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THE SHOT ACROSS THE BOW AND THE LIMITED COURSE CORRECTION AFTER *UNITED STATES V. CONNOLLY*

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Almost a year ago, in *United States v. Connolly*,[1] Chief Judge McMahon of the Southern District of New York fired a warning shot at the close relationship that often exists between prosecutors and lawyers conducting an internal investigation on behalf of a company. On the facts presented to the court, *Connolly* suggested that an executive's statement to the company's investigators was "fairly attributable" to the government and "compelled"; the end result could have been a prohibition against the introduction of that statement in a prosecution of the executive—depriving the government of a key prize from an internal investigation. But many investigators and commentators have paid little heed to the warning, except in extreme cases like what the record showed in *Connolly*: the prosecutors in that case essentially conducted no investigation of their own and instead directed how the company's outside counsel conducted their internal investigation.

This article asks whether the reasoning and authorities on which *Connolly* relies could apply to situations beyond the extreme facts of that case, and, finding at least some basis for doing so, explores the implications for internal investigations of a reading of *Connolly* that does not limit that case to its facts. It does so by first providing the context of government policies that impact internal investigations; by then describing *Connolly*, its reasoning, and the authorities on which it relies in order to determine whether the teachings of the case could be applied beyond its narrow facts; and finally by assessing some of the potential implications of such a broader reading.

The Context: The Government's Influence on Internal Investigations

One of the biggest transformations in the work of federal prosecutors and the work of corporate law firms over the past 50 years has been the increase in investigations of corporations and corporate executives by the government, and the corresponding increase in internal investigations and compliance efforts conducted by corporations.[2] Some of this growth is the result of new statutes,[3] and an additional impetus came from the Sentencing Guidelines for organi-

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zations, which expressly reward full cooperation in the government's investigation.[4]

The Department of Justice has fueled these incentives by crushing a leading accounting firm,[5] and by adopting and publicizing a series of new policies that encourage the prosecution of corporations, their executives, or both, and that use the leverage of the Department "to incentivize companies to conduct internal investigations and then to cooperate with regulators and law enforcement officials."[6] Since the 1990s, five different Deputy Attorneys General have enhanced and elaborated upon these policies,[7] with still more encouragement of cooperation in investigations of violations of specific statutes.[8] In the latest iteration of these policies, the Department has declared that in order for a company to receive any consideration for cooperation, "the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct."[9]

Given this dynamic, there is often a tricky balancing act among the competing interests of conducting a thorough and independent investigation, ensuring protection of employees' interests, and providing all relevant facts and individuals to the government to be eligible for cooperation credit. But, especially when looking down the barrel of an indictment or other government action, the balance often seems to disproportionally tilt in favor of cooperation.[10] In the words of one commentator, outside law firms conducting independent investigations have become "branch offices of the prosecutor."[11]

The *Connolly* Decision and the Principles on Which It Is Based

United States v. Connolly

Into this world of powerful government influence over corporations conducting internal investigations came the extreme case of *United States v. Connolly*.[12] The issue presented by defendant Gavin Campbell Black in *Connolly* was whether the statements of a bank employee made during an internal investigation qualified as being sufficiently compelled by the government to trigger the employee's Fifth Amendment privilege and therefore be excluded at trial.

While the *Connolly* court ultimately denied Black any relief, holding that there was no use of Black's statements at trial,[13] it concluded based on the limited record before it that the bank's investigation was "fairly attributable" to the government[14] within the meaning of *Garrity v. New Jersey*,[15] because the government had effectively outsourced its investigation to the bank's outside counsel. As a result, the court found that when Black agreed to be

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interviewed by the bank during its investigation (understanding that under the Bank's policies he would be fired if he did not do so), his statements were "compelled" in violation of his right against self-incrimination.

Connolly arose out of the Commodity Futures Trading Commission's ("CFTC") investigation into manipulation of the London Interbank Offered Rate ("LIBOR"). After the SEC and the CFTC opened investigations into Deutsche Bank's role in LIBOR manipulation, and the Bank retained an outside law firm to respond to the inquiries, the CFTC asked the Bank to "voluntarily" conduct an investigation by outside counsel. For five years, the Bank and its counsel "coordinated extensively" with the SEC, CFTC, and eventually the DOJ.

