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The Risks of “Too Much” Entanglement with the Government When Conducting Internal Investigations

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Introduction

The U.S. Department of Justice's policy on corporate criminal enforcement, refreshed on October 28, 2021 and further refined on September 15, 2022, places renewed emphasis on individual accountability. In a break from Trump-era policy, the DOJ now requires corporations hoping to receive *any* cooperation credit in criminal investigations to "disclose to the Department all relevant, non-privileged facts about individual misconduct," and to do so "swiftly and without delay." Lisa Monaco, Deputy Attorney General, U.S. Department of Justice, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group at 3 (Sept. 15, 2022) [hereinafter, "Monaco Memo"]. As the latest guidance warns, "[c]ompanies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit." *Id.*

This policy places company counsel that are conducting internal investigations in a difficult position. Companies seeking to limit or avoid liability in a DOJ probe have strong incentives to coordinate closely with the DOJ in identifying and investigating potential wrongdoers. Too much cooperation, however, risks undermining the ultimate success of any DOJ action and raises significant ethical and legal concerns for company counsel. This article addresses some of those potential pitfalls.

OVERVIEW OF DOJ'S CORPORATE ENFORCEMENT POLICY

In 2015, the U.S. Department of Justice articulated a policy on corporate enforcement that focused on identifying and prosecuting individual wrongdoers. That policy, introduced by then-Deputy Attorney General Sally Yates, emphasized the DOJ's efforts to hold individual wrongdoers accountable for corporate wrongdoing. To further that effort, the Yates Memo announced an "all-or-nothing" approach to corporate cooperation. If companies wished to receive any cooperation credit from the DOJ, they were required to identify "all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority." Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, Individual

Accountability for Corporate Wrongdoing at 3 (Sept. 9, 2015) [hereinafter, "Yates Memo"]. The Yates Memo also made clear that the DOJ would not "release culpable individuals" from liability when resolving a matter with a corporation "absent extraordinary circumstances or approved departmental policy," and any attempt to resolve matters with a corporation should be accompanied by a "clear plan to resolve related individual cases." *Id.* at 2.

The DOJ changed tack under the Trump Administration and walked back the Yates Memo's "all-or-nothing" approach to corporate cooperation credit. In November 2018, then-Deputy Attorney General Rod Rosenstein announced that corporations could receive cooperation credit in criminal investigations if the corporation "identif[ied] every individual who was substantially involved in or responsible for the criminal conduct"—*i.e.*, not all involved individuals, as the Yates Memo had required. Rod J. Rosenstein, Deputy Attorney General, U.S. Department of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Oxhon Hill, MD (Nov. 29, 2018). In fact, DAG Rosenstein specifically advised that investigations "should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted," and he encouraged companies seeking cooperation credit to have "full and frank discussions with prosecutors about how to gather the relevant facts." *Id.* In civil investigations, DOJ rolled back the "all-or-nothing" policy even further, noting that corporations could receive cooperation credit (albeit not full credit) if they identified "all wrongdoing by senior officials, including members of senior management or the board of directors," even if they failed to identify all individuals who were substantially involved in or responsible for the misconduct. *Id.*

Then, in October 2021, the Deputy Attorney General under President Biden, Lisa Monaco, announced yet another set of changes to the DOJ's corporate enforcement policy. These revisions, which Monaco further refined in a speech and a memo released in September 2022, mark a clear return to the "all-or-nothing" policy set forth in the Yates Memo. A company seeking any cooperation credit "must disclose to the Department all relevant, non-privileged facts about individual misconduct." Monaco Memo at 3. Moreover, such disclosures must be made "swiftly and without delay," and companies must prioritize turning over evidence "that is most relevant for assessing individual culpability," including "information and communications

associated with relevant individuals during the period of misconduct." *Id*. The penalty for failing to cooperate fully and swiftly is steep: "undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit." Lisa O. Monaco, Deputy Attorney General, U.S. Department of Justice, Remarks on Corporate Criminal Enforcement, New York, NY (Sept. 15, 2022). As DAG Monaco put it in her September 2022 remarks, "[i]f a cooperating company discovers hot documents or evidence, its first reaction should be to notify prosecutors." *Id*. To further disincentivize delay, the Monaco Memo instructed prosecutors to complete investigations into individuals and seek any warranted criminal charges prior to or simultaneously with the entry of a resolution against the corporation. Monaco Memo at 3.

