

## Outside Counsel

## Expert Analysis

# Navigating Federal Anti-Fraud Subpoenas

The federal government has made combating fraud a top priority. Lawyers in the Department of Justice in Washington and in U.S. Attorney's Offices throughout the country are busy tackling fraud from every conceivable approach: by working with traditional law enforcement agencies and federal inspectors general; combining criminal and civil efforts into joint investigations; partnering with state and local investigators; and teaming up with whistleblowers, especially so-called relators in sealed cases filed under the False Claims Act. Regionally, the U.S. Attorney's Office in Manhattan has both a Civil Frauds Unit and a Criminal Division Complex Frauds Unit.

In investigating fraud, the federal government draws upon an expansive arsenal of subpoena powers. To gather evidence it may use, among other things, grand jury subpoenas, HIPAA subpoenas, civil investigative demands, FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act) subpoenas, and inspector general subpoenas. These subpoenas all have unique characteristics. A recipient of any of them should promptly consult with counsel competent to offer advice on the recipient's rights, a strategy for interfacing with government investigators, the recipient's potential exposure to criminal or civil liability, and what the subpoena reveals about the government's investigation.

This column surveys the legal and administrative rules governing these subpoenas, beginning with a brief review of the grand jury subpoena so familiar to criminal defense practitioners and addressing each of the other, perhaps less familiar anti-fraud subpoenas in turn. The chart accompanying this article compares and contrasts the rules governing the subpoenas discussed in this column.

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### Grand Jury Subpoenas

Federal grand jury subpoenas are issued by assistant U.S. attorneys, as well as other specifically authorized lawyers in the Justice Department investigating criminal cases, to obtain records and to compel testimony relating to the investigation of federal crimes. Three features of the grand jury system make responding to a grand jury subpoena unlike responding to any of the other anti-fraud subpoenas.

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To offer useful advice to subpoena recipients, attorneys must appreciate the differences between the various subpoena types.

First, grand jury secrecy rules protect witnesses from disclosure of the fact of their appearance, and the contents of their testimony, before the grand jury. Although the witness is free to speak about his or her appearance before the grand jury, the grand jurors themselves, the prosecutors, and the court reporters are sworn to secrecy pursuant to Federal Rule of Criminal Procedure 6(e).

These secrecy rules have important implications. For purposes of fraud investigations, the rules prevent prosecutors from sharing information gained through grand jury subpoenas, including witness testimony, with government attorneys pursuing only civil cases (with the significant exception of FIRREA civil penalty cases, as discussed below).

Thus, testimony before a grand jury will generally not end up in a civil settlement pre-

sentation, complaint, motion, or trial. Prosecutors' use of a grand jury subpoena to gather information that could have been obtained—and shared with civil attorneys—through one of the other subpoenas below may therefore indicate that the government is not contemplating a civil resolution, but is committed to a criminal prosecution.

Second, a witness summoned before a grand jury appears without the assistance of counsel. Federal prosecutors will advise the witness that the grand jury may grant him or her a reasonable opportunity to consult with a lawyer, but the witness would have to step outside of the grand jury room to have that conversation. During questioning, the witness sits alone before the grand jury and the interrogating prosecutor. This isolation, which can be terrifying for a person testifying before the grand jury, does not occur with the other subpoenas for testimony described below.

Third, procedural protections built into the federal government's grand jury practice provide grand jury subpoena recipients with information about their status, which is generally not available with the other subpoenas discussed in this column. In criminal investigations, the government classifies subpoena recipients as either targets (i.e., putative defendants, the people against whom the government is building its case), subjects (i.e., others with criminal exposure within the scope of the investigation), or witnesses (i.e., persons who are neither targets nor subjects).

When targets and subjects receive subpoenas to testify before the grand jury, they also receive an advice of rights that indicates whether they are targets or subjects. Among other things, this disclosure allows recipients to seek counsel on the likely need to invoke the Fifth Amendment privilege against self-incrimination, and on the possibility of seeking immunity. In the case of the other subpoenas for testimony discussed below, by contrast, the government may subpoena individuals to testify without disclosing their potential civil or criminal exposure.