Among other things: (i) the government instructed the law firm to interview certain employees, and the firm sought permission from the government to interview others; (ii) the government "gave marching orders" for how to conduct interviews, even instructing a law firm partner to approach an interview "as if he were a prosecutor"; (iii) the law firm provided the government with interview summaries and exculpatory statements; (iv) the firm submitted a white paper that provided "an exhaustive overview of the Bank's substantial cooperation with the Government during its LIBOR investigation"; and (v) counsel and the government had 230 phone calls and 30 in-person meetings, and for the final 14 months of the investigation, held weekly update calls.

At the same time, there was no evidence that the government conducted a substantive parallel investigation. Based on the record before it, the court determined that the government did not conduct a single interview of its own without first using the findings and notes from the prior interviews conducted by the law firm, thereby "illuminating just how the Government should 'investigate' the case against certain Deutsche Bank employees, including Black."

The company's outside lawyers, the court determined, "did everything that the Government could, should, and would have done had the Government been doing its own work." Distinguishing other cases because, in those cases, the regulators "were actually conducting parallel investigations," the court concluded: "Deutsche Bank was told by the Government to conduct an investigation into a particular matter, to do so in a particular fashion, to interview particular people (including Black), to share its findings with the Government on a regular basis, and to carry out governmental investigative demands that were generated by its earlier efforts. Deutsche Bank, facing ruin, complied with the Government's directives in every particular." As a result, the district court concluded that Deutsche Bank's interviews of Black, "for which he was compelled to sit under threat of termination, [we]re fairly attributable to the Government."[16]

U.S. v. Stein

Central to *Connolly*'s "fairly attributable" analysis was the Second Circuit's holding in *U.S. v. Stein*.[17] Stein arose in the context of the Justice Department's January 2003 "Thompson Memorandum," which, among other things, declared that "a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys' fees, through retaining employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."[18]

In 2002, Stein was one of the executives asked to leave KPMG after he testified in congressional hearings on KPMG's allegedly fraudulent tax shelters. Part of his exit package included an agreement that KPMG would pay his legal fees in actions brought against him arising from his activities at KPMG. When KPMG learned that Stein (and the firm), was the subject of a grand jury investigation into fraudulent tax shelters, KPMG began advancing Stein's legal fees.

The government then inquired and learned of KPMG's obligation to advance legal fees to employees. Despite acknowledging the obligation, the government advised KPMG that "the Thompson Memorandum [w]as a point that had to be considered." Pressure from the government led KPMG to set forth a new policy, pursuant to

which advancement of fees and expenses was: (i) capped at $400,000 per employee; (ii) conditioned on an employee's cooperation with the government; and (iii) terminated when an employee was indicted. Employees who refused to cooperate either buckled and submitted to interviews or were fired and KPMG stopped advancing their fees. Indeed, in negotiating a settlement, KPMG's lawyer reminded the government how the firm had pressured employees to cooperate, which was "precedent setting."

The same day KPMG escaped prosecution through a Deferred Prosecution Agreement ("DPA"), Stein and eight other KPMG employees were indicted. Shortly thereafter, KPMG ceased advancing legal fees to all the indicted employees. Stein subsequently moved to dismiss the indictment based on the government's interference with his fees, alleging that KPMG's decision amounted to state action because it resulted from the government's "significant encouragement." The government responded that KPMG's adoption and enforcement of its new fees policy was "private action, outside the ambit of the Sixth Amendment."

Affirming the district court's dismissal of the indictment, the Second Circuit found that the prosecutors deliberately reinforced the threat inherent in the Thompson Memorandum and conducted themselves in a manner that evidenced a desire to minimize the involvement of defense counsel. In reaching this conclusion, the Second Circuit rejected the government's contention that KPMG was not a state actor because it was ultimately up to KPMG how to implement and enforce its policies. Rather, state action was established because the government forced KPMG to adopt the restricted fees policy: the government "brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions," and "to ensure that KPMG's new Fees Policy was enforced, prosecutors . . . steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases. Such 'overt' and 'significant encouragement' supports the conclusion that KPMG's conduct is properly attributed to the States."

