

# PUBLICATION

---

## Cooperation Issues in Government Contractor Investigations – Part 2

July 15, 2019

In Part 1 of this article series, we looked at duties and opportunities for government contractors to investigate and report fraudulent or criminal conduct within their organizations or voluntarily disclose and cooperate to reduce civil False Claims Act (FCA) exposure. There are tremendous incentives for government contractors to uncover and disclose criminal conduct, as well as FCA violations, and to turn over all of the evidence they uncover to the government. These incentives include: (1) cooperation credit in sentencing and assessment of penalties in criminal matters and (2) reduction of damages in civil FCA cases. The potential for the government to use the fruits of the contractor's internal investigation to prosecute or sue the contractors' own employees raises several questions. We will analyze some of these questions in the second and final part of this article series.

When government contractors are incentivized to uncover criminal or fraudulent conduct within their organizations and provide the evidence to the government, this raises questions such as: Is there a point at which the contractors have been sufficiently "deputized" as government-like investigators so that their employees are entitled to *Garrity* warnings, given that any statement made during the internal investigation may be used against them in a subsequent criminal prosecution?

*Garrity* is a 1967 Supreme Court decision which held that "statements obtained from public employees under threat of termination of employment were involuntary and therefore inadmissible against them in a criminal trial." [Connolly and Black Decision and Order at p. 20](#). The *Garrity* rules can apply to private sector conduct "where the actions of a private employer in obtaining statements are 'fairly attributable to the government.'" *Id.* [Citing U.S. v. Stein, 541 F.3d 130, 152 n.11 \(2d Cir. 2008\)](#).

In the recent [Connolly and Black](#) case, the trial court concluded that, under the facts of that case, the government "outsourced" its investigation to the company, Deutsche Bank, and its outside counsel to such degree that they "were de facto the government for *Garrity* purposes." [Connolly and Black Decision and Order at p. 2](#). In [Connolly and Black](#), there was a significant amount of cooperation and interaction between the company and the government. The government even gave the company's outside attorneys direction regarding the specific employees to interview and how to conduct those interviews. Under these facts, the court found that the "government violated *Garrity* because Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the government." *Id.* [at p. 29](#). Moreover, under the prior *Stein* case, the government cannot force the company, under a non-prosecution agreement, to condition payment of employees' attorney's fees on their cooperating with the government. [U.S. v. Stein, 542 F.3d 130, 150 \(2d Cir. 2008\)](#).

The implications of holdings such as these on government contractors are not yet clearly determined. In addition to *Upjohn* warnings, will contractors be required to provide employees interviewed during internal investigations additional warnings similar to a *Garrity* warning? If the results of the company's internal investigation will be provided to the government and could result in criminal prosecution, will contractor employees have a constitutional right to have counsel present? Will the government be likely to continue to work with contractors and essentially help contractors conduct internal investigations? Although the penalties paid by Deutsche Bank as described in the [Connolly and Black](#) court order seem massive, according to the Court, the bank's internal investigation was a tremendous success. The government could not deny the bank's

cooperation credit when the bank's internal investigation was conducted under the government's guidance and direction. Thus, if the government, now chastised, becomes unwilling to work with contractors to make sure the contractors are conducting thorough and complete investigations, will it become more difficult for contractors to receive cooperation credit? [See \*Cooperation Issues in Government Contractor Investigations: Part I\*](#).

Until some of the questions raised in the second part of this article series are more fully resolved, government contractors should continue to take steps to ensure they receive full cooperation credit and mitigate risk to the greatest degree possible.