ALERT MEMORANDUM

SDNY Judge Finds Government "Outsourcing" of Investigation to External Counsel Runs Afoul of Fifth Amendment

May 7, 2019

On May 2, 2019, the United States District Court for the Southern District of New York issued an important decision delineating the boundaries between conducting a proper internal investigation and acting as an arm of the government. For the government, the consequences of "outsourcing" an investigation to a company and its counsel could be exclusion of evidence collected as a result of that internal investigation, including statements made by a company employee in an interview, or even dismissal of an indictment.

In *United States v. Connolly*, Chief Judge Colleen McMahon held that the Department of Justice, Commodity Futures Trading Commission ("CFTC"), and other agencies had effectively outsourced their investigation of potential LIBOR manipulation at Deutsche Bank to the bank and its lawyers and that as a consequence the Fifth Amendment rights of the former Deutsche Bank trader who was on trial, Gavin Black, were likely compromised when he was compelled under threat of termination to submit to an interview by Deutsche Bank's external counsel. The conviction was ultimately sustained, but only because the compelled statements were not used to obtain a conviction. The ruling has potentially broad implications for conducting internal investigations because of the significant obligations that attach to those deemed to be government agents, even beyond the important Fifth Amendment rights at issue in *Connolly*.

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1. Background

The underlying case against Black and co-defendant Matthew Connolly arose from an investigation originally initiated by the CFTC into LIBOR[1] manipulation by two LIBOR panel banks. That was followed in short order by additional investigations both in the United States and abroad, including into conduct by Deutsche Bank, and including investigations by the Securities and Exchange Commission ("SEC") and the Justice Department. Ultimately, after a five-year internal investigation costing millions in legal fees, Deutsche Bank settled with the Justice Department on April 23, 2015, for a three-year deferred prosecution agreement and a $775 million fine.[2] During the investigation, company counsel conducted three interviews of Gavin Black, who was then an experienced swaps trader at Deutsche Bank. Black was given a standard *Upjohn* warning but was not represented by counsel.

On May 31, 2016, the grand jury indicted Black on charges of wire fraud and conspiracy to commit wire fraud and bank fraud based on his alleged conduct in connection with the submission of LIBOR rates. He was convicted on October 17, 2018. On December 10, 2018, Black filed a motion to vacate his conviction and dismiss the indictment on the basis that his interview statements to Deutsche Bank's counsel were both "fairly attributable" to the government and "compelled." He further argued that these statements were then improperly used by the government in prosecuting him as prohibited by *United States v. Kastigar* under which a conviction can be challenged when "compelled testimony" was "used" to obtain it.[3]

2. The Court's Findings

As an initial matter, the court held that, assuming Deutsche Bank acted as an arm of the government, Black's statements in his internal interviews would have been compelled within the meaning of the Supreme Court's decision in *Garrity*.[4] The facts upon which the court based this conclusion were unexceptional. The bank's Global Compliance Core Principles stated that employees "*must* fully cooperate" with internal or external investigations, and one of the bank's lawyers confirmed that if Black had declined to be interviewed he would have lost his job.[5] Thus Black "did not have discretion to refuse to talk to" Deutsche Bank's counsel.[6]

The court then turned to the question of whether the bank and its counsel were acting as an arm of the government. The court noted several facts that it perceived to be unusual and troubling. The first agency to begin an investigation, the CFTC, did not ask for documents or information or to take testimony from specified personnel. Rather, the CFTC sent a letter asking Deutsche Bank to "voluntarily conduct by external counsel" a full review of its USD LIBOR trading business. As Chief Judge McMahon observed, given Deutsche Bank's role as a regulated financing institution "there was nothing 'voluntary' about the investigation that followed the CFTC letter."[7] The CFTC went on to specify what the investigation would entail, including "interviewing all relevant Bank staff."[8] Upon commencing their own investigations, the Justice Department's Criminal and Antitrust

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1 LIBOR is a benchmark interest rate, calculated based on submissions from a panel of 16 banks and previously published by the British Bankers' Association based in London.