Although the *Stein* court cited considerable government interference, other language in the opinion, most, if not all of which, was relied upon by the *Connolly* court, suggests that private conduct can be found attributable to the government on an even lesser showing. All that is required for "[a]ctions of a private entity [to be] attributable to the State . . . [is that] there is a sufficiently close nexus between the State and the challenged action . . .."[19] Explaining this concept, the Court declared that a "close nexus" exists "when a governmental actor (i) exercises coercive power; (ii) is entwined in the management or control of the private actor; (iii) provides the private action with significant encouragement, either overt or covert; (iv) engaged in a joint activity in which the private actor is a willful participant; (v) delegates a public function to the private actor; or (vi) entwines the private actor in governmental policies."[20] As noted by the Court, although "an adversarial relationship does not normally bespeak partnership . . . [t]he government's threat of indictment [in this case, against KPMG] was easily sufficient to convert its adversary into its agent."[21] After all, "KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed."[22]

As a result, KPMG's position was, in the *Stein* court's view, distinguishable from prior cases where courts had declined to find the requisite "nexus" between the private conduct and the state.[23] KPMG was different because it "was never 'free to define' cooperation independently," and "the prosecution designated particular employees for deprivation of fees."[24]

Can a similar claim be based on the framework of government policies for corporate criminal prosecutions, and especially the requirement of producing all relevant facts and identifying all substantially involved individuals, which effectively directs key interviews? At least one company, Siemens A.G., spent over a billion dollars on an internal investigation;[25] raise your hand if you think any company would have spent that much money for its own purposes absent the significant encouragement or steering by the government. The teachings of

Connolly and *Stein* are that such "significant encouragement" or "steering," especially when combined with some form of a "joint activity" or government supervision, may constitute state action.[26] Corporate executives prosecuted after *Connolly* can therefore be expected to challenge the use of any unhelpful statement they made in an internal investigation, and at least some courts may be open to such a challenge.

The Sentencing Guidelines and the government's own policies, even without additional encouragement from the prosecutor, might support a plausible claim of "significant encouragement" or "steering"; somewhat harder but still potentially plausible would be an argument that those policies—especially the requirement that the company identify all individuals substantially involved in or responsible for the misconduct at issue and provide all relevant facts relating to that misconduct—provide a basis for a finding of effective supervision of the essence of the investigation. If there are regular reports to and/or substantive back-and-forth with the prosecution during the investigation, the argument could be strengthened. This is especially so because the government both sets the criteria used to measure a company's cooperation and determines whether to award cooperation credit in an individual case. In this way, based on the approaches outlined in *Connolly* and *Stein*, corporate executives could plausibly argue that the Sentencing Guidelines and government policies, especially with any additional coordination between the company's investigators and the prosecutors, constitute state action.[27]

This argument may have additional force when applied to investigations conducted under the authority of a DPA. Such agreements frequently contain clauses requiring the company to "cooperate fully" at the request of the Department of Justice "in any investigation of the company" of conduct under investigation during the term of the agreement,[28] and to disclose all factual information with respect to its activities and those of its officers, among others.[29] This language, along with the coordination that is at a minimum implicit in a DPA, suggests that statements made to a company under a DPA may be the strongest case for applying *Connolly.*

Implications and Questions for Investigations Cognizant of a Broader Reading of *Connolly*

What are the implications of this potential broader reading of *Connolly* for prosecutors and internal investigators seeking to preserve their Grand Prizes?[30] The most likely implication is an impact on the extent of ongoing communications between internal investigators and prosecutors. To minimize *Connolly*'s risk as much as possible, the government and the company would conduct entirely separate, albeit potentially parallel investigations.

