

Under Scrutiny:

SHB's Government Enforcement & Compliance Update

MAY 21, 2009



AMENDMENTS TO FALSE CLAIMS ACT STRENGTHEN GOVERNMENT'S INVESTIGATIVE ARSENAL: CIVIL INVESTIGATIVE DEMANDS FOR DOCUMENTS AND TESTIMONY ARE MADE MORE EASILY AVAILABLE TO GOVERNMENT ATTORNEYS

On May 20, the Fraud Enforcement & Recovery Act of 2009 became law over President Barack Obama's signature. While the new legislation contains several provisions that will have far reaching impact on liability under the False Claims Act (FCA), this alert focuses solely on a lesser noticed provision that creates a potent tool for assistant U.S. attorneys deciding whether a particular case merits intervention—a much stronger civil investigative demand (CID) provision.

The revisions authorize the U.S. attorney general (AG) to delegate approval authority for the issuance of a CID—for documents and testimony—to his or her designee, which is expected to greatly increase the use of this powerful investigative tool. The bill also provides for sharing of any information received from a CID with a relator and with other government agencies “for official use.”

Under the revised provision, the AG, or his designee, is authorized to issue CIDs for documents, written interrogatories and oral testimony. Because CIDs can be issued before a complaint is filed and even before intervention in an FCA case, the courts consider them investigative tools, not discovery devices. Thus, courts accord the government broader discretion in the use of CIDs than would otherwise be available under traditional discovery rules. Confidentiality orders from other civil litigation will not foreclose disclosure under a CID.

Company employee testimony may be sought through a CID, although oral examinations are limited to one per witness. Attendance is limited to the person giving the testimony, his or her attorney or representative, the government attorney, and any person who may be agreed on by the government attorney and the person giving the testimony.

Company counsel has no right to attend the proceeding, unless counsel is also representing the witness. The Department of Justice (DOJ) generally objects to company counsel attendance. During the course of the examination, counsel may object only on the grounds of a constitutional or other legal right or privilege, including the privilege against self-incrimination. Transcripts are not readily available; the witness must pay for a copy and the AG, deputy AG, or an assistant AG may limit access to inspection for “good cause,” a term not defined in the statute.

GOVERNMENT ENFORCEMENT & COMPLIANCE

Our clients face unprecedented enforcement scrutiny and novel legal theories. Today, government enforcement actions can include civil as well as criminal investigations and litigation. They can involve a host of independent actors including federal and state prosecutors, regulators, whistleblowers and their counsel, and class-action attorneys. These cases must be defended under the watchful eye of investors and the public.

Our Government Enforcement & Compliance Practice consists of former prosecutors -- including a former U.S. Attorney, former Justice Department officials and even former corporate executives -- who counsel and defend companies, their executives and employees in the full range of criminal, civil and regulatory government enforcement actions at the state and federal level. We counsel clients on how to avoid enforcement scrutiny. When investigations do arise, however, we work with our clients to resolve it as efficiently, cost-effectively and quietly as possible.

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MAY 21, 2009 - PAGE 2

The newly enacted FCA changes are expected to dramatically alter the government's approach to investigating FCA cases and significantly enhance its power to obtain evidence. CIDs may eclipse use of the more familiar Office of Inspector General (OIG) subpoenas because CIDs can compel testimony whereas the OIG subpoena can compel documents only. CIDs are also likely to prove a more attractive investigative tool than grand jury subpoenas because CIDs are not subject to the strict confidentiality provisions of grand jury subpoenas. The DOJ is sure to take full advantage, so companies should expect to see an increase in the issuance of CIDs, as soon as Attorney General Eric Holder appoints his designees.

CIDs present a special risk to companies because recipients may not appreciate the potential consequences of any documents or testimony provided in response to one. Although the subpoena is issued in connection with a civil proceeding, a false statement made to the government can also potentially violate the criminal false claims act. Statements made in response to a CID can also constitute the basis for other crimes such as false statement, perjury or obstruction of justice.

The information obtained through a CID can be shared with prosecutors to advance a criminal investigation. Companies should consider educating their employees, agents and others who may receive CIDs, seeking evidence of the company's operations, about the risks and appropriate steps to take to protect their rights and interests, including notifying the company. All employers that might be subject to an FCA case should include in their employee training and compliance efforts appropriate information on responding to a CID. An uninformed or cavalier response to receipt of a CID can put the employee and the employer at great risk.

For more information about CIDs or any of the FCA amendments, please contact [David Douglass](#) or [Jennifer McGee](#), the authors of this alert, or any member of Shook, Hardy & Bacon's Government Enforcement Practice Group.

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The choice of a lawyer is an important decision and should not be based solely upon advertisements.

For additional information on SHB's Government Enforcement & Compliance Practice, please contact

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