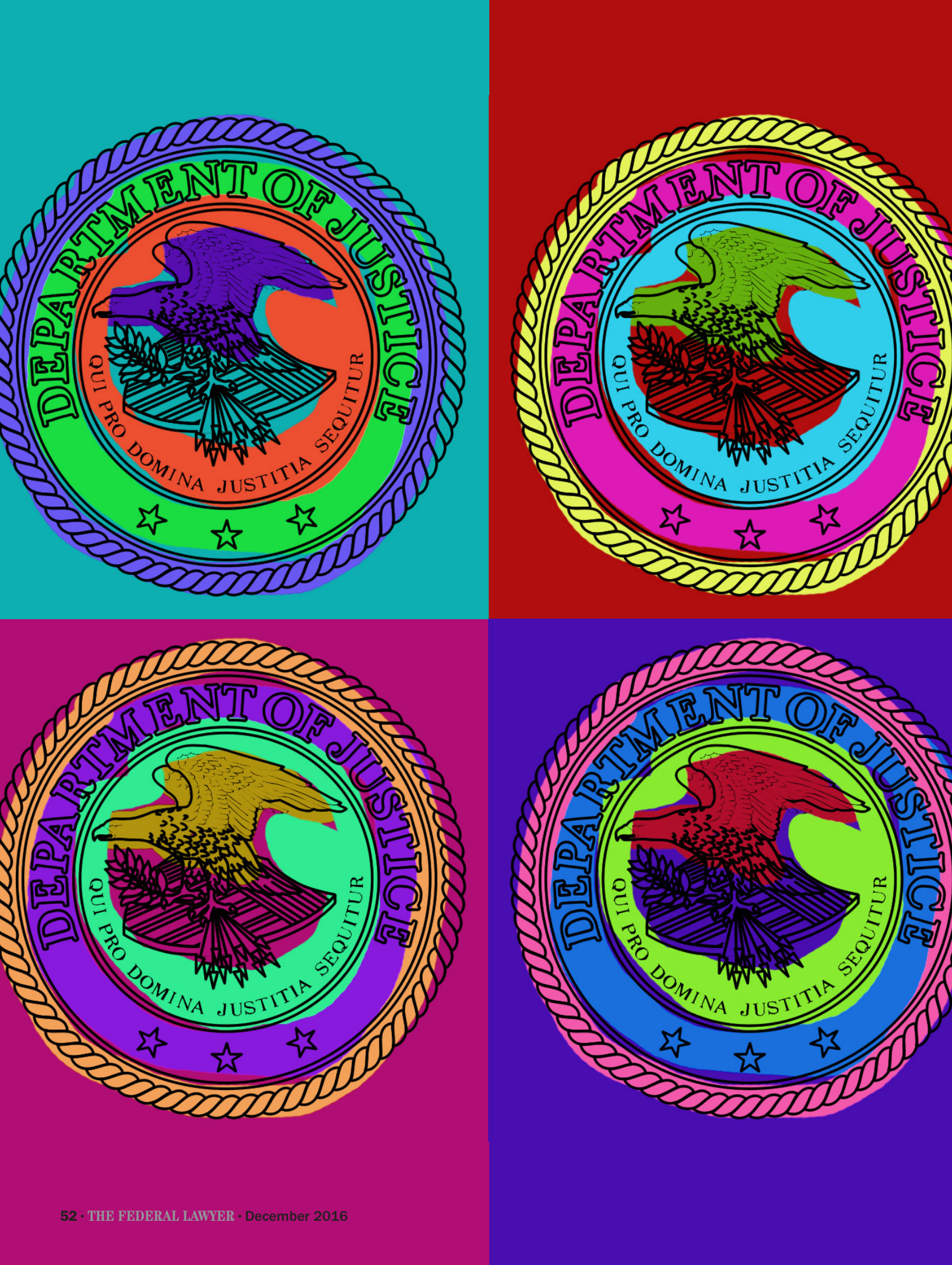
DEPARTMENT OF JUSTICE
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Andy Warholing It

A New Take on an 'Old' Tool

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Much has been written about the impact of the Fraud Enforcement Recovery Act's (FERA) amendments to the False Claims Act (FCA), particularly in connection with the expansion of authority for issuing civil investigative demands (CID). Since the enactment of FERA in 2009, practitioners operating in the fraud arena, whether civil or criminal, have likely noticed a significant increase in the use of CIDs. What used to be a rare occurrence is now a powerful tool for federal investigators and an alternative, in some cases, to the use of the federal grand jury to obtain records and sworn testimony. By utilizing CIDs, federal prosecutors are able to obtain information and testimony that is not subject to Rule 6(e) of the Federal Criminal Procedure Rules, thereby permitting the sharing of information between civil and criminal investigations without the need for a court order. While these changes in the FCA and federal fraud investigations may be bemoaned by defense counsel and putative FCA defendants alike, the use of CIDs can provide the basis for a more proactive, offensive approach to defending fraud allegations, whether criminal or civil in nature.

