quickly, it could take months or even years for the government to respond, or they may not respond at all. The government's response could be nothing, a civil lawsuit, a federal criminal indictment, settlement discussions, or some combination of these. Settlement discussions or a lawsuit could take months or years. The provider should be prepared for a particularly long process with some period of a lull followed by periods of heavy activity.

**7. Make a Financial Plan.**

It can be expensive to hire counsel or even a team of legal advisors to handle a CID response. It is important to discuss attorneys' fees and costs before hiring the law firm and to understand how the process works. Most law firms bill hourly and monthly. Most will seek a retainer up front for a substantial project. However, some firms may be willing to plan in advance with the providers (especially ones with long histories of on-time payments with the law firm) and consider accepting payments over time so that the provider can better manage the cost of responding to a CID. For example, some firms may consider accepting a set fee paid per month to be charged against accumulating accounts receivable so the provider can have some predictability during this time period and can get caught up on payments during the lulls in the process.

**8. Be Mindful of Conflicts.**

There could be several parties involved in responding to a CID. For example, a CID could be served on a legal entity and individuals. Also, the legal entity could have active and passive investors, some with more or less potential liability. It is important to assess up front whether a joint representation is appropriate to save costs, or if separate counsel is a better option. At the outset, or later on in the process, it may be necessary or appropriate for certain parties to retain their own counsel.

**9. Consider Getting a Few Steps Ahead of the Government.**

When a provider receives a CID, the government is looking into whether any improper activity on the part of the provider resulted in false claims to the government. Sometimes, the requests or questions in a CID may give insight to the provider as to the area of inquiry. Other times, the questions may be rather broad. In any event, the provider can engage the appropriate experts and health care counsel to conduct an investigation into the provider's activities to determine whether compliance problems exist. If providers engage these experts through their legal counsel, the information shared may be protected by the attorney-client privilege and the work product doctrine. Depending upon the outcome of the provider's internal investigation, the provider may decide to engage, through their legal counsel, in early discussions with the government concerning defenses, or, if liability has been found, approach the government with a settlement discussion and repayment plan. If compliance problems are found, they may be able to be corrected earlier to limit the extent of the health care provider's exposure.

**10. Be Aware of What is Going on in Your Industry and Get Your House in Order.**

Be aware of any enforcement focus in your industry through annually reviewing the OIG Work Plan and checking on compliance or enforcement news concerning your industry. If you find an area the government is focusing on, then focus compliance efforts in that area with inside and possibly outside advice. Again, if you use a third party to review compliance, you should consider doing so via legal counsel so that you may be able to maintain privileges in what you find.

There are more in depth considerations on these points to be considered when a health care provider receives a CID. However, these are intended to point a health care provider in the right direction. In light of the exponential growth in the government's use of CIDs, it may behoove providers who have not even received a CID to review these points. Even more important, all health care providers who bill government payers should make sure their health care compliance plan is in place, is robust, and is being implemented. A culture of compliance is the best defense.