Increased government demands for de-confliction will impede internal investigations

By Lauren R. Randell[i]

The Department of Justice recently faced criticism for getting too involved in an internal investigation ostensibly conducted by a company's external lawyers, with the government telling the company's lawyers which employees to interview and what questions to ask them. But less attention has focused on cases in which the DOJ tells corporate investigators what *not* to do—that is, to *omit* certain interviews or investigative steps, in favor of letting the DOJ take the first crack at talking to relevant witnesses. The DOJ is now signaling that it may rely more frequently on this "de-confliction" policy, which favors government investigations at the expense of internal investigations and a company's ability to gather facts, to achieve the same result.

The Chief Judge of the Southern District of New York determined in a recent case that the government had become so involved in directing an internal investigation conducted by Deutsche Bank's external lawyers that statements made by an employee (who became a defendant) to the bank's lawyers were effectively compelled statements made to the government that therefore could not be used at the employee's criminal trial. Key to the court's analysis was evidence that the government told Deutsche Bank's external lawyers which employees to interview, and even what questions to ask. *United States v. Connolly & Black*, 16-cr.-0370 (CM) (S.D.N.Y. May 2, 2019).

Predictably, DOJ officials have since taken pains to publicly assert that the DOJ does not direct investigations or tell companies to conduct particular interviews. Instead, though, the DOJ has quietly buttressed policies permitting it to control corporate investigations through de-confliction.

De-confliction was already written into the DOJ's FCPA Corporate Enforcement Policy through a requirement that a company seeking maximum cooperation credit agree to "de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation." Justice Manual 9-47.120(3)(b) (binding in FCPA cases, and nonbinding guidance for all other federal criminal cases). De-confliction usually takes the form of the DOJ instructing companies not to contact potential witnesses for interviews until the DOJ can do it first.

The DOJ saw the risk of the *Connolly* decision coming, and just two months before the ruling, added the following to its cooperation policy: "Although 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."

The new language makes clear that the DOJ sees de-confliction as a remedy to the problems cited by the judge in *Connolly*. But the logical contradiction in the DOJ's approach is striking: The DOJ claims it will not "take any steps to affirmatively direct" an internal investigation, while at the same time reserving the

power to tell a company to "refrain" from taking actions that may be key in that investigation. And of course, "requests" from the DOJ are generally anything but—a failure to heed such a request means that a company might be required to enter a guilty plea instead of a more favorable resolution, or to pay tens or hundreds of millions of dollars more in fines. Few companies would see the DOJ's "requests" as anything other than directions.

De-confliction is not harmless to companies, so any indication that the DOJ will be relying on it more is troubling. De-confliction radically hinders companies' internal investigation efforts, leaving investigators unable to determine key facts because they are denied access to key witnesses or documents. Companies are then unable to determine and remediate root causes of violations. Companies are also unable to negotiate potential resolutions on equal footing because the government has denied them key information related to the alleged violation and is under no obligation to disclose that information back to the company, even if exculpatory, in a pre-indictment setting.

Certainly, requiring a company to get permission to do certain interviews is of a different character than the "outsource[ing]" of a government investigation to a company that the *Connolly* court was so concerned about. In the de-confliction scenario, the government is at least doing its own investigation instead of relying solely on the company to do it first—a factor the court considered in its Fifth Amendment analysis. But from the company's perspective, it is still "direction" of a supposedly "internal" investigation, and a court in the future may very well find that to be of similar concern. And indeed, the judge in *Connolly* expressed outrage at a version of de-confliction, pointing out how shocking it was that in one instance, "Deutsche Bank *asked the Government for 'permission' to interview its own employee*." (Mem. at p.13, italics in original). A court may similarly conclude that the DOJ has simply switched one method of interference in corporate investigations for another.

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