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Blurred Lines: Government Involvement in Corporate Internal Investigations and Implications for Individual Accountability

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[In May 2019], Chief Judge Colleen McMahon of the US District Court for the Southern District of New York (SDNY) issued an opinion that could have significant implications for how companies cooperate in Government investigations. Following a trial, Defendant Gavin Black was convicted of wire fraud and conspiracy to commit wire fraud and bank fraud in the well-known LIBOR (London Interbank Offered Rate) manipulation scheme. Black argued that his conviction should be vacated and the indictment dismissed because interview statements he made to attorneys representing his employer, Deutsche Bank were "fairly attributable to the Government" and "compelled," in violation of his Fifth Amendment right against self-incrimination.

The court excoriated the Government for its heavy reliance on the Bank's internal investigation in building a case against Black and his co-defendant, ultimately concluding that the Bank's interview of Black was "fairly attributable to the Government." The court declined to overturn Black's convictions, however, holding that the Government did not "use" Black's compelled statements in indicting or prosecuting him such that the relief he sought was warranted. Yet it was Judge McMahon's commentary concerning the Government's reliance on—and direction of—the Bank's internal investigation that could impact how companies and outside counsel cooperate with Government investigations in the future.

Background

Gavin Black was a director on Deutsche Bank's Money Market Derivatives and Pool Trading Desks in London from 1997 through 2015, where he traded in USD LIBOR-based derivative products. In the years immediately following the financial crisis, the U.S. Securities and Exchange Commission (SEC) and the US Commodity Futures Trading Commission (CFTC) commenced investigations into alleged LIBOR manipulation by various Banks, including Deutsche Bank. The Bank retained external counsel to assist with conducting an internal investigation.

After receiving inquiries from the SEC and CFTC in 2010, the Bank cooperated extensively with these agencies throughout their investigations. In particular, the Bank, through outside counsel,

conducted a lengthy internal investigation that included the review of 158 million electronic documents and nearly 200 interviews of more than 50 Bank employees. As part of its investigation, the Bank's counsel conducted four interviews with Black over the course of two years.

The court found—based in part on testimony from the Bank's outside counsel—that Black would have been terminated had he not participated in the interviews, and that his interview statements were therefore "compelled" for Fifth Amendment purposes. The Bank, through counsel, provided summaries of the first two interviews to the CFTC, which forwarded them to the Department of Justice (DOJ). [1] Thereafter, the Bank's counsel met with DOJ lawyers to provide a "download" of Black's statements and, ultimately, in 2013, Black (accompanied by defense counsel) was interviewed by the FBI, DOJ, and CFTC. Black was then interviewed by the Bank one last time—with the Government's blessing and accompanied by his defense counsel—in 2014.

In 2016, the DOJ indicted Black on one count of conspiracy to commit wire fraud and bank fraud and nine counts of wire fraud. Following a month-long trial in late 2018, a jury in the SDNY convicted Black of conspiracy and one count of wire fraud. Black moved to vacate his conviction and dismiss his case, arguing that the Government's evidence was tainted through exposure to Black's compelled statements to the Bank.

The Court's Opinion

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court held that statements made by employees (in that case, police officers) put to the choice of either providing potentially incriminating statements in connection with a criminal investigation or losing their jobs were "coerced" and therefore unusable in subsequent criminal proceedings. Thus, it is well established that the Government violates an individual's Fifth Amendment privilege against self-incrimination when it forces that individual to choose between their continued employment and waiving their Fifth Amendment privilege. In *Garrity*, however, the investigation was conducted by the New Jersey Attorney General—unquestionably a Government actor to which the Fifth Amendment applied. To establish a *Garrity* violation here, Black needed to show that his statements were coerced by the Bank's counsel through conduct "fairly attributable to the Government." As to the question of whether Black's statements were coerced, the court concluded there was "no question in the court's mind" that Black's statements were "compelled" because they were made under threat of termination. [2]

The court then reviewed the Bank's and the Government's investigations and held that there was "compelling evidence" that the Bank's internal investigation was "fairly attributable to the Government." The factors relied upon by Judge McMahon are noteworthy:

[1] By this time, the DOJ had commenced its own investigation. As used herein, the term "Government" refers collectively to the SEC, CFTC, and DOJ.