Particularly when investigations follow a government subpoena or other type of governmental inquiry, companies and the prosecutors will need to feel out how much coordination during the investigation triggers risk under *Connolly*. Aspects of potential coordination are the selection of which employees to interview,[31] as well as the provision of interview memoranda or summaries to the government (instead of reporting results to the government in generalities), and the timing and frequency of any such reports or updates.

Of course, limiting the coordination could also have the effect of undermining the value of a company's cooperation if, for example, the company and the government, absent coordination, disagree at the end of the investigation about whether the company "provide[d] to the Department all relevant facts relating to [its] misconduct."[32] Coordinating with the government also has the added benefit of enabling the company to save resources by focusing its work on the issues that are of the most interest to the government. It can be anticipated that this balance will be struck differently in different jurisdictions, depending on local practices, rulings, and risk tolerance.

Beyond potential adjustments to the extent of coordination between the company and the government, it can be expected that defendants whose statements were taken in internal investigations will seek discovery from the government about the extent of its coordination with counsel conducting internal investigators, citing, among other things, the government's obligations under *Brady*

v. Maryland[33] and *Giglio v. United States*.[34] The *Connolly* docket suggests that the defendants learned of the coordination through a combination of discovery requests—from which they obtained a copy of the company's "white paper" about the investigation, which detailed, among other things, the extent of telephone calls and in-person meetings between the investigators and the prosecutors—and questioning witnesses during trial, most notably, Deutsche Bank's outside counsel.[35]

While the government might argue that there should be a high bar to discovery requests into such coordination, citing by analogy cases such as *United States v. Armstrong*,[36] the better argument—and the argument that seems to have succeeded so far in more analogous cases addressing this issue—is that the bar is lower. In *Armstrong*, the Court held that, to establish entitlement to discovery on a claim of selective prosecution based on race, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. The Court's reasoning focused on the protection of the core work product of prosecutors, namely, decisions on who to prosecute,[37] and on its reluctance to exercise judicial power over prosecution decisions—a " 'special province' of the Executive," and a matter on which prosecutors had greater competence.[38]

This reasoning does not apply to discovery into coordination between prosecutors and a third party, which has a far less intrusive impact on the government's work product, and does not invade a "special province" of executive branch decision making. In addition, and unlike prosecution decisions where the government is afforded deference and a presumption of propriety, under *Kastigar*, the prosecution bears the burden of demonstrating that it has not used, directly or indirectly, a defendant's immunized testimony.[39]

Nor is an argument that investigation materials are privileged likely to succeed if those materials have been shared with the government. In *U.S. v. Bergonzi*,[40] the defendants successfully moved for the production of internal investigation materials provided by their former employer to the government (which had been inadvertently produced to one of the defendants). The court rejected the company's argument that the investigation materials were protected by the attorney-client privilege, as they were prepared with the intent to share them with the government and not with the intent that they remain confidential. This production to the government also waived any work product protection, because "[i]t is inherently unfair to permit an entity to choose to disclose materials to one outsider while withholding them from another on grounds of privilege."[41]

No more persuasive to the court was the government's argument that it was not required to turn over the internal investigation report in discovery.[42] Consistent with a line of cases establishing that Federal Rule of Criminal Procedure 16 requires only a *prima facie* showing, and not a heavy burden,[43] the court found that Rule 16 and *Brady* required production, reasoning that "the discovery will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[44] In so holding, the court rejected the government's assertion that only exculpatory information contained in the memoranda should be provided because of "strong policy considerations . . . encouraging corporations to cooperate with government investigators by producing work product resulting from internal corporate investigations."[45]

In addition to creating discovery issues, will there be an impact on the timing or form of prosecution decisions? While the government perhaps could consider adding some procedural protections to avoid the risk of rewarding companies for providing information that turns out to be inadmissible—such as adding contingencies into declinations or DPAs[46]—there should be no change in the way companies are rewarded for their cooperation: the government has control over the extent of coordination, so the burden to make sure that the level of coordination does not trigger any risk under *Connolly* should fall entirely on the government. In any event, the company's cooperation is complete when it has provided all relevant evidence, regardless of whether that evidence is later excluded.

