Investigations Alert: Connolly Ruling Creates Complications for Prosecutors, Companies Seeking to Cooperate

May 10, 2019

On May 2, 2019, a court in the Southern District of New York ruled in United States v. Connolly (16-CR-370) that statements made by an employee to outside counsel during an internal investigation were subject to certain constitutional protections because the government had “outsourced” its investigation to company counsel and company counsel’s actions were consequently “fairly attributable” to the government. A number of the steps taken by company counsel in the matter are standard for a company hoping to receive cooperation credit in related regulatory or law enforcement proceedings. This decision, therefore, raises significant questions about how boards of directors, companies, law firms and the government will approach internal investigations in the future.

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In October 2018, two former Deutsche Bank employees were convicted of wire fraud and conspiracy charges in connection with alleged manipulation of the LIBOR benchmark. Defendant Gavin Black moved to vacate his conviction on the basis that certain statements he had made to the bank’s outside lawyers while still an employee had been used against him in the criminal case. Black argued that even though those statements had been made to a private party, the statements had been effectively compelled by the government. Black relied on the reasoning of Garrity v. New Jersey, 385 U.S. 493 (1966), in which the Supreme Court held that in a trial against former police officers the government could not introduce incriminating statements those officers had made to prosecutors in interviews the police officers had been compelled to sit for under threat of termination. Id. at 500. Black argued that his statements to the bank’s lawyers were effectively compelled by the government because of the manner in which the government coordinated with and relied on the
The court ruled on May 2 that the bank’s actions were fairly attributable to the government. The court cited a number of factors; among the most important were:

- **Evidence of government influence over the bank’s interviews.** The court found that “the Government directed Deutsche Bank to investigate Gavin Black on its behalf.” In reaching its conclusion, the court pointed to (i) CFTC requests that the bank conduct interviews of various categories of employees (including Black); (ii) the fact that, late in the investigation, the bank’s counsel sought permission from the DOJ before interviewing Black a final time; and (iii) a separate instance in which—after bank counsel had concluded its four interviews of Black—a “[g]overnment official” instructed the outside lawyer to “approach [an employee] interview as if he were a prosecutor.”

- **The absence of evidence of an independent governmental investigation.** The court determined that the government did not “conduct a substantive parallel investigation to the ‘internal’ investigation at Deutsche Bank . . . [and instead elected to] simply give direction to Deutsche Bank . . . , take the results of their labor (which appears to have been fully disclosed to Government lawyers), and save itself the trouble of doing its own work.” The court relied in part on a white paper submitted by the bank’s counsel stating that “much (if not most) of the information that will ultimately be used in making charging decisions . . . will have come from the Bank’s identification of notable communications and its having brought those communications to the DOJ’s attention.”

The court ultimately denied Black’s motion to vacate his conviction because his statements to the bank’s lawyers—although fairly attributable to the government—had not been introduced against him at trial. As a consequence, the court’s extension of *Garrity* to internal investigation interviews by a private employer may be regarded as nonbinding dicta. Nevertheless, much like Judge Kaplan’s decision a decade ago dismissing indictments based on a finding that the government pressured a company to cut off the defendants’ attorney’s fees (*United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007)), the *Connolly* ruling challenges the government’s aggressive leveraging of companies’ eagerness to cooperate.

The decision raises a number of important questions about how the government, as well as cooperating companies and their lawyers, should proceed in the future.

Among other things:

- **Restrictions on Internal Investigations.** *Connolly* may make prosecutors wary of allowing a company internal investigation to get too far out in front of the government’s own, lest they be deemed to have “outsourced” their investigative
duties. Among other things, the government may request that cooperating companies refrain from conducting or delay witness interviews to permit the government either to conduct its own interviews or to take additional investigative steps without the benefit (and arguably “taint”) of reporting on the company’s interviews. Delays could increase the time and cost of internal inquiries with parallel government investigations.

- **Modifications to “Instructions.”** Agencies may be less likely to issue detailed instructions about investigative priorities and preferred steps and approaches to cooperating companies. Indeed, a DOJ official stressed at a conference this week that the DOJ does not “direct” company investigations, but merely seeks to obtain the benefits of investigations companies have undertaken voluntarily. If government attorneys balk at being explicit with cooperating companies, the risk of miscommunication will increase, which might make it more difficult for companies to obtain cooperation credit.

- **Representation of Individuals.** Counsel representing current employees of a cooperating company will likely seek to make a record that an interview was “compelled.” Counsel’s starting point for that record will be the DOJ policies requiring cooperation in order to receive DPA consideration and sentencing credit—a fact that may cause the DOJ to consider modifying its cooperation guidelines. Beyond DOJ policies, attorneys representing individuals may well ask specifically whether a refusal to be interviewed will trigger termination, or simply send a letter stating the understanding that the interview to which the employee is agreeing is mandatory.

- **A New Argument: Derivative Use?** Prosecutors are forbidden from making derivative use of testimony that is compelled by threat of termination. See *United States v. Slough*, 641 F.3d 544, 549 (D.C. Cir. 2011). For example, the government may not use such compelled testimony for investigatory leads or to “flip” witnesses. Thus, under *Connolly*, individuals and companies may argue that evidence—indeed, the fruits of an entire investigation—can be suppressed if it stemmed from a statement made by an employee of a cooperating company where the DOJ “outsourced” its duties.

We will continue to monitor and report on these developments, both in relation to any appeal in this matter and any similar challenges brought in other matters.
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