[2] The court's conclusion was based on (1) the Bank's policies providing that employees "must fully cooperate" with investigations and that employees "who violate Deutsche Bank's policies may be subject to disciplinary action up to and including termination," (2) testimony from the Bank's outside counsel that employees' "choice is to cooperate or find new employment," and (3) Black's declaration, in which he stated that he believed his refusal to cooperate would have resulted in his termination. The court did not address the Government's contention that Black was never told he would be terminated if he chose not to cooperate.

- CFTC sent a request letter to the Bank indicating that it intended to look into whether the Bank had submitted false LIBOR reports, advising the Bank that it was “expect[ed]” to “cooperate fully,” and requesting that the Bank “voluntarily conduct by **external** counsel a full review of Deutsche Bank’s . . . [LIBOR reporting] and report on an on-going basis the results of that review to the Division”;
- It was “highly relevant” that the CFTC’s request that the Bank conduct an investigation was an “offer that could not be refused” and the Bank’s interest in cooperating was “perfectly aligned” with the Government’s interest in letting the Bank take the investigatory lead;
- The interviews of Black appeared to be “Government-engineered” in that the Government “instructed” the Bank’s outside counsel to interview certain employees, including Black (whom the Bank identified as an individual of interest);
- On one occasion, the Bank requested the Government’s permission to interview Black, which the court found remarkable insofar as Black was the Bank’s employee at this time;
- The Government gave the Bank’s counsel “marching orders” during regular update meetings, including instructing counsel “to approach an employee interview as if he were a prosecutor,” a request to which the Bank’s counsel agreed; [3]
- The Bank was “eager to share information” with the Government relating to at least two of Black’s interviews and highlighted important information for the Government;
- Throughout the investigation, the Government continued to discuss Black in meetings with the Bank’s investigators; and
- The Government did not make any effort to speak with Black until three and a half years after the internal investigation began, and “did not conduct a single interview of its own without first using a road map that Deutsche Bank provided.”

Throughout the opinion, the court repeatedly faulted the Government for its failure to “give the court much of a window into its investigatory conduct” during the time prior to the Government’s receipt of a comprehensive summary of the LIBOR investigation from the Bank’s counsel in 2015. As a result, the court concluded that “the Government’s investigatory strategy up to that point was to let the Bank carry the water for it.”

Takeaways

Although many of the factors cited by the court in support of its conclusion that the Bank’s investigation was “fairly attributable to the Government” are standard procedure for complex investigations involving heavily regulated entities, a few facts nevertheless stand out. For example, the CFTC’s letter to the Bank requesting a “voluntary” investigation conducted by outside counsel, while a common request by the CFTC, is not a common request from other regulators. Although the Government generally views investigations conducted by external counsel as having a greater degree of independence than those conducted by in-house lawyers, it is unusual for a law enforcement agency to explicitly request an investigation, let alone direct that it be conducted by outside counsel. Moreover, as the court notes, a “request” from a significant regulator with an active enforcement program for a regulated entity to “voluntarily” do anything could fairly be seen as stretching the definitions of both words.

[3] The employee referred to here was not Black.

That said, the SEC, DOJ and CFTC have all published guidance setting forth their positions that, for corporations seeking leniency, internal investigations are expected and timely reports of misconduct discovered during the course of those investigations are required. [4] Although these agencies may continue to refine their approach to corporate cooperation, Judge McMahon's opinion will probably not change their reliance on the work of internal investigations. Going forward, regulators would do better to rely on their general, published guidance than make "requests" for internal investigations directed at specific entities.

The same is true regarding the Government's requests that counsel interview specific witnesses or take certain investigatory steps. A Government instruction to counsel to interview a particular witness is indeed unusual and cause for concern. Prosecutors typically do not make such requests, and the CFTC may well wish to rethink its practices here. For the Government, the safer course may be to rely on published guidance and the defense bar—a significant portion of which consists of former federal prosecutors and regulators—to understand what the Government considers valuable cooperation.

Although some of the Government's conduct could be seen as overreaching, other factors cited by the court are commonplace and do not suggest that the Government is covertly "directing" an internal investigation. For example, the court casts doubt on the Government's regular practice of coordinating with and receiving updates from counsel, [5] but the court does not explain how providing updates to the Government is the equivalent of taking direction. And although the court made much of the Bank's request for "permission to interview its own employee," that request, which occurred "as the Bank's internal investigation was drawing to a close," was likely motivated by the Bank's desire to avoid interfering with the Government's own investigation.