In addition to penalizing delay, DAG Monaco's policy also introduced several "carrots" to incentivize cooperation. Most notably, in her September 2022 speech, DAG Monaco announced a new policy whereby "every Department component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure." If any component lacked a formal, documented policy, it would be required to draft one. One common principle would govern all components' policies: if a company voluntarily discloses, cooperates and remediates, then the DOJ will not seek a guilty plea absent aggravating factors. Thus, as DAG Monaco explained, "the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure."

In short, DAG's Monaco's policy changes reinforced the DOJ's emphasis on individual culpability and exerted greater pressure on corporations to cooperate quickly and fully when they encounter evidence of potential wrongdoing.

POTENTIAL PITFALLS OF "TOO MUCH" COOPERATION

The DOJ's emphasis on individual accountability creates strong incentives for companies to align themselves with the government during a criminal investigation, as rooting out individual wrongdoers will help secure cooperation credit and potentially stave off a guilty plea or indictment. However, unless certain guardrails are in place, such alignment has the potential to raise significant constitutional and ethical concerns.

Constitutional issues may arise, for instance, if the government presses the company to interfere with employees' Fifth Amendment right against self-incrimination or Sixth Amendment right to counsel. Perhaps the most notorious example of government overreach is *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). In *Stein*, KPMG was the target of a government investigation that implicated senior partners, including the deputy chair and chief operating officer of the firm, Jeffrey Stein. *Stein*, 435 F. Supp. 2d at 339. KPMG initially agreed to pay for the partners' legal expenses in any suits related to the alleged misconduct. *Id.* DOJ attorneys, however, conveyed to KPMG "that payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm." *Id.* at 344. The DOJ issued such warnings in accordance with the then-controlling "Thompson Memorandum," which required prosecutors to consider, among other things, whether a company elected to pay legal fees for its employees and whether a company continued to employ or support employees who asserted their Fifth Amendment rights when deciding whether to indict a corporate entity. Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, Principles of Federal Prosecution of Business Organizations at 7-8 (Jan. 20, 2003). In light of this policy, KPMG decided that it would pay legal fees only for partners or employees who agreed to cooperate fully with the government and to cut off payment of legal fees for anyone who was indicted. *Stein*, 435 F. Supp. 2d at 345-46.

Stein and a number of other KPMG personnel were ultimately indicted and, "[t]rue to its word, KPMG cut off payments to the defendants of legal fees and expenses." *Id.* at 350. Stein and his co-defendants challenged the government's successful campaign to persuade KPMG not to pay their legal fees and expenses as a violation of their constitutional rights. The court agreed, holding that the government's conduct had violated Stein and his co-defendants' Fifth Amendment right to a fair criminal process and the defendants' Sixth Amendment right to counsel. *Id.* at 382. In so ruling, the court rejected the government's claim that the United States had neither "coerced" nor "bullied" KPMG into cutting off payment for the individual defendants' legal expenses, observing that such an assertion could "be justified only by tortured definitions of those terms." *Id.* at 381. Following *Stein*, the DOJ issued new guidance (the so-called "McNulty Memorandum"), which prohibited prosecutors from considering whether a

corporation paid its employees' legal fees in connection with a government investigation, except where "the totality of the circumstances show that [such indemnification] was intended to impede a criminal investigation." Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, Principles of Federal Prosecution of Business Organizations at 11 & n.3 (Dec. 12, 2006).