2 In April 2015, Deutsche Bank also settled allegations concerning LIBOR manipulation with the CFTC and the U.K. Financial Conduct Authority.

3 406 U.S. 441 (1972).

4 In *Garrity v. New Jersey*, the Supreme Court held that statements obtained from police officers under threat of termination of employment were involuntary and therefore inadmissible against them in trial. 385 U.S. 493, 497 (1967). Under *Garrity*, private conduct may be attributed to the government where "there is a sufficiently close nexus between the State and the challenged conduct." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

5 *United States v. Connolly*, No. 16 Cr. 0370 (CM), slip op. at 6–7 (S.D.N.Y. May 2, 2019).

6 *Id.*

7 *Id.* at 4.

8 *Id.*

Divisions again did not request documents but made a request to access the investigatory files of the CFTC. Thereafter, the Justice Department conducted no interviews on its own until after Deutsche Bank's counsel had interviewed the relevant employees.

The court found that the Justice Department essentially relied upon company counsel to conduct its investigation. As the investigation progressed, the government's instructions to Deutsche Bank's counsel became more explicit. In early November 2010, the CFTC directed Deutsche Bank's counsel to re-interview various staff who had been first interviewed by telephone, to do so in-person, and to complete the interviews "by Thanksgiving."[9] In a later meeting, government official coached Deutsche Bank's counsel to "approach [an employee] interview as if he were a prosecutor."[10] Deutsche Bank's counsel also coordinated closely with and provided expansive information to the government. Company counsel asked permission before interviewing certain witnesses, including Black. In addition, rather than simply produce documents and interview summaries, company counsel provided a full digest of all the information collected, highlighting the most important nuggets of information and sharing a blue print for future prosecutor interviews.[11] The government required Deutsche Bank's counsel to provide "regular updates, initially occurring weekly."[12] Ultimately, company counsel had "hundreds if not thousands" of interactions with the government, including 230 telephone calls and 30 in-person meetings.[13]

Company counsel compiled results of the investigation by Deutsche Bank's external counsel into an extensive White Paper that it provided to the Justice Department and that disclosed facts incriminating to Deutsche Bank and argued for a reduced penalty as a result of Deutsche Bank's extensive cooperation.[14]

3. The Court's Decision

Based on the facts above, the court held that the statements taken from Black during interviews with company counsel were compelled in violation of Black's Fifth Amendment rights against self-incrimination. That conclusion required the court to find both that there was a "close nexus" between the government and the interviews such that the conduct of company counsel was "fairly attributable" to the government and that the testimony was compelled. In so holding, the court rejected the government's broad contention that because Deutsche Bank's counsel owed a fiduciary obligation to Deutsche Bank, it therefore could not be acting on the government's behalf. To the contrary, it held, Deutsche Bank's counsel "did everything that the government could, should, and would have done had the [g]overnment been doing its own work." For example, the court noted, "Deutsche Bank did not respond to the [g]overnment's subpoenas by turning over documents without comment," and its employees were not subjected to government or regulatory depositions on notice, at which they were defended by company counsel." Instead, the court found that Deutsche Bank did the opposite—it effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies."[15]

The court specifically held that company interviews, including that of Black were "[g]overnment-engineered interviews," relying for that holding on the observations that:

— the government asked company counsel to interview all relevant staff;

— company counsel forbore interviewing Black until it received permission;

9 *Id.* at 5–6.
10 *Id.* at 7.
11 *Id.* at 21–24.
12 *Id.* at 5.
13 *Id.* at 14.

14 The Opinion notes that Deutsche Bank received praise in its settlement for having "collected, analyzed, and organized voluminous evidence, data, and information … in a way that saved the Department significant resources." *Id.* at 17.

15 *Connolly*, slip op. at 23–24.

— the government directed company counsel to act "like a prosecutor" in the interview; and

— at the government's direction, company counsel shared their findings on a regular basis.

