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Investigations for Self-Disclosure Should Be Independent of DOJ To Avoid Fifth Amendment Issues

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Key Points

- DOJ policies incentivizing companies to self-disclose unlawful conduct, investigate themselves and report their findings do not on their own cause the company's investigation to be attributable to the DOJ for Fifth Amendment purposes.
- Although company counsel should address government inquiries when pursuing DOJ credit for cooperation, government attorneys and company counsel should be vigilant in ensuring that the company's internal investigation is not directed by the government.
- Two recent decisions show that corporate interviews of employees can be used against the employees in criminal actions if conducted free of DOJ guidance.

The Department of Justice (DOJ) has long encouraged companies to disclose to the DOJ potential violations of federal law, investigate themselves and report their findings in detail. The DOJ often depends on those self-reports to prosecute the individuals involved, and sometimes the companies themselves, albeit with a discount for cooperating.

The DOJ has sought over the past year to standardize and cement policies incentivizing cooperation and companies' support for prosecuting culpable individuals, including in the DOJ's September 2022 Further Revisions to Corporate Criminal Enforcement Policies, the Criminal Division's January 2023 Corporate Enforcement and Voluntary Self-Disclosure Policy and the U.S. Attorneys' Offices' February 2023 Voluntary Self-Disclosure Policy. (For more on this topic, see our April 2023, March 3, 2023, and January 19, 2023, articles.)

Individual defendants recently mounted significant challenges to the DOJ's approach in two prosecutions brought after detailed self-reports by the defendants' employers. The defendants argued that their Fifth Amendment right against self-incrimination was violated because their interviews occurred under threat of termination and their employers were, in effect, acting on behalf of the government.

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Although neither challenge was ultimately successful, both were subjects of detailed opinions that provide valuable guidance to companies and their counsel conducting internal investigations, as well as to government agencies receiving reports of those investigations.

The cases are:

- *United States v. Coburn* (D.N.J. July 20, 2023).
- *United States v. Tournant* (S.D.N.Y. Aug. 3, 2023).

United States v. Coburn

The defendants in *Coburn* sought to suppress statements they made to their employer's counsel and to compel the government to produce any exculpatory information in their employer's files, asserting that the company's investigation was attributable to the government.

Their challenge sought to capitalize on findings made in a 2019 case, *United States v. Connolly* (S.D.N.Y. May 2, 2019). In that case, the court found that the government's coordination with counsel conducting an internal investigation was so extensive that the investigation was fairly attributable to the government. The court explained that company counsel "did everything that the Government could, should and would have done had the Government been doing its own work."

The court in *Connolly* held in particular that company counsel's interviews of the defendant — a company employee at the time — violated the defendant's constitutional right against self-incrimination because they were "compelled … under threat of termination [and] attributable to the Government." Consequently, the government was precluded from using, directly or indirectly, any statements the defendant made in those interviews.

In *Coburn*, after a two-day evidentiary hearing, the court held that the defendants could not make a similar showing. The court noted that the defendants' interviews were compelled because they faced termination if they declined, as in *Connolly*, and their employer acted in the hope of avoiding prosecution of itself pursuant to DOJ policies.

However, the court did not find a sufficient nexus between the government's actions and the employer's investigation to attribute the investigation to the government. Two of the three interviews the defendants sought to suppress occurred before their employer notified the government of its investigation. In addition, according to the court, there was "literally no document or testimony" establishing that the government directed the third interview.

United States v. Tournant

The defendant's challenge in *Tournant l*ikewise followed a company's self-report to the DOJ. In *Tournant*, according to the court, the company's cooperation included a full oral summary of an interview of the defendant conducted by counsel that jointly represented the company and the defendant at the time of the interview. The defendant sought dismissal of the indictment against him, arguing that the government unlawfully intruded on his attorney-client privilege.

The court rejected the defendant's challenge. The engagement agreement the defendant signed with company counsel agreeing to joint representation gave the company the authority to waive attorney-client privilege, including with regard to communications between that counsel and the defendant. The agreement also provided that if counsel concluded that the employer's interests are in conflict with those of the defendant, counsel could terminate its representation of the defendant. In enforcing these provisions, the court noted that the defendant had separate, independent counsel at the time he agreed to the joint representation.

The court also found that DOJ policy did not force the company to take any particular action, nor did the government directly intervene in the company's decision-making. The court explained that the "mere existence" of policies encouraging cooperation is insufficient to render the government responsible for the company's investigation.

Takeaways

Despite the pressure DOJ policies place on companies to cooperate in investigations and provide evidence against individuals, these recent cases indicate both an acceptance of the principles laid out in *Connolly* and a reluctance to extend *Connolly* to attribute to the government investigative decisions that were clearly made by the company.

Government attorneys who are mindful of *Connolly* will generally take care to avoid the type of specific direction that could cause a court to treat a company's investigation as the government's own. On the company side, counsel should ensure that internal investigations are conducted with appropriate independence. Whenever government direction begins to feel too specific or coercive, company counsel should make sure to document independent bases for taking certain actions and communicate any concerns to the government.

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