Although *Stein* and the McNulty Memorandum curbed DOJ's efforts to influence companies in the payment of employees' legal expenses, more recent examples of close coordination between the government and companies have continued to raise constitutional concerns. For instance, in *United States v. Connolly*, No. 16-cr-0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019), then-Chief Judge McMahon of the U.S. District Court for the Southern District of New York, criticized the DOJ for "outsourc[ing] its investigation" of LIBOR manipulation to the target of the investigation, Deutsche Bank, and its outside counsel. *Id.* at *1. When Deutsche Bank first learned that it was under investigation, it "immediately decided that it would go all-in with cooperation." *Id.* at *2. The government instructed the bank's counsel on, among other things, whom to interview, when to interview them and how to conduct the interviews. Bank counsel interacted with the government on "hundreds if not thousands of occasions," and for the final 14 months of the banks' internal investigation, "counsel held joint 'weekly update calls' to provide the Government with the latest developments and afford it an opportunity to 'make new requests.'" *Id.* at *7. Moreover, rather than "simply respond[ing] to Government document requests by producing responsive documents for the Government's review," the bank also "flagged 'notable' . . . evidence or information that [it] believed would be of particular interest' to the Government," provided the government with "real time updates about facts gleaned from employee interviews" and made sure to ask government for "permission" to re-interview one of its own employees—Gavin Black—as part of its internal investigation. *Id.* at *6-7.

During the five years that Deutsche Bank was conducting its internal investigation, there was no evidence that the DOJ was conducting a "substantive parallel investigation" of its own. *Id.* at *9. Rather, the court surmised, the lack of evidence of any "independent investigative activities" indicated that the DOJ simply "g[a]ve direction" to Deutsche Bank and its counsel, took "the results of their labor (which appears to have been fully disclosed to Government lawyers), and save[d] itself the trouble of doing its own work." *Id.*

Ultimately, the investigation led to criminal charges against three Deutsche Bank employees, including Gavin Black, who later challenged his indictment as unconstitutional. He argued that his interview statements to Deutsche Bank's outside counsel were "fairly attributable" to the government because of the degree to which the government directed Deutsche Bank's investigation, and that those statements were "compelled" and the "product of coercion." *Id.* at *10. As a result, he claimed that his indictment ought to be dismissed under *United States v. Kastigar*, 406 U.S. 441 (1972), which held that "[a]ny use, direct or indirect, of a defendant's compelled statements is unconstitutional under the Fifth Amendment's self-incrimination clause." *Id.* at *15; *see also Kastigar*, 406 U.S. at 453.

The court agreed that the Deutsche Bank's investigation was "fairly attributable" to the government in that the DOJ effectively "directed Deutsche Bank to investigate Gavin Black on its behalf." *Connolly*, 2019 WL 2120523 at *11. There was also "no question in the Court's mind that Black was compelled, upon pain of losing his job, to sit for at least three, probably four, interviews" with the bank's counsel. *Id.* Nevertheless, the court concluded that there was no *Kastigar* violation because the government did not use Black's statements at trial, before the grand jury or during its investigation. *Id.* at *21-22.

The *Connolly* decision highlights the significant constitutional risks that arise when companies and company counsel are perceived to serve as an arm of the government when investigating potential wrongdoing. Indeed, shortly after *Connolly* was decided and likely in response to the decision, the DOJ modified guidance in its FCPA Corporate Enforcement Policy to make clear that, "[a]lthough the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts." Justice Manual, Principles of Federal Prosecution of Business Organizations, FCPA Corporate Enforcement Policy, 9-47.120 n.2 (updated Nov. 2019). This update reflects an effort to set appropriate boundaries between the DOJ and company counsel when a company opts to cooperate. But even still, the line between undue entanglement and extensive cooperation is not always clear. It is made all the murkier by DAG Monaco's recent guidance, including, for instance, her insistence in her September 2022 remarks that a company's "first reaction" upon learning of "hot documents or evidence . . . should be to notify prosecutors"—presumably even while an internal investigation is still ongoing.