## Subpoenas — a Comparison

Subpoena Type	Governing Rules	Categories Of Investigations Authorized	Issuing Entity	Whether Subpoena May Compel Testimony	Whether Counsel May Be Present for Testimony	Whether Sharing Permitted	Special Limits On Use
Grand jury subpoena	Fed. R. Crim. P. 6; Fed. R. Crim. P. 17	All federal crimes	Federal criminal prosecutors	Yes	No	No (with limited exceptions, such as FIRREA cases)	Procedural protections for targets
HIPAA subpoena	18 U.S.C. §3486	Criminal federal health care offenses	U.S. Attorneys or Justice Dept. Criminal Division	No (except custodians of records)	Yes	Yes	N/A
Civil investigative demand	31 U.S.C. §3733	Civil False Claims Act violations	U.S. Attorneys or Justice Dept. civil component	Yes	Yes	Yes, including with relators	By default, recipient subject to a single deposition
FIRREA subpoenas	12 U.S.C. §1833a	FIRREA civil penalty cases (e.g., wire fraud affecting a financial institution)	U.S. Attorneys or Justice Dept. civil component	Yes	Yes	Yes	N/A
Inspector General subpoenas	5 U.S.C. App., §4(a)	Waste, fraud, abuse relating to the agency	Agency Inspectors General	No	N/A	Yes	N/A

### HIPAA Subpoenas

Health care fraud has been the most productive area of fraud investigations for the Justice Department over the past decade. The Health Insurance Portability and Accountability Act (HIPAA) authorizes the Justice Department to issue administrative subpoenas—known as health care fraud or HIPAA subpoenas—whenever the department is investigating a “Federal health care offense.”<sup>1</sup> These offenses, enumerated at 18 U.S.C. §24(a), consist of various frauds relating to health care benefits. They are all criminal offenses.

HIPAA subpoenas may be used to compel the production of records in such investigations; but they do not, generally, provide prosecutors with a route to compel testimony (with the sole exception being the limited ability to depose a records custodian).<sup>2</sup> Every U.S. attorney’s office, as well as the Criminal Division in Washington, D.C., has the authority to issue HIPAA subpoenas.<sup>3</sup>

The secrecy provisions of Federal Rule of Criminal Procedure 6(e) are wholly inapplicable to HIPAA subpoenas. A client who receives a HIPAA subpoena must understand that its response to the subpoena may therefore be

used by the U.S. attorney’s office, or civil components within the Department of Justice, to file or build a civil case, such as a False Claims Act suit, even if the client ultimately escapes any criminal charges. Indeed, the ability to share information with civil attorneys is the primary reason a prosecutor would use a HIPAA subpoena instead of a grand jury subpoena.<sup>4</sup>

### Civil Investigative Demands

The False Claims Act authorizes subpoenas called civil investigative demands, which may be used to obtain records, answers to interrogatories, and testimony.<sup>5</sup> The False Claims

Act, with its broad reach and its whistleblower and treble damages provisions, may be the most important tool for the Justice Department in cases where the government has sustained a financial loss. Civil investigative demands may be issued in a False Claims Act investigation by any U.S. attorney or by the Assistant Attorney General for the Civil Division in Washington.<sup>6</sup>

A few points about False Claims Act civil investigative demands are important to keep in mind. First, as with responses to HIPAA subpoenas, information obtained by civil investigative demands may be shared among Justice Department lawyers. Whereas HIPAA subpoenas are served by criminal prosecutors and their fruits shared with civil attorneys, civil investigative demands are issued on the civil side and the responses may be shared with criminal prosecutors.<sup>7</sup>

Second, the government may also share information obtained by a civil investigative demand with a relator (i.e., a whistleblower) in a sealed False Claims Act case.<sup>8</sup> The vast majority of False Claims Act cases begin with a relator's sealed qui tam complaints. Such cases often remain under seal for months while the government investigates the case and decides whether or not it will intervene in the action. A 2009 amendment to the False Claims Act now grants the government the right to share with relators any information obtained in such suits via a civil investigative demand.<sup>9</sup>

Third, the federal government is generally not permitted to depose the same person twice through the civil investigative demand procedure. The statute permits an exception to this rule, but only with the approval of the attorney general and notice to the subpoena recipient explaining that the additional testimony is "necessary."<sup>10</sup> Practically, these procedural limitations should make it unlikely that a recipient of a civil investigative demand would be hauled back into a U.S. attorney's office or the Justice Department in Washington for a second deposition.

In some cases, this rule might therefore counsel against the customary practice of defense counsel seeking to waive a client's formal appearance to testify pursuant to the subpoena. Pushing off a formal appearance would preserve the government's right to depose the client under the civil investigative demand after informal interviews. That practice may make it easier for the government to have repeated interactions with a witness—both at the initial stages of its investigation and in the latter, more developed stages—which may not always be in a recipient's interest.