In the end, however, the court's holding that the government violated *Garrity* was a pyrrhic victory for Black personally. The court declined to vacate Black's conviction, holding that because the unlawfully obtained statements were not "used" against Black to obtain either his indictment or his conviction, there was no Fifth Amendment violation.[16] "Use" can include, *inter alia*, obtaining an indictment based on tainted evidence, preparing the government's case for trial based on this evidence, or presenting tainted evidence to the grand jury. The government was able to identify an independent source other than Black's interviews for everything that the FBI agent presented to the grand jury, and was able to provide "alternative source material for *every line* of grand jury testimony."[17] It also was able to identify all of the notes from witness interviews that it relied upon for witness preparation, none of which discussed Black statement's to Deutsche Bank's counsel. The government did not make direct or indirect non-evidentiary use of Black's statements during its investigation. Finally, the government did not enter into evidence any of Black's interview statements at trial and was able to show there was an independent source for all of the evidence it presented at trial and that it did not make any direct or indirect use of Black's statements.

4. Observations: Cooperation, Defense, and Constitutional Rights

The Southern District opinion comes at the confluence of two separate, and occasionally conflicting, lines of guidance.

On the one hand, enforcement agencies have spent the last decade issuing extensive guidance encouraging affirmative and pro-active cooperation. As Chief Judge McMahon noted, the CFTC had issued a memorandum at the start of the investigation expressly requiring a cooperating institution to, among other things, provide employees for testimony.[18] Since then, the CFTC has only heightened its expectations, issuing additional guidance in 2017 that, among other changes, explicitly notes that a company's cooperation will be evaluated in part based on their identification to the CFTC of individual wrongdoers and listing certain types of assistance provided by the company to its employees—for example, providing employees access to documents other than those they might have been privy to previously—as factors weighing against cooperation credit.[19]

For its part, the Justice Department's Criminal Division has likewise aggressively encouraged cooperation, which it too has emphasized requires adding significantly more value that simply responding to requests for information. In 2015, then-Deputy Attorney General Sally Yates issued guidance that "corporations are required to provide to the Department [of Justice] all relevant facts about the individuals involved in the alleged misconduct."[20] Her successor Rod Rosenstein reinforced the substance of this guidance in 2018, directing that companies must identify individuals who were "substantially involved in or responsible for the misconduct" and "must identify all wrongdoing by senior officials, including members of senior management or the board of directors."[21] Likewise, recently updated guidance from the Justice Department provides that companies that self-report and fully cooperate with Criminal Division investigations are entitled to a presumption that they will not be prosecuted and, even short of a

16 A compelled statement only gives rise to a Fifth Amendment violation it if it is actually "used" against that defendant to obtain a conviction. *Kastigar*, 406 U.S. at 453.

17 *Connolly*, slip op. at 41.

18 *Id.* at 3.

19 CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, Jan. 19, 2017.

20 Memorandum from Sally Yates, "Re: Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015.

21 "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's

declination, companies can receive up to a 50% discount on penalties if they meet the Justice Department's requirements.[22] Since 2017, the Justice Department guidance has provided that "full cooperation," includes, among other things, that a company "de-conflict" employee interviews and other investigatory steps with prosecutors, which has resulted in internal investigators in certain cases seeking permission to interview a witness in advance of the Justice Department.[23]

Against this backdrop of heightened expectations for cooperation by regulators and prosecutors alike for companies under investigation, it is hardly surprising that Deutsche Bank and its counsel cooperated so extensively in conducting their internal investigation. At the same time, the courts repeatedly have expressed concern regarding the government's outsourcing of its investigative responsibilities and the implications that such outsourcing has for the due process and constitutional rights of subjects of government investigations. Chief Judge McMahon's opinion repeatedly draws upon the reasoning and conclusion of the Southern District's prior opinion in *United States v. Stein*, in which Judge Kaplan famously dismissed the indictments of previous partners and employees of KPMG on the grounds that the conduct of company counsel in refusing to advance the employees' legal fees was attributable to the government.[24] In that case, Judge Kaplan described the government's actions of discouraging companies from advancing legal fees to employees in order to receive cooperation credit as having "undermin[ed] the proper functioning of the adversary process that the Constitution adopted as the mode of determining guilt or innocence in criminal cases."[25] This decision also follows on the heels of the Second Circuit's opinion in *United States v. Allen*, in which the Circuit Court vacated the convictions of two other bankers who were found guilty of manipulating LIBOR on the grounds that the Justice Department had improperly used statements that had been compelled by a foreign enforcement agency.[26]