Lastly, the court repeatedly chided the Government for doing little of its own investigation until the Bank's internal investigation was largely complete and reported to the Government. Again, it is difficult to see how the Government's decision to await the Bank's conclusions before investing its own resources converts the Bank's internal investigation into Government action, or why the *absence* of significant Government action should take on a constitutional dimension. Certainly the Government's failure to develop its own evidence could be seen as proof that it must have relied on the Bank's internal investigation in obtaining its indictment.

Ultimately, the Government is free to conclude that the Bank's investigation was thorough and therefore required little additional effort on its part or, alternatively, that the Bank's investigation was shoddy and that the Government would have to start from scratch. It is hardly surprising that the Bank's investigation, which was well-funded and run by lawyers whose prior experience suggests an understanding of what the Government considers a thorough investigation, managed to satisfy the Government. The fact that the Government awaited the conclusion of the Bank's investigation to determine what further steps to take (if any) does not mean that the Government assumed control of that investigation.

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[4] *See* Sec. & Exchange Comm'n, Release No. 44969, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (2001); Dep't of Justice, Justice Manual 9-28.720 (2017); Commodity Futures Trading Comm'n, Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation (2017).

[5] It is worth noting that the court's entire analysis of whether the Bank's conduct was "fairly attributable" to the Government was unnecessary since the court had concluded, both before and after the trial, that the Government made no "use" of Black's coerced statements.

Policy Implications

The court's decision threatens to upend decades of established practice, a fact to which the opinion makes only a passing reference. Although the court dismissed the Government's policy arguments underlying these practices (since such policies must yield in the face of the Fifth Amendment), an understanding of those policies, and why they were implemented, is essential to striking an appropriate balance between the Government's interests in holding corporate wrongdoers accountable and an individual's Fifth Amendment rights.

In the wake of the 2008 financial crisis, both banks and the federal Government faced significant criticism for failing to punish the individuals perceived to be most responsible. Commentators faulted the Government for its focus on securing high dollar settlements from the banks involved, a practice that Judge Jed S. Rakoff called in 2009 a "contrivance designed to provide the SEC with the façade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry—all at the expense of the sole alleged victims, the shareholders." As Judge Rakoff said, "since the fine is imposed, not on the individuals putatively responsible, but on the shareholders, it is worse than pointless: it further victimizes the victims." [6]

In response to this widespread critique, the federal Government renewed its focus on identifying and prosecuting individual wrongdoers within these companies. This was the genesis of the DOJ's 2015 "Yates Memo," which directed federal prosecutors to "fully leverage [their] resources" to prosecute individuals who committed financial wrongdoing, and demanded that companies disclose "all relevant facts about individual misconduct" in order to earn cooperation credit with the agency. At the same time, the memo also directed DOJ attorneys to "strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case."

In addition to directing prosecutors to ferret out wrongdoing at the individual level, the DOJ, SEC, and CFTC have set out, in varying degrees, to incentivize companies to cooperate with their investigations and provide the Government with evidence of their employees' wrongdoing. Under the leadership of former federal criminal prosecutors, for instance, the SEC has begun utilizing cooperation agreements, deferred prosecution agreements, and non-prosecution agreements. [7] The avowed purpose of these types of agreements is to incentivize those who seek leniency to help these agencies build a case against other alleged wrongdoers.

This renewed emphasis on individuals was generally regarded as a positive step toward rooting out corporate wrongdoing. After all, as Judge Rakoff said, "[a] corporation does not commit a crime. An individual makes the decision whether to commit a crime or not." [8] Accordingly, the SEC's Division of Enforcement has adopted as one of its "core principles" the view that "[i]ndividual accountability is critical to an effective enforcement program." [9] The CFTC has taken the same approach, acknowledging that "[a] consensus has now developed in the enforcement

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[6] *See also The Big Short*, by Michael Lewis, and *Too Big to Jail*, by Brandon Garrett, which highlight the absence of individual prosecutions and further make the case that large corporate prosecutions have been unsuccessful in changing the compliance culture of the subject companies.