This article first outlines the applicable statutory provisions and related legislative history and case law governing the issuance of CIDs, followed by practical observations and examples of how to make a CID work also in favor of the defense. While typical challenges to CIDs remain (e.g., arguing burdens and breadth), some creative thinking and bootstrapping of analogous legal principles in the FCA context may provide an avenue for affirmative challenges to government authority that might just turn the process on its head.

Statutory Scheme

Many practitioners, even those new to the FCA statutory scheme, will likely be aware that the FCA provides broad civil administrative subpoena power to the government during its investigative process. The FCA commands that the "attorney general diligently shall investigate a violation under § 3729."[1] Prior to the 2009 FERA amendments, the CID provisions of the FCA could only be utilized by the attorney general and were seldom invoked. Through the enactment of FERA in 2009, however, Congress expanded the availability of CIDs to the attorney general "or a designee."[2] Since 2009, the key tool utilized by the government to investigate allegations of fraud is the CID.

Section 3733 of Title 31 details the vast powers conferred on the attorney general and her designees, including the power to compel sworn testimony, to answer interrogatories, and to compel the production of documents.[3] Notably, CID power extends to any person, including otherwise unrelated third parties, that "may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation."[4]

Like other government-issued subpoenas, recipients of a CID may petition the district court where the recipient resides to modify or set aside the CID.[5] The recipient's grounds for the petition "may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner."[6]

Most petitions to set aside or modify a CID center on the typical, run-of-the-mill objections to subpoenas, including complaints about the burden of production, legal privileges, and the breadth of requests. But the statutory language employed by the FCA provides an often overlooked grounds for setting aside a CID. This obvious language can be found in the very first sentence of 31 U.S.C. § 3733: "the attorney general, or a designee, may, *before commencing a civil proceeding under § 3730(a)* or other false claims law, or *making an election under § 3730(b)*, issue in writing and cause to be served upon such person, a civil investigative demand."[7] Put another way, though the FERA amendments greatly expanded the use of CIDs, it is important to note that the FCA nevertheless expressly limits the circumstances under which the government may use CIDs to those where the government has not yet commenced a civil proceeding under § 3730(a), another false claims law, or elected to intervene in a *qui tam* action. Once the government has made the decision to intervene in a *qui tam* action or decides to initiate a civil false claims action on its own accord, even in the absence of a live complaint, the government loses its ability to issue a CID and is restricted to the Federal Rules of Civil Procedure's ordinary mechanisms for discovery.[8]

The CID provisions, namely when and how a CID may issue, seem relatively straightforward, but in practice, the issues can become complex. As most practitioners in this area have experienced, FCA investigations can take years to result in an intervention or declination decision by the government. It has become commonplace in jurisdictions across the United States for district courts to grant extension after extension to the government to keep a relator's complaint under seal. On the one hand, given the demands and limitations placed on U.S. attorney's offices nationwide, FCA investigations can languish for almost unconscionable periods of time for unfortunate, but legitimate purposes. On the other hand, for complex investigations, extending the seal permits the government, and indirectly relators, to circumvent the limitations of the Federal Rules of Civil Procedure as well as the reciprocal obligations of discovery in civil litigation. The use of CIDs in this manner permits the government and relator to effectively engage in one-sided, virtually unfettered discovery for years before making an intervention decision. Given the right set of facts, the benefits of this "sneak peek" approach for the government and relator can be used as both a sword and a shield by perceptive defendants.

To fully appreciate the nuance of challenging a CID in this manner, we must first look to the nature and purposes of the sealing provisions outlined in the FCA. The FCA provides that:

> The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.[9]

For "good cause shown" paragraph (b)(3) permits the government to move for an extension of the seal, typically granted in 90- or 180-day increments. During this sealed period, the defendants do not receive a copy of the complaint, have no opportunity to respond to the allegations, and are not afforded the benefit of discovery under the Federal Rules of Civil Procedure.