Even apart from its constitutional implications, *Connolly* underscores the tricky ethical and legal considerations that come into play when companies and their counsel are considering voluntary self-disclosure or cooperating in a DOJ probe. On the one hand, extensive cooperation is often in a company's best interests. Indeed, the court in *Connolly* noted that Deutsche Bank's strategy of extensive cooperation was a "conspicuous success" for the bank. Even though Deutsche Bank had not voluntarily self-disclosed, it avoided both a guilty plea and an indictment and was able to sign a Deferred Prosecution Agreement with the DOJ, under which it paid a $775 million fine, agreed to continue cooperating in the government's ongoing investigation and retain a corporate monitor for three years. *Connolly*, 2019 WL 2120523, at *8. Had Deutsche Bank been forced to plead guilty, by contrast, its operating subsidiaries would have lost "key licenses and authorizations in the United States" and it "would have lost business in virtually all aspects of its operations." *Id.*

At the same time, the incentive to cooperate necessarily creates a tension between the company and its employees, as the company wants to encourage its employees to cooperate with its own internal investigation to the greatest extent, while reserving the right to identify those same cooperators to the DOJ as wrongdoers if any misconduct comes to light. Companies and company counsel must therefore take care to abide by their ethical obligations to be honest and transparent in their dealings with employees, even as they are incentivized to disclose as much as possible as early as possible in an investigation. The standard *Upjohn* warnings issued to employees being interviewed during the course of an internal investigation—*i.e.*, warnings from counsel conducting the interview that they represent the company and not the employee, and that any privileged information gathered during the interview could be shared with third parties, including the government, at the company's discretion—may not be sufficient in all cases.

The commentary to Rule 1.13 of the New York Rules Professional Conduct, for instance, advises that if company counsel thinks a conflict *may* develop between the company and an employee, counsel should specifically warn the employee of the potential conflict and note that the employee may wish to obtain independent representation. Although this commentary has not been adopted by the Appellate Division of the New York Supreme Court and therefore is not binding, it is nonetheless telling about the extent to

which company counsel are expected to protect and respect the interests of individual employees—including potential wrongdoers.

Absent full transparency in communications between company counsel and employees, there is a real risk that the scope and nature of counsel's representation will be misunderstood or misconstrued. Indeed, there is currently a motion pending in *United States v. Gregoire Tourant*, a case in the Southern District of New York, arguing that the indictment against the defendant (Gregoire Tourant, a former Allianz employee) should be dismissed because it was secured based on privileged communications between Tourant and his counsel, which the government allegedly "induced" the company counsel to reveal. In *Tourant*, Allianz's counsel initially represented both the company and Tourant. Tourant alleges, however, that his attorneys "ultimately concluded that the Government's investigation presented an existential threat to Allianz," and, "[i]n an effort to stave off a possible indictment against Allianz, counsel made the choice to misuse their attorney-client relationship with Mr. Tourant to obtain additional statements from him about the subject matter of the case, which they subsequently disclosed to the Government." Mem. of Law ISO Defendant George Tourant's Mot. to Dismiss the Indictment, or, In the Alternative, for a Hearing at 2, *United States v. George Tourant*, No. 1:22-cv-00276-LTS (S.D.N.Y. Jan. 30, 2023), ECF No. 54. According to Tourant, "[t]he Government not only encouraged and permitted [counsel's] actual betrayal of its former client, but [counsel's] actions are additionally attributable to the Government due to the coercive pressure placed on Allianz by the Government's corporate cooperation policies." *Id.* at 26. The motion has not been decided, and the government strenuously denies that it received any privileged information from Tourant's former counsel or that there is any basis to "attribute any action by Allianz or its law firms to the Government." The Government's Response in Opposition to Defendant's Mot. to Dismiss the Indictment and to Compel at 16, *United States v. George Tourant*, No. 1:22-cv-00276-LTS (S.D.N.Y. Feb. 17, 2023), ECF No. 61. Whatever way this motion is ultimately decided, it underscores the importance of communicating clearly with employees during the course of internal and government investigations and carefully demarcating the bounds of any attorney-client relationship.