[7] Spotlight on Enforcement Cooperation Program.

[8] Rakoff, Jed, *Minnesota Law Review 2018 Symposium*,; *see also* Former Attorney General Jeff Sessions, *Ethics and Compliance Initiative Annual Conference,* Washington, DC (Apr. 24, 2017) ("it is not merely companies, but specific individuals, who break the law").

[9] SEC Division of Enforcement Annual Report 12 (2018).

and business communities that individual accountability must sit at the center of any effective effort to deter misconduct." [10]Corporations are held responsible only by virtue of the oft-criticized Doctrine of Corporate Criminal Responsibility. [11]

Yet Judge McMahon suggests that there is something wrong, indeed unconstitutional, about the level of cooperation between the Government and the Bank. The court's warning to the Government cautions against the use of cooperative investigation procedures that have become routine, especially in complex and international cases such as the alleged LIBOR manipulation scheme. Policy-makers have rationally concluded that law enforcement will suffer greatly if, for instance, the DOJ, SEC and CFTC are left to wade through the 158 million documents reviewed, or nearly 200 interviews conducted, by Deutsche Bank's outside counsel. Even the court noted that the investigation was the largest in the history of both the Bank and its outside counsel.

On the other hand, it does appear that the CFTC lawyers may have overreached in their efforts to foster cooperation. There is a difference between asking for updates from an internal investigation and directing a company to interview particular witnesses. It is not a stretch to say that the latter practice allows the Government to take advantage of the employment consequences of an employee's refusal to meet with a company's lawyer, which was the issue at the heart of *Garrity*. Of course, it is equally wrong to suggest that every instance where a witness is effectively forced to choose between their continued employment and their Fifth Amendment privilege violates the Constitution. For example, few publicly-traded companies would continue to employ an officer or director who asserted their Fifth Amendment privilege in response to a government subpoena relating to an investigation of the company. In the nuanced world of internal and Government investigations, this line will be a hard one to draw, and we can expect *Kastigar* motions to be a permanent fixture in white-collar proceedings.

With all the focus on the conduct of the Bank's outside counsel, it is easy to forget that the Bank and its counsel did nothing more than execute a successful strategy aimed at earning "cooperation credit" from three different law enforcement agencies. Judge McMahon's admonitions are for the Government, not corporations and counsel. Indeed, regulators have already taken note of the opinion, and one must imagine that they will be less explicit with their requests in future cases. [12]

Although this decision has caught the attention of both government and defense attorneys, it is unclear whether the court's view will have a significant impact on the government's policy of encouraging robust internal investigations and demanding reports of the facts learned in

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[10] McDonald, James, Speech Regarding Enforcement Trends at the CFTC, NYU School of Law: Program on Corporate Compliance & Enforcement (Nov. 14, 2018).

[11] *See,* e.g., Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 Colum. J.L. & Soc. Probs. 77 (2006).

[12] At a recent event, the Regional Director of the SEC's New York office indicated that companies that have something to self-report should not let internal inquiries delay disclosure to the SEC, so that the SEC is aware of steps the company will take going forward and can "have some input on whether . . . those steps are reasonable or not," later clarifying that the SEC would not be directing companies' specific steps, but rather assessing the reasonableness of the investigation and whether the internal inquiry would be helpful to the SEC. At that same event, a supervisor in DOJ's Foreign Corrupt Practices Unit remarked that the DOJ does not direct internal investigations, but rather "seek[s] to get the benefits of that investigation." Similarly, the acting chief of the DOJ's Fraud section recently commented that "we have done our best to make sure that we do not in any form or fashion direct the company's investigation." The acting chief went on to note, however, that cases with an international component pose additional problems, since US law enforcement agents cannot easily be sent overseas for interviews. Indeed, foreign law enforcement agencies operating in countries without a Fifth Amendment equivalent, and not US law firms, are a source of *Kastigar* concerns given the increasing number of "cross-border prosecutions" that "necessarily entail intimate coordination between the United States and foreign authorities." *United States v. Allen*, 864 F.3d 63, 89 (2d Cir. 2017).

exchange for leniency. As novel as this ruling is, there is nothing new about law enforcement's obligation to navigate the waters between the public's desire to see corporate wrongdoers punished, and the constitutional rights of those suspected of crimes.