There are, of course, valid policy reasons underpinning the sealing provisions of § 3730(b), which were outlined by Congress in 1986 and have been recognized by federal courts since.[10] Congress recognized a host of policy justifications for the sealing provisions, including "to permit the United States to determine whether it already was investigating the fraud allegations (either criminally or civilly)." Congress included the sealing provisions to permit the government to investigate the allegations so it could make an informed decision about intervention. As is central in all fraud cases, the sealing provisions granted the government the power of secrecy to investigate the allegations before tipping off the putative defendant in the hopes of avoiding destruction of evidence. Interestingly, Congress' final justification for implementing the FCA's mandatory 60-day sealing period focuses on protecting the reputation of the defendant while the government investigates, in an effort to avoid undue embarrassment and reputational harm, at least until an actionable fraud has been verified.

Congress' stated policy considerations are well-founded, but must be viewed in the context out of which they arose. Congress clearly indicated that "[b]y providing for sealed complaints, the committee does not intend to affect defendants' rights in any way."[11] Instead, Congress sought to balance the interests of the government in investigating potential fraud without unduly prejudicing a putative defendant. Indeed, the Senate committee reported that "with the vast majority of cases, 60 days is an adequate amount of time to allow government coordination, review, and decision."[12] If this express statement about "the vast majority of cases" were not clear enough, Congress also contemplated the potential delays associated with simultaneous criminal and civil investigations, suggesting that courts "should carefully scrutinize any additional government requests for extensions [of the seal] by evaluating the government's progress with its criminal inquiry."[13] Most importantly, "[t]he government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* litigation."[14]

Congress' stated intent is important, but is consistently overlooked by advocates and, hence, by the courts. And the sheer absence of analysis and case law (perhaps due to sealing itself or perhaps because the argument is overlooked) presents a prime opportunity to challenge opposing counsel and the courts to consider just how far we've strayed from the considerations facing Congress in 1986. The reality today is that the government rarely makes a decision about a potential *qui tam* claim within the 60 days envisioned by Congress. Recognizing that "[s]ometimes 60 days is simply insufficient," the *U.S. Attorney's Manual* provides that "confusion exists as to the tolling of the 60-day period, it is advisable to file a status report with the court (copy to the relator) advising it when the government's deadline expires."[15] It is unclear just what "confusion exists" regarding the 60-day mandatory sealing period, but "good cause shown" at least for an initial extension of the seal, appears to require a relatively low showing on the part of the government.

It is not uncommon, however, for the government to seek, and to be granted, extension after extension over a period of years.

Herein lies the first basis for our argument. In recent years, some courts have questioned the need for multiyear investigations and the perception that the court will function as a rubber stamp for the government. For example, in one of the "older" cases to deal with continuous extensions of a seal, the district court lifted the seal on the underlying complaint after 18 months of investigation.[16] In *United States ex rel. Costa v. Baler & Taylor Inc.*, the district court focused its analysis on the rights of the putative defendant and the public vis-à-vis the government's interests in combatting fraud. In recognizing that "[d]efendants have a legitimate interest in building their defense while the evidence is still fresh" as well as the fact that the "public has a right to monitor the activities of government agencies and the courts," the court scolded the government by stating that "[t]his practice of conducting one-sided discovery for months or years while the case is under seal was not contemplated by Congress and is not authorized by the FCA."[17]

In the year following *Costa*, the Eastern District of Louisiana declined to grant the government's fifth motion to extend the seal in a *qui tam* action, noting that 19 months of investigation was more than enough time to make a decision about whether to intervene.[18] In *United States ex rel. St. John-Lacorte v. Smith Kline Beecham Clinical Lab. Inc.,* the court relied heavily on both *Costa* and the Senate committee report, and took particular exception to the government's representations that it would not seek a fifth seal extension. The district court excoriated the government describing the government's shifting position as "disingenuous" and could not "in good conscience, reward the United States for these misrepresentations at the expense of the defendants, especially when, as noted above, the statute itself and the Congressional Record direct this court to unseal the case once the United States has been given an opportunity to consider intervening."[19]