Over time, as charges are filed in the relatively rare cases in which individuals have made unhelpful statements during internal investigations, defendants will challenge those statements under *Connolly.* Only then will a balance in light of *Connolly* and its brethren be struck, the line between what sort of coordination is permissible and what is not be drawn, and any new procedures be determined.

ENDNOTES:

[1]*United States v. Connolly*, 2019 WL 2120523 (S.D. N.Y. 2019).

[2]*See, e.g.,* C. Weisselberg & S. Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms,* 53 ARIZ. L. REV. 1221 (2011); H. First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions,* 89 N.C. L. REV. 23, 26 (2010) (noting lack of corporate prosecutions until the late 1970s and observing that before then "the issues of individual and entity liability in business crime cases were a low-level policy concern").

[3]*See, e.g.,* 15 U.S.C.A. § 78dd-1, *et seq.* (Foreign Corrupt Practices Act): 18 U.S.C.A. §§ 1348-50, 1519-20 (criminal portions of Sarbanes-Oxley Act).

[4]United States Sentencing Guidelines Manual § 8C2.5 & 8C2.5(g)(2).

[5]*See* E. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution,* 43 AM. CRIM. L. REV. 107, 108 (2006).

[6]C. Weisselberg & S Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms,* 53 ARIZ. L. REV. 1221, 1243 (2011); *see* Lisa Kern Griffin*, Compelled Cooperation and the New Corporate Criminal Procedure,* 82 N.Y.U. L. Rev. 311, 367 (2007) ("The threat of [ruinous indictment] brings significant pressure to bear on corporations . . ..").

[7]*See* Deputy Attorney General Eric Holder, *Bringing Criminal Charges Against Corporations* (June 16, 1999) ("Holder Memorandum"), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF; Deputy Attorney General Larry Thompson, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) ("Thompson Memorandum"), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; Deputy Attorney General Paul J. McNulty, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf ("McNulty Memorandum"); Deputy Attorney General Mark Filip, *The Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf; and Deputy Attorney General Sally Yates, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

[8]In addition to the broader policies encouraging cooperation, DOJ also has issued policies outlining the parameters and benefits of cooperation, including voluntary disclosure, for violations of particular statutes, including for the Foreign Corrupt Practices Act and False Claims Act. *See* Justice Manual 9-47.120 (FCPA Corporate Enforcement Policy) and Justice Manual 4-4.112 (Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters).

[9]Justice Manual 9-28.700(A) (citing U.S.S.G. § 8C2.5(g), cmt. (n.13) ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient . . . to identify . . . the individual(s) responsible for the criminal conduct.").

[10]*See, e.g.,* Gary DiBianco et al., *U.S. Foreign Corrupt Practices Act Enforcement Developments and Trends and Selected Non-U.S. Anti-Corruption Developments*, World Sec. L. Rep., Vol. 21, No. 4, 2 (April 2015), http://perma.cc/TYU8-D4JF (commenting how "eight of the 10 corporate settlements in 2014 and the only two settlements announced to date in 2015 involved reportedly prompt and genuine cooperation by the target entities").

[11]H. First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions,* 89 N.C. L. REV. 24 (2010).

[12]*United States v. Connolly*, 2019 WL 2120523 (S.D. N.Y. 2019).

[13]In denying Black's motion, the court also commented repeatedly on the incompleteness of the record before it—and, by extension, the tentative nature of its findings—due in large part to a lack of information provided by the government. *See, e.g., United States v. Connolly*, 2019 WL 2120523 at *1 (S.D. N.Y. 2019) ("There remain holes in the record . . . and a fully-bore *Garrity* hearing would be a fascinating exercise"); *Connolly* at *4-5 (noting record lacked information about what was said at certain meetings or what was discussed in certain email exchanges); *Connolly* at *5 (describing record as "limited"); *Connolly* at *9 (faulting the Govern-

ment for "not provid[ing] the Court with much information about any independent investigative activities it may have undertaken"); *Connolly* at *10 ("In short, while the record before the Court is incomplete (at the Government's choice)"); *Connolly* at *14 ("given the Government's deliberate choice not to create a record that would allow for a contrary finding, the record presently before the Court establishes that the Government violated *Garrity*" (citing *U.S. v. Stein*, 541 F.3d 130, 152 n.11, 2008-2 U.S. Tax Cas. (CCH) P 50518, 102 A.F.T.R.2d 2008-6023 (2d Cir. 2008))). Black has appealed his conviction, so there is a chance that some of these issues could be addressed by the Second Circuit.

