

July 13, 2009

The Honorable Eric H. Holder, Jr.
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United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable David W. Ogden
Deputy Attorney General of the United States
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The Honorable Tony West
Assistant Attorney General, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Civil Investigative Demand Authority under False Claims Act, 31 U.S.C. § 3733

Dear Sirs:

We write concerning the changes to the Civil Investigative Demand (“CID”) provisions in the civil False Claims Act, 31 U.S.C. § 3733, that were recently enacted in the Fraud Enforcement and Recovery Act, P.L.111-21. These changes are designed to expand the use of CIDs by the Department of Justice (“DOJ”), and they raise several important policy issues that we believe the DOJ should thoroughly consider. We therefore petition the DOJ to institute a formal rulemaking process to establish Departmental regulations concerning the use of these powerful investigative tools, which will allow full and transparent consideration of the interests of all stakeholders in the fair and balanced use of CIDs.

1. Background on False Claims Act CID Provisions

Since 1986, the CID provisions of the False Claims Act have afforded the DOJ formidable tools to investigate potential fraud, including the ability to request documents, demand answers to interrogatories, and take depositions. The statute permitted only the Attorney General to issue CIDs, and as a result False Claims Act CIDs were used less frequently than in the Antitrust Division. By contrast, the Assistant Attorney General for the Antitrust Division is statutorily authorized to issue CIDs for antitrust investigations, and the Antitrust Division uses this authority frequently.

On May 20, 2009, President Obama signed P.L. 111-21. The new law makes several changes to the False Claims Act, including three important changes to the CID provisions. First, the legislation authorizes the Attorney General to delegate authority to issue CIDs. Second, the

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legislation permits the DOJ to share information obtained through use of a CID with relators upon a determination that “it is necessary as part of any false claims act investigation.” Third, the legislation permits broad use of such information, including:

any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

The unexpressed, though obvious purpose of these changes is to revitalize the Department’s use of CIDs in false claims investigations.

2. Issues Raised by New CID Provisions

The new CID provisions present a host of significant issues. We believe the DOJ should examine these issues carefully to ensure that its use of the CID provisions is fair to the targets of false claims investigations as well as third-party non-targets that may receive CIDs. We understand that the DOJ must also be mindful that its policies governing use of False Claims Act CIDs enhance its long-term enforcement mission and are consistent with policies governing issuance of Antitrust Division CIDs. The following are some of the issues that we believe require consideration.

(a) Delegation of CID authority. The new legislation provides that the Attorney General can delegate authority to issue CIDs, but provides no limit on such delegation. We are concerned about consistency, coordination, institutional memory, and a variety of other issues that overbroad delegation would raise. Limited delegation of authority to a single individual – such as the Assistant Attorney General for the Civil Division – would alleviate most or all of these concerns. The Antitrust Division, similarly, does not delegate below the level of the Assistant Attorney General its authority to issue CIDs.

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(b) Criteria for issuing CIDs. The legislation does not provide guidance on the circumstances in which issuance of a CID is appropriate. Given the significant burdens that a CID can impose on a recipient, the DOJ should adopt general criteria to be employed in considering issuance of a CID. For example, the DOJ should consider guidelines of the sort employed by the Antitrust Division. Among other things, the Antitrust Division Manual specifies that “CIDs should be prepared after the theory of the violation being investigated has been carefully formulated and should request the information needed to develop and establish the violation in accordance with that theory. Additional breadth of scope is generally to be avoided as unnecessary” The Manual further provides that “Special care should be taken to keep CIDs served upon third parties as narrow as possible, consistent with the investigation’s goals.” *See* Antitrust Division Manual Chap. III, § E(1)(d).

(c) Concern for parallel criminal proceedings. The statute provides no guidance on the use of CIDs when there is a parallel criminal proceeding or investigation. “Official use” is defined to include communications “in furtherance of a Department of Justice investigation or prosecution of a case.” We urge the DOJ to consider issuing guidelines to guard against misuse of the CID provisions, and to ensure that CID information is not improperly employed to aid a criminal investigation. Moreover, CIDs seeking depositions or interrogatory answers in the face of pending criminal proceedings pose particularly important problems, because they can undermine Fifth Amendment rights and prejudice a defendant’s ability to defend, among other concerns. We urge the DOJ to consider a policy generally prohibiting depositions or interrogatories when criminal cases or proceedings are pending, absent extraordinary circumstances.