#### FIRREA Subpoenas

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)

created a civil penalty provision, along with a subpoena mechanism to allow the government to investigate violations of that provision.<sup>11</sup> The civil penalty statute provides for a penalty in the amount of the gain or loss, or up to \$1 million (\$5 million for a continuing violation), whichever is greater. The penalty applies to a series of predicate criminal acts, including, most sweepingly, any mail or wire fraud affecting a financial institution. FIRREA authorizes subpoenas for either records or testimony.<sup>12</sup> FIRREA subpoenas may be issued in the pursuit of FIRREA civil penalties cases by any U.S. attorney's office and two branches of the Civil Division in Washington.<sup>13</sup> Although FIRREA civil penalties cases are not as common as, for instance, False Claims Act cases, they are becoming more common, especially in the Southern District of New York.<sup>14</sup>

Like the False Claims Act civil investigative demand, the FIRREA subpoena comes with no restriction on civil attorneys' ability to share information obtained by the subpoena with other government lawyers, including criminal prosecutors. Indeed, the statute expressly contemplates that civil and criminal attorneys will share information in FIRREA cases, as it provides for a rare exception to the grand jury secrecy provision of Federal Rule of Criminal Procedure 6(e).<sup>15</sup>

#### Inspector General Subpoenas

The various offices of federal inspectors general, which often work with federal prosecutors and civil attorneys in building cases, have the power to issue subpoenas for administrative, civil, and criminal investigations.<sup>16</sup> Inspector general subpoenas, like HIPAA subpoenas, are limited to demands for records. Moreover, like all of the subpoenas discussed here, with the exception of grand jury subpoenas, inspector general subpoenas will result in records that may be shared with Justice Department lawyers pursuing both civil and criminal cases. Inspectors general have wide-ranging investigative authority to prevent fraud, waste, and abuse, and they may use their subpoena powers to obtain records for any of their investigations.

A client receiving an inspector general subpoena may often have a difficult time gaining insight into the underlying federal investigation, as compared to a recipient of the other subpoenas. A grand jury subpoena must relate to a criminal investigation; a HIPAA subpoena must relate to a criminal health care offense; a civil investigative demand must relate to a civil False Claims Act case; and a FIRREA subpoena must relate to suspected violations of FIRREA. By contrast, an inspector general subpoena could relate to any of those categories of investigations, plus any other civil or administrative investigation, and the recipient

may be completely in the dark.

Moreover, whereas the other anti-fraud subpoenas are issued out of a U.S. attorney's office or a particular division of the Justice Department, and bear the name of the assistant U.S. attorneys or Justice Department lawyers handling the investigations, the inspector general subpoenas reveal neither whether the investigation is being coordinated with the Justice Department nor, if so, which lawyers, in which divisions, are handling the investigation. The inspector general subpoenas are, therefore, arguably the most opaque of the anti-fraud subpoenas available to the federal government.

In sum, the federal government has a robust set of subpoena powers to use in its anti-fraud efforts. To fully appreciate the significance of a particular subpoena, practitioners need to understand all of the government's subpoena options.

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1. 18 U.S.C. §3486(a)(1)(A)(i)(1).
2. 18 U.S.C. §3486(a)(1)(B).
3. United States Attorney's Manual 9-44.201.
4. U.S. Department of Justice, Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (OLP Report), §III.A.5.
5. 31 U.S.C. §3733(a)(1)(A)-(D). The federal government has separate civil investigative demand authorities in other contexts, such as antitrust and racketeering investigations. See, e.g., 15 U.S.C. §1312 (antitrust); 18 U.S.C. §1968 (RICO).
6. Final Rule, 75 Fed. Reg. 14070 (March 24, 2010).
7. 31 U.S.C. §3733(i)(3).
8. 31 U.S.C. §3733(a)(1).
9. 31 U.S.C. §3733(a)(1).
10. 31 U.S.C. §3733(a)(2)(G).
11. 12 U.S.C. §1833a.
12. 12 U.S.C. §1833a(g).
13. Leon Weidman, Civil Chief, United States Attorney's Office for the Central District of California, "Civil Remedies for Mortgage Fraud," United States Attorneys' Bulletin (May 2010), at 25 at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5803.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5803.pdf).
14. See, e.g., *United States v. Allied Home Mortgage Corp.*, 11 Civ. 5443 (S.D.N.Y. filed Aug. 5, 2011); *United States v. Bank of New York Mellon*, 11 Civ. 6969 (S.D.N.Y. filed Oct. 4, 2011); *United States v. Buy-A-Home, LLC*, 10 Civ. 9280 (S.D.N.Y. filed Dec. 13, 2010).
15. 18 U.S.C. §3322(a).
16. 5 U.S.C., App. §6.