[14]*United States v. Connolly*, 2019 WL 2120523 at *10 (S.D. N.Y. 2019) (quoting *U.S. v. Stein*, 541 F.3d 130, 152 n.11, 2008-2 U.S. Tax Cas. (CCH) P 50518, 102 A.F.T.R.2d 2008-6023 (2d Cir. 2008) ("While *Garrity* involved the conduct of a government employer, the *Garrity* rule applies with equal vigor to private conduct where the actions of a private employer in obtaining statements are 'fairly attributable to the government.' ").

[15]*Garrity v. State of N.J.*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

[16]*United States v. Connolly*, 2019 WL 2120523 at *14 (S.D. N.Y. 2019) (citing *Stein*, 541 F.3d at 152 n.11).

[17]*U.S. v. Stein*, 541 F.3d 130, 2008-2 U.S. Tax Cas. (CCH) P 50518, 102 A.F.T.R.2d 2008-6023 (2d Cir. 2008).

[18]After *Stein,* this principle was abandoned. Now the Justice Manual states: "In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action." Justice Manual 9-28.730.

[19]*Stein*, 541 F.3d at 146.

[20]*United States v. Connolly*, 2019 WL 2120523 at *10 (S.D. N.Y. 2019) (citing *Stein*, 541 F.3d at 147).

[21]*Stein*, 541 F.3d at 151.

[22]*Stein*, 541 F.3d at 151 (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 369 (2007) ("The threat of [ruinous indictment] brings significant pressure to bear on corporations, that that threat 'provides a sufficient nexus' between a private entity's employment decision at the government's behest and the government itself.")).

[23]The court distinguished *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), finding that decisions made by physicians in that case "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State." *Stein*, 541 F.3d at 149. The *Stein* court similarly distinguished *Albert v. Carovano*, 851 F.2d 561, 48 Ed. Law Rep. 35 (2d Cir. 1988) because the ultimate power to select a particular sanction in an individual case rested with a private party, in this case, the college. *Stein*, 541 F.3d at 149.

[24]*Stein*, 541 F.3d at 149.

[25]Peter Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times (Mar. 5, 2012), http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/.

[26]*See, e.g., United States v. Connolly*, 2019 WL 2120523 at *10 (S.D. N.Y. 2019); *Stein*, 541 F.3d at 148.

[27]In some situations, and for some entities such as private regulatory entity, it may be harder to make a successful *Connolly* challenge, such as when the investigating entity has its own, independent reasons for conducting an investigation. *See U.S. v. Solomon*, 509 F.2d 863, Fed. Sec. L. Rep. (CCH) P 94948 (2d Cir. 1975) (no state action where New York Stock Exchange compelled a trader's testimony because NYSE was pursuing its own interests and obligations and would have investigated anyway, regardless of SEC involvement); *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002) (no state action where NASD had a "preexisting regulatory duty to investigate questionable securities transactions, that is, it would have requested interviews regardless of government pressure"). Although most companies conducting internal investigations do have "independent . . . motives for making their inquiries," most notably, an interest in promoting a compliant workplace, in practice they are most likely conducting such investigations due to an existing or potential government inquiry, rather than doing so "regardless of governmental pressure." *Stein*, 541 F.3d at 150.

[28]*See, e.g.,* Deferred Prosecution Agreement in *United States v. Samsung Heavy Industries Co., Ltd.*, Case No. 19-CR-328 (E.D. Va. 2019), p. 5.

