



Received a Civil Investigative Demand? Key Steps to Protect Your Business

A federal prosecutor's main investigative weapon is a grand jury subpoena. Before 1983, the U.S. Department of Justice (DOJ) white-collar prosecutors shared Rule 6(e) grand jury materials with civil attorneys investigating False Claims Act (FCA) theories arising out of the same events. The U.S. Supreme Court held that Rule 6(e) criminal grand jury materials could not be shared with civil attorneys absent a court order.¹

This ruling effectively removed DOJ's ability to independently investigate civil fraud.

In response, Congress passed 31 U.S.C. § 3733 in 1986, which allows the "Attorney General, or a designee"² to issue a Civil Investigative Demand (CID) to "any person" that he believes is "in possession, custody, or control of any documentary material or information relevant to a" FCA investigation.³ A CID may request documents, testimony, or information through interrogatories.⁴

One of the main differences between a CID and a grand jury subpoena is how widely materials produced in response to a CID may be shared. The statute expressly allows the civil custodian of materials received in response to a CID to share these materials with DOJ prosecutors or other civil investigators for "official use."⁵ Materials provided in response to CIDs may also be shared with a *qui tam* relator where appropriate.⁶

If a party fails to comply with a CID, the government may file an action to enforce it.⁷ Similarly, a party who receives a CID may file an action to modify or set aside the CID within 20 days of service, or before the return date specified in the demand, whichever is sooner.⁸ Actions to enforce or set aside a CID may be filed in any federal district court where the CID target resides, is found, or transacts business.⁹

Coordination Between Criminal and Civil Attorneys

The DOJ has long had policies that encourage the coordination of criminal and civil investigations.¹⁰ Each U.S. Attorney's Office is urged to develop policies that encourage civil attorneys to communicate with white-collar prosecutors concerning matters that present potential civil and criminal liability.¹¹ Where appropriate, civil attorneys and criminal prosecutors should use investigative techniques that maximize their ability to share information across divisions.¹² CIDs may be issued even when there is an ongoing grand jury investigation into the same events.¹³

This cooperation was further encouraged through the creation of DOJ's National Fraud Enforcement Division¹⁴, which is designed to help "the Department leverage[s] the full range of tools – civil and criminal – to combat fraud against taxpayer dollars."¹⁵

Strategies For Responding to Civil Investigative Demands

The broad scope of information sharing and DOJ's recent expansion of its fraud-fighting efforts should get the attention of any entity receiving a CID. Recipients and their counsel should work to determine whether there are parallel efforts within DOJ or between the DOJ and state or local authorities and, if so, carefully consider the response to the CID. In light of these concerns, here are some strategies companies should keep in mind when responding to CIDs:

- Time is of the essence. Early contact with government counsel and an analysis of the nature and scope of the CID are critical. Decisions about moving to modify or set aside should be made very early in light of the 20-day deadline.¹⁶
- Analyze the CID to determine the nature of the underlying civil investigation. The fact that your client receives a CID does not mean that the client is the focus of the investigation. CIDs may be used to gather information from third-party custodians that possess relevant information.
- Generally, government lawyers will work with responding counsel concerning response deadlines and the scope of the request. During initial conversations with your client, it is important to assess the client's assessment of the request, the volume and types of responsive materials sought, and whether the request appears – from the client's perspective – to be overly broad or to require

excessive work, as well as the reasons for that assessment. The Assistant U.S. Attorney may be willing to provide insight into the scope of the investigation and your client's connection with the subject matter, including whether your client is the focus or merely a document custodian. Even if your client is the focus, establishing a relationship with the attorneys involved will pay dividends for your client.

- Efforts to informally limit the scope of the CID requests are often successful, which has two benefits: it reduces the workload and it indicates where the government is focused. A prompt meet-and-confer with government attorneys can be useful in explaining the burdens that responding to the requests will place on your client. Offer to sequence, or "roll" the production in ways that allow the government attorneys to get the highest-priority material first while minimizing the cost to your client.
- If you cannot adequately reduce the scope of discovery by agreement, carefully analyze whether you can assert objections to production. Notably, any objection to a grand jury subpoena or discovery request issued pursuant to the Federal Rules of Civil Procedure is available to the recipient of a CID.¹⁷ A common defense to production would be that the response would impose an undue burden on your client. You may also challenge the reasonableness or scope of the requests. Your client may also assert the attorney-client privilege or work-product protections in objecting to production. Where there are testimonial issues associated with all or some of the requests, you should carefully consider your client's Fifth Amendment right against self-incrimination. Any objections must be tailored to the specific request (no blanket objections) and specify how the response may incriminate your client.

If you suspect that your client is the target and cannot get the information from the government attorney, you have the option to request a "cold-comfort letter" from the DOJ. Such letters request a statement that the Department does not intend to pursue enforcement against your client. A cold comfort letter is, however, weak assurance. They are only a statement of Department intent at that time by that specific U.S. Attorney's Office and fall well short of any formal or binding settlement.

This blog was drafted by [Stephen Wadsworth](#) and [Pat McInerney](#), members of the Spencer Fane White Collar Defense and Investigations Group. For more information,

visit spencerfane.com.

¹ *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 446 (1983).

² The Attorney General has generally delegated authority to issue CIDs to United States Attorneys; Branch, Office, and Staff Directors; and Attorneys-in-Charge of Field Offices. 28 C.F.R. § Pt. 0, Subpt. Y, App. § 1(c)(2). United States Attorneys may redelegate authority to issue CIDs to Civil Chiefs or other Assistant U.S. Attorneys who supervise other Assistant U.S. Attorneys. 28 C.F.R. § Pt. 0, Subpt. Y, App. § 1(d).

³ 31 U.S.C. § 3733(a)(1).

⁴ 31 U.S.C. § 3733(a)(1).

⁵ 31 U.S.C. § 3733(i)(2)(B). Civil discovery should not be abused or issued merely as a pretext for use in a criminal investigation. Justice Manual 1-12.000, *available at* <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>

⁶ 31 U.S.C. § 3733(a)(1).

⁷ 31 U.S.C. § 3733(j)(1).

⁸ 31 U.S.C. § 3733(j)(2).

⁹ *Id.*

¹⁰ AG Memorandum (July 28, 1997) (encouraging coordination of criminal, civil, and administrative investigations);

¹¹ Justice Manual 1-12.000, *available at* <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>

¹² *Id.*

¹³ *United States v. Witmer*, 835 F. Supp. 208, 217–18 (M.D. Pa. 1993).

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<https://www.whitehouse.gov/presidential-actions/2026/03/establishing-the-task-force-to-eliminate-fraud/>

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<https://www.justice.gov/ag/media/1435311/dl?inline> at 3

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31 U.S.C. § 3733(j)(2).

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31 U.S.C. § 3733(b)(1).