In addition, in a series of cases, defense counsel for individuals have sought access to the investigative files of company counsel on the theory that—if company counsel is conducting an investigation at the behest of the government and in coordination with the government—the files of company counsel may be tantamount to government files and give rise to *Brady* obligations to turn over exculpatory evidence.[27]

Chief Judge McMahon's opinion is explicit on this point. Noting that the "Court is deeply troubled by this issue," she observed that "there are profound implications if the [g]overnment, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations who are in a uniquely coercive position *vis-a-vis* potential targets of criminal activity."[28]

35th International Conference on the Foreign Corrupt Practices Act," Department of Justice, November 29, 2018, *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

22 "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act," Department of Justice News, November 29, 2017, *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

23 United States Attorneys' Manual ("USAM") § 9-47.120(3)(b). The Justice Department recently added a footnote to the de-confliction guidance (likely in response to arguments made in *Connolly* and elsewhere) stating that: "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."

24 *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

25 *Id.* at 368–69.

26 *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

27 *See United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006); *United States v. Blumberg*, No. 2:14-cr-00458-JLL, slip op. (D.N.J. Mar. 23, 2015); *United States v. Duronio*, No. 02-933, 2006 WL 1457936 (D.N.J. May 23, 2006), *aff'd*, No. 06-5116, 2009 WL 294377 (3d Cir. 2009); *cf. United States v. Wilmington Trust Corp.*, No. 15-23, 2016 WL 3749860 (D. Del. 2016).

28 *Connolly*, slip op. at 2.

Thus, in the wake of *Connolly* and the revised guidance in the USAM, it is possible that the Justice Department may play a more passive role in receiving information from a cooperating company and its counsel, as opposed to trying to dictate how an internal investigation should be conducted. And, at the same time, the Justice Department can be expected to be more proactive in its own efforts earlier on in an investigation and may no longer wait to see the results of an internal investigation before conducting its own investigative work. The government likely will issue subpoenas or requests for documents earlier in an investigation and perhaps may seek to conduct some of its own interviews without waiting for company counsel to complete its interview program.

At the same time, however, *Connolly* also provides helpful reminders to the defense bar regarding how to conduct an internal investigation in light of the cooperation imperative. As with respect to any other representation, outside counsel's duty in conducting an internal investigation is one of zealous representation to protect the client's interests. That zealous representation will continue to involve full cooperation in appropriate cases, and sharing information developed during the course of an investigation. Defense counsel should be wary of taking any direction from government officials about how to conduct an interview—a direction the court found particularly problematic.[29] And, to be fair, it must involve the development of exculpatory as well as incriminating facts and the presentation of a defense (where available) on the law as well as on the facts. Those injunctions are not inconsistent with cooperation. If the role of the government is not just to secure a conviction but to do justice based on the law and the facts,[30] with the benefit of an adversarial presentation, it is essential for cooperation. To the extent prosecutors seek or encourage defense counsel to conduct an internal investigation process that borders on a predetermined exercise searching for evidence solely of guilt (and without the limits placed on law enforcement by the Constitution and statute), it is the role of counsel—now further armed with the court's decision in *Connolly*—to identify and respond to such government overreach.

5. Conclusion

Balancing cooperation, defense of the company, and protection of employees' rights is not always straightforward, and each case presents its own challenges and nuance. This decision demonstrates, however, that while ever-increasing standards for cooperation may entice companies to defer to government investigators' demands, such deference should be tempered by a recognition that our legal system defines an important and separate role for defense counsel in protecting the rights of those under investigation.[31]

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[29] *Connolly*, slip op. at 7.

[30] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[31] This Alert Memorandum was prepared with the assistance of Brandon N. Adkins, Melissa Gohlke, and Tamara Wiesebron.