Costa has been cited in more recent times, most colorfully by the Eastern District of Tennessee in *United States ex rel. Martin v. Life Care Ctrs. of Am. Inc.,* which lifted the seal on a *qui tam* after four years of investigation and indecision by the government.[20] Relying on *United States ex rel. Summers v. LHC Group Inc.*,[21] the court in *Martin* opined that "the primary purpose of the under-seal requirement is to permit the government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator."[22] In a scathing opinion, the district court described the length of the investigation as "border[ing] on the absurd," pointed out that the government's "handling of this matter leaves much to be desired," and its "pre-intervention strategies approach the abusive and, in any event, fall well beyond the contemplation of the FCA."[23]

During the four years of "investigation," the government engaged in numerous discussions with the defendants regarding settlement, a process which is now commonplace in FCA investigations. The court found this approach to be fundamentally at odds with the purpose of the FCA's sealing requirements and declared that "manufactured complexity simply will not suffice" to justify sealing.[24] The court was explicit in stating that the justification for extending sealing (e.g., the so-called "complexity" of the case), "was likely a product of the government's own extra-statutory discovery efforts."[25] Furthermore, the government should not be permitted to extend an investigation to engage in one-sided discovery where the government's behavior indicated that it had *de facto* determined to intervene at least two years prior to the final extension application. According to the court, pursing settlement discussions "based on claims that it did not intend to pursue" belied common sense and could not legitimately serve as the basis for continued sealing. Simply put, if the government's actions indicate it is pursuing claims, it has elected to intervene.[26]

And it is at this juncture where the body of case law on the sealing provisions of the FCA intersect with the power to issue a CID. As noted above, the government only has the statutory authority to issue a CID "before commencing a civil proceeding under § 3730(a) or other false claims law, or making an election under § 3730(b)."[27] Following the logic of *Martin*, one of the more exhaustive analyses of the sealing provisions, where the government has *de facto* made a decision that it will intervene, regardless of a formal Notice of Intervention, it has made its election under § 3733(a)(1) and should not be permitted to issue a CID. This conclusion is based on the obvious and logical principle recognized by the district court in *Martin* that the government should not, and indeed cannot, self-declare when it formally intervenes, particularly where the government's own actions indicate otherwise.

In *Martin*, the court criticized the government's misuse of CIDs in denying the government's motion for a seal extension:

> The court recognizes that, under the FCA, the government may issue [CIDs] before making an election under § 3730(b). Here, the government availed itself of that opportunity, issuing a June 23, 2011, CID to Defendant in order to gather evidence material to filing a complaint in this matter. A CID is a particular type of investigative tool, analogous to an administrative subpoena, that enables the government to investigate whether there is a basis for remedying a false claim made against the United States. While the FCA empowers the government to conduct some pre-intervention discovery, it is not unlimited: Congress intended the false claims CID to provide the Department of Justice with a means to assess quickly, and at the least cost to the taxpayers or to the party from whom information is requested, whether grounds exist for initiating a false claim suit under 31 U.S.C. §§ 3729-32. In this case, the government appears to believe itself unconstrained by concerns of either timeliness or taxpayer expense.[28]

In a similar fashion, the court in *Costa* homed in on the government's use of pre-suit discovery tools as reason to lift the seal. The court observed that "each of the defendants has been served with a subpoena" and the government had already conducted interviews with a number of current and former employees of the putative defendant.[29] The court ultimately determined that the government "ought to have been able to make up its mind" after investigating for 18 months and unsealed the *qui tam* complaint specifically to prevent the government from continuing to engage in unchecked "one-sided discovery" that is prohibited by the FCA.

In essence, arguments focused on both the letter and the spirit of the law provide a putative defendant with solid ground to petition to set aside a CID where the government is engaged in an abuse of the FCA. Congress never envisioned that *qui tam* complaints would remain under seal for many months, much less many years.[30] Congress also presumed that the government would issue a CID "only in those instances where it is absolutely necessary to determine whether a fraud action under the act is appropriate."[31]

The great difficulty in succeeding in setting aside a CID based

on the arguments discussed above lies in discovering that in fact a *qui tam* complaint exists. Unfortunately, § 3733 of Title 31 does not require the government to identify if or where a sealed *qui tam* complaint has been filed. In some instances, the putative defendant will be in a position to gather some information about underlying action, but it can be difficult to bridge the gap between a district court considering a CID where the recipient resides and where a *qui tam* complaint may have been filed. If the complaint and the CID happen to be filed in the same jurisdiction and happen to be assigned to the same district court judge, the task should be less onerous. In most situations, however, the odds favoring a putative defendant are low, and defense counsel should contemplate attempts to elicit information from the government should an opportunity to challenge a CID present itself at some juncture.