[29]DPA in *Samsung* at p. 6.

[30]Any such challenges would also likely involve an attempt to get the entire case thrown out under *Kastigar v. U.S.*, which prohibits the use, whether direct or indirect, of a defendant's compelled statements. *United States v. Connolly*, 2019 WL 2120523 at *15 (S.D. N.Y. 2019) (citing *Kastigar v. U.S.*, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)). As the district court reiterated in *Connolly*, to defeat a *Kastigar* motion, the government must show that the evidence it proposes to use—whether, for example, to secure an indictment or to prepare its case for trial—"is derived from a legitimate

source wholly independent of compelled testimony," *i.e.*, that the evidence has not been "tainted" by the use of a defendant's compelled statements. *United States v. Connolly*, 2019 WL 2120523 at *15 (S.D. N.Y. 2019) (quoting *Kastigar*, 406 U.S. at 460).

[31]*See United States v. Connolly*, 2019 WL 2120523 at *14 (S.D. N.Y. 2019) (holding as critical to its finding of state action the fact that "Deutsche Bank was told by the Government to conduct an investigation into a *particular* matter, to do so in a *particular* fashion, to interview *particular* people (including Black)" (emphasis added)).

[32]Justice Manual 9-28.700(A).

[33]*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[34]*Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[35]Future whitepapers, at least from investigators who want to maintain the admissibility in subsequent criminal trials of the statements they took, may be less boastful about the extent of their coordination with the prosecutors.

[36]*U.S. v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

[37]*Armstrong*, 517 U.S. at 463.

[38]*Armstrong*, 517 U.S. at 464-65.

[39]*See Kastigar*, 406 U.S. at 460-62.

[40]*U.S. v. Bergonzi*, 216 F.R.D. 487, 502 (N.D. Cal. 2003).

[41]*Bergonzi*, 216 F.R.D. at 497.

[42]*Bergonzi*, 216 F.R.D. at 499, 502.

[43]*See U.S. v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990); *U.S. v. McGuinness*, 764 F. Supp. 888, 894-895, 121 Lab. Cas. (CCH) P 10140 (S.D. N.Y. 1991) (collecting cases). The materiality requirement " 'is not a heavy burden,' rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.' " *U.S. v. Lloyd*, 992 F.2d 348, 351, 93-1 U.S. Tax Cas. (CCH) P 50317, 72 A.F.T.R.2d 93-5437 (D.C. Cir. 1993) (quoting *U.S. v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992)) (citation omitted).

[44]*Bergonzi*, 216 F.R.D. at 502.

[45]*Bergonzi*, 216 F.R.D. at 499.

[46]Or, in the most twisted sort of case, a contingency for the case of deliberate attempts by a company to protect its executives.

COURT HOLDS THAT SYNDICATED BANK LOAN IS NOT A "SECURITY"

By Andrew J. Ehrlich, Roberto Finzi, Udi Grofman, Brad S. Karp, Gregory F. Laufer, and Richard C. Tarlowe

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Federal and state securities laws generally apply only to instruments that qualify as "securities." The question of whether a particular instrument is a security, therefore, can have significant and far-reaching consequences. Nearly 30 years ago, in *Banco Espanol de Credito v. Security Pacific National Bank*, the Second Circuit Court of Appeals held that certain loan participations at issue in that case were not securities.[1]

Although the syndicated loan market has grown substantially since then, courts have only rarely had occasion to consider whether a syndicated loan qualifies as a security (and thus falls within the scope of federal and state securities laws). That question was squarely presented in *Kirschner v. JPMorgan Chase Bank, N.A. et al*, a case pending in the Southern District of New York, and on May 22, 2020, U.S. District Judge Paul Gardephe held that syndicated bank loans were not securities.[2] Judge Gardephe noted in his decision that he had not identified any decisions from other courts concluding that a syndicated bank loan was a security, and he rejected the plaintiffs' argument that changes in the syndicated loan market compelled a different conclusion.

Kirschner arose out of a $1.775 billion syndicated loan transaction in which several banks served as lenders