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The DOJ Wants to Stay Out of Your Investigations

Earlier this month, Judge Colleen McMahon of the SDNY handed down a [decision](#) in *U.S. v. Connolly* that serves as a good reminder that the DOJ needs to keep its distance from companies' internal investigations.

Matthew Connolly and Gavin Black were convicted of misconduct related to LIBOR manipulation in 2018. Black argued that his trial was tainted by statements he made to Paul Weiss during an internal investigation the firm was conducting on behalf of his employer, Deutsche Bank. He relied on *Garrity v. New Jersey*, which held that statements obtained from government employees under threat of termination are involuntary and inadmissible in a criminal trial as a violation of a defendant's Fifth Amendment rights. The *Garrity* rule has been extended to cover private employees when a private employer's actions are "fairly attributable to the government," when there is a "sufficiently close nexus between the state and the challenged action." Judge McMahon ultimately denied Black's motion because the statements he made during the investigation were not actually used at trial, but she also said that the record "contains compelling evidence that Deutsche Bank's investigation is fairly attributable to the Government."

When asked about the *Connolly* decision at ACI's recent FCPA conference held in New York, Dan Kahn, Chief of the DOJ's FCPA Unit, noted that the government agency involved in that case was the CFTC, not the DOJ, and that the DOJ's policy is not to tell companies what to do in an investigation. In fact, he told the conference audience that if they were hearing otherwise from FCPA Unit prosecutors to let him know directly. Charles Cain, Chief of the SEC's FCPA Unit, concurred and said the SEC has always been sensitive to this issue, particularly in the FCPA space. At the same time, the DOJ's [FCPA Corporate Enforcement Policy](#) requires companies to [de-conflict](#) their investigations with the DOJ in order to earn full [cooperation credit](#). Kahn assured the audience that the DOJ will only make such a request in "limited circumstances" and will not "instruct or direct a company to take any specific acts."

That means companies are on their own to conduct thorough investigations that will earn maximum cooperation credit, so perhaps now is a good time to brush up on best practices for effective [internal investigations](#). Our archive is full of helpful articles about preserving [privilege](#), conducting [interviews](#) and how to manage data [privacy](#) and [security](#) issues when gathering documents. We would love to hear what aspects of internal investigations you or your clients are finding most challenging.

With warm regards,

Megan Zwiebel, Senior Editor