Conclusion

While it remains to be seen whether district courts across the United States will recognize and consider Congress' stated intent in permitting the use of CIDs for FCA actions, practitioners in the field should be aware of how filing a petition to set aside a CID can be used as both a sword and as a shield. The same justifications for district courts' emerging frustration with multiyear investigations conducted with no public oversight provides a sound basis for challenging the government's use and, particularly, misuse of the CID.

By its very nature, FCA fraud is typically hidden, complex, multilayered, and walks the fine line between legitimate business practices and victimization of the taxpayer to the benefit of a business enterprise. It is precisely because of the serious damage that fraud extracts from both its perpetrators (by way of reputational and fiscal harm) and the public that our laws require specificity in pleadings, thorough investigations and conclusions before unsealing to the public, and a demanding standard of elements and proof to prevail. But because the stakes are so high, the government should not have much more of an advantage than any other civil plaintiff might have against any defendant in a fraud case. Congress understood this careful balance in 1986 and 2009, and given the reality of practice at present, it is likely that Congress will need to revisit the use of CIDs in FCA cases to ensure that the government, and its agents, are not granted too much discretion and unchecked power to the detriment of individuals and corporations alike. Until such legislative refinements occur, a reinvention of an oft-used tool of the government should help to, at a minimum, inform a district court of perceived abuses by the government and, at a maximum, may provide the grounds for some relief in an otherwise impossible situation. ⊙

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Endnotes

[1]31 U.S.C. § 3730(a).
[2]Pub. L. 111-21.
[3]*See* 31 U.S.C. § 3733.
[4]31 U.S.C. § 3733(a)(1).
[5]31 U.S.C. § 3733(j)(2)-(3).
[6]*Id.*
[7]31 U.S.C. § 3733(a)(1) (emphasis added).
[8]*See United States v. Kernan Hosp.*, 2012 U.S. Dist. LEXIS 165688 (D. Md. Nov. 20, 2012) (finding that 31 U.S.C. § 3733 did not permit the government to issue CIDs after it filed an initial complaint, even where that complaint had already been dismissed with prejudice by the district court).
[9]31 U.S.C. § 3730(b)(2).
[10]*See e.g.*, *ACLU v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011); S. Rep. 99-345, at 24-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90.
[11]S. Rep. 99-345, at 24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289.
[12]S. Rep. 99-345, at 24-25 (1986), r*eprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90.
[13]*Id.*
[14]*Id.*
[15]Department of Justice, U.S. Attorney's Manual, CRM 932, Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act, *available at* https://www.justice.gov/usam/criminal-resource-manual-932-provisions-handling-qui-tam-suits-filed-under-false-claims-act (last visited Sept. 29, 2016).
[16]*United States ex rel. Costa v. Baker & Taylor Inc.*, 955 F. Supp. 1188 (N.D. Cal. 1997).
[17]*Id.* at 1189-91.
[18]*United States ex rel. St. John Lacorte v. SmithKline Beecham Clinical Lab. Inc.*, 1998 U.S. Dist. LEXIS 19224 (E.D. La. 1998).
[19]*Id.* at *4-5.
[20]*United States ex rel. Martin v. Life Care Ctrs. of Am. Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012).
[21]*United States ex rel. Summers v. LHC Grp. Inc.*, 623 F.3d 287, 292 (6th Cir. 2010).
[22]*Martin*, 912 F. Supp. 2d at 623.
[23]*Id.*
[24]*Id.* at 626.
[25]*Id.* at 625.
[26]*Id.* at 624.
[27]31 U.S.C. § 3733(a)(1) (emphasis added).
[28]*Martin*, 912 F. Supp. 2d at 624, n.5 (internal citations and quotations omitted).
[29]*Costa* 955 F. Supp. 1188, 1190 (N.D. Cal. 1997).
[30]*See* S. Rep. No. 99-345, 24-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 6289-90.
[31]*Avco Corp. v. United States Dep't of Justice*, 884 F.2d 621, 624 (D.C. Cir. 1989) (quoting H.R. Rep. No. 660, 99th Cong., 2d Sess. 26 (1986)).