(d) Protection of CID information shared with relators and other third parties. The new legislation explicitly permits the DOJ to share CID information with relators, as well as a broad array of third parties, including state and local government agencies; witnesses; courts and other tribunals; Government investigators, auditors, consultants, and experts; counsel for other parties; and arbitrators and mediators. While the statute imposes strict custodial obligations on the DOJ to safeguard CID information and provides that CID information is exempt from disclosure under FOIA, no such obligations are binding on relators and other third-party recipients of CID information. This raises serious concerns that CID information might be released broadly once it is shared with third parties. We urge the DOJ to promulgate comprehensive regulations to specify the circumstances in which CID information will be shared with relators and other third parties. We also urge that the DOJ issue regulations ensuring that any relators, relators’ counsel, or other third-party recipients of CID information are held to strict confidentiality rules.

This concern is particularly acute because a CID may seek information not only from the target of a false claims investigation, but also from innocent third parties with information

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deemed relevant to an investigation. Among other things, a failure to ensure confidentiality might chill nonparties' cooperation with the United States during investigations of potential violations, and might unfairly lead to inaccurate perceptions that a non-target was involved in a violation. We urge the DOJ to adopt strict guidelines to ensure that information elicited from innocent non-targets is protected from unnecessary disclosure.

(e) Protection of confidential information. It is crucial for the DOJ to protect the confidentiality of proprietary and competition-sensitive information provided in response to a CID, especially when such information is shared with relators or other parties. In this regard, the Antitrust Division Manual notes that "the disclosure of third-party confidential business information obtained through CIDs may cause third-party CID recipients to be less cooperative with the Division in the future." *See* Antitrust Division Manual Chap. III, § E(6)(b)(v)(c).

(f) Consistency with Antitrust Division and Other DOJ Policy.

The Antitrust Division has decades of significant experience in employing CIDs under legislative authority similar in many respects to the new False Claims Act legislation. We urge that the DOJ ensure its policies for False Claims Act CIDs are consistent with the policies and practices developed by the Antitrust Division, as well as other DOJ components that exercise CID authority.

3. Petition for Rulemaking

In light of the complexity and significance of the issues above, we believe the DOJ should adopt policies concerning its CID authority through a careful and transparent process. Accordingly, pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), we petition the DOJ to exercise its authority to engage in a formal rulemaking, with notice and comment. A deliberate and open process will ensure that all issues are identified and addressed, and ensure that the viewpoints of all with a stake in the False Claims Act process can be heard – including qui tam plaintiffs and their counsel, as well as the industries that have had significant experience with the False Claims Act over the past two decades.

We look forward to your prompt response. Please contact either of the following with regard to the matters raised in this letter: Matthew D. Webb, U.S. Chamber Institute for Legal Reform, (202) 463-5361, mwebb@uschamber.com; or Peter B. Hutt II, Akin Gump Strauss Hauer & Feld, (202) 887-4294, phutt@akingump.com.

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Sincerely,

Aerospace Industries Association
American Council of Engineering Companies
American Health Care Association/National Center For Assisted Living (AHCA/NCAL)
American Hospital Association
American Insurance Association
American Tort Reform Association
American Trucking Associations
Associated Industries of Florida
Construction Industry Round Table
Eli Lilly and Company
Exxon Mobil Corporation
Federation of American Hospitals
Florida Justice Reform Institute
GlaxoSmithKline
Lawyers for Civil Justice
Manhattan Institute
National Association of Criminal Defense Lawyers (NACDL)
National Association of Manufacturers
National Defense Industrial Association
Pennsylvania Chamber of Business and Industry
Pfizer, Inc.
Pharmaceutical Research and Manufacturers of America (PhRMA)
Property Casualty Insurance Association of America
Shell Oil Company
TechAmerica
The Heritage Foundation
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce
WellPoint, Inc.

cc: The Honorable Christine Varney
Assistant Attorney General, Antitrust Division