There may be other legal and business implications, too, from excessive alignment between company counsel and the government. For instance, certain countries have implemented "blocking statutes," which aim to limit the transfer of sensitive information outside the countries' borders. France's blocking statute, for example, prohibits any person from requesting, searching for or communicating "documents or information of an economic, commercial, industrial, financial or technical nature" for use as evidence in a "foreign judicial or administrative procedure," unless done pursuant to an international treaty or agreement to which France is a party. Ela Barda & Thomas Rouhette, "The French Blocking Statute and Cross-Border Discovery," IADC (Feb. 7, 2020). Documents and information gathered as part of a purely internal investigation would not run afoul of this statute because such material would not be collected in connection with a "judicial or administrative procedure." But as Academy fellow Frederick Davis has written, if an internal investigation is unduly directed or influenced by the DOJ—as the court concluded had occurred in *Connolly*—then a French judge may decide that the U.S. lawyers conducting the investigation have violated French law. Frederick T. Davis, United States v. Conolly *and the Risk That 'Outsourced' Criminal Investigations Might Violate Foreign Blocking Statutes*, New York U. Program on Corporate Compliance & Enforcement.

There is also the risk that helping the government target a suspected wrongdoer will backfire on the company if the government is wrong or lacks enough evidence to secure a conviction. In *United States v. Bogucki*, No. 18-cr-021, 2019 WL 1024959 (N.D. Cal. Mar. 4, 2019), for instance, Judge Charles Breyer of the Northern District of California dismissed the government's criminal fraud case against a former Barclays trader after the government rested and before the case went to the jury—the first time Judge Breyer had issued such a ruling in his more than 20 years on the bench. Aruna Viswanatha, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, Wall Street Journal (July 5, 2021).

In *Bogucki*, the DOJ alleged that the former head of Barclays' over-the-counter foreign exchange trading desk had committed fraud by misusing a corporate client's, HP Inc.'s, information to benefit the bank at HP's expense. *Id.* The DOJ learned about Bogucki's alleged misconduct from Barclays directly, which was required, as part of a plea deal it had previously signed in a separate case, to disclose to the government signs of potential fraud that it might encounter.

When Barclays found audio recordings relevant to the deal in question “that its lawyers considered troubling,” Barclays retained outside counsel to conduct an internal review. *Id.* Those lawyers briefed the DOJ about their findings and notified the DOJ that they intended to interview Bogucki. *Id.* The outside lawyers conducted the interview in July 2016, and Bogucki was placed on paid leave in November 2016 while Barclays and its lawyers “continued to hand evidence to the DOJ.” *Id.* Bogucki was indicted by a federal grand jury on wire fraud and other charges in January 2018. At trial, the government was required to prove that Bogucki had made materially false statements to HP as part of a scheme to defraud. The court found that Bogucki had not made any “false statements or material omissions that were capable of influencing a person in . . . HP’s position to part with money or property,” and that the government was instead “pursu[ing] a criminal prosecution on the basis of conduct that violated no clear rule or regulation, was not prohibited by the agreements between the parties, and indeed was consistent with the parties’ understanding of the arms-length relationship in which they operated.” *Bogucki*, 2019 WL 1024959 at *6-7. As a result, the court granted Bogucki’s motion to dismiss the indictment as to all counts. *Id.* at *7.

After his victory in court, Bogucki sued Barclays for his suspension and lost earnings, and the bank settled the case for an undisclosed sum in May 2020. Viswanatha, *supra*. Notably, Barclays had suspended Bogucki following his interview with outside counsel even though Barclays had told DOJ prosecutors that “the trading didn’t look like fraud and that they would have trouble proving their theory at trial.” *Id.* Though the details of Bogucki’s settlement with Barclays are not public, it seems plausible that the bank’s decision to discipline him in accordance with the government’s theory of liability factored into the settlement terms. The risk of lawsuits from disgruntled and vindicated employees is also something companies must consider when deciding how and when to cooperate with government probes.

All together, these risks highlight the tight rope companies and company counsel must walk when they encounter potential wrongdoing in their ranks. Although it is often in a company’s best interest to cooperate extensively with the government, both the company and company counsel must take care to maintain an appropriate professional distance from the government and to conduct their own internal investigation without undue direction from the government. At the same time, to comport with their legal and ethical

obligations, company leadership and company counsel must be direct, transparent and fair in their dealings with employees. Only by maintaining these appropriate, professional dealings can companies and their counsel avoid the constitutional, ethical and business pitfalls that arise from "too much" cooperation with the government in times of corporate distress.

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