S.D.N.Y. Decision May Have Outsized Implications on DOJ's "Outsourcing" of Investigations

In a significant ruling by a federal judge in Manhattan late last week, the actions of a major law firm conducting an internal investigation on behalf of Deutsche Bank AG ("Deutsche Bank") were deemed "fairly attributable" to the government based on interview requests and direction provided by government actors, including the Commodity Futures Trading Commission ("CFTC").[1] Although the Court denied the ultimate relief sought by the individual defendant, former Deutsche Bank trader Gavin Black—vacating his conviction on wire fraud and conspiracy charges on the grounds that his Fifth Amendment rights against self-incrimination had been violated during this internal investigation and his subsequent prosecution—the ruling nonetheless has serious consequences for the way companies and counsel interact with government agencies during the course of conducting internal investigations and beyond.

I. Background

In 2010, as part of a broader probe into LIBOR manipulation by financial services firms, the U.S. Securities and Exchange Commission ("SEC"), CFTC, and Department of Justice ("DOJ") each began investigating Deutsche Bank. Deutsche Bank retained a law firm as outside counsel to represent it in these LIBOR investigations. As the Court summarized, over the ensuing five years, Deutsche Bank and its counsel "coordinated extensively" with the government, during which time, "the Government was kept abreast of [investigative] developments on a regular basis, and … gave considerable direction to the investigating [outside counsel] attorneys, both about what to do and about how to do it."

At the early stages of its investigation, the CFTC sent Deutsche Bank a letter stating that it "expect[ed]" the bank to "cooperate fully" with this investigation and might provide the bank with cooperation credit if it "utilize[d] all available means to [] make employee testimony or other relevant corporate documents available in a timely manner." The partner heading the investigation conducted by Deutsche Bank's counsel later testified that, because of the severe consequences that would have resulted if the bank did not accept CFTC's invitation to cooperate, there was really nothing "voluntary" about the investigation that followed Deutsche Bank's receipt of CFTC's letter. As the Court noted, "CFTC's request that Deutsche Bank conduct a 'voluntary' investigation was a classic 'Godfather offer' – one that could not be refused."

During the initial phase of its investigation, CTFC proposed, and Deutsche Bank agreed, that it would interview "all relevant Bank staff" and provide CFTC with weekly updates on the investigation. In November 2010, CFTC specifically asked Deutsche Bank's counsel to re-interview three employees with whom it already spoken and, critically in the view of the Court, to take the additional step of identifying and interviewing any other individuals with whom these three regularly interacted. Deutsche Bank identified Black "as an individual who fell within the parameters" of this interview request, and the government conceded that Black was included among the individuals it expected Deutsche Bank's counsel to interview as part of this request.

Shortly thereafter, Deutsche Bank's counsel interviewed Black. Deutsche Bank's counsel would later re-interview Black in 2011, 2012, and 2014, going as far as to seek the government's "permission" before conducting its final interview with Black, who was still a Deutsche Bank employee at the time (i.e., as the Court highlighted, "Deutsche Bank *asked the Government for 'permission' to interview its own employee*" (emphasis in original)).

[1] *United States v. Connolly*, No. 16-CR-370 (CM), slip op. (S.D.N.Y. May 2, 2019).

As the Court noted, "Black did not have discretion to refuse to talk to the investigative team" because Deutsche Bank's employee policy provided that employees "must fully cooperate" with Deutsche Bank investigations and could be "subject to disciplinary action up to and including termination of employment" for failure to provide such cooperation.

II. Order

As the Court summarized, under the Supreme Court's holding in *Garrity v. New Jersey*, "[a]n individual claiming a violation of the [Fifth Amendment's] privilege against self-incrimination must prove that the statements at issue were both the product of coercion and attributable to the government." Finding that there was "no question" as to whether Black had been compelled "upon pain of losing his job" to sit for multiple interviews with Deutsche Bank's counsel, the Court focused its *Garrity* inquiry on whether Deutsche Bank's investigation—specifically, the steps it took regarding Black—were fairly attributable to the government.

In finding that Deutsche Bank's investigation essentially saw its outside counsel step into the shoes of the government, the Court highlighted that the record either demonstrated or suggested that:

- The government "directed Deutsche Bank to investigate Gavin Black on its behalf";
- Deutsche Bank's counsel's first interview with Black "was conducted at the behest of the Government";
- Deutsche Bank's counsel "was eager to share information" regarding its second and third interviews with Black in meetings with the government;
- "[A]s Deutsche Bank's investigation progressed, the Government continued to discuss Black by name in meetings with Bank investigators"; and
- "All of this occurred well before any representative of the Government made any effort to speak with Black," which did not occur until over three years after Deutsche Bank's investigation began.

The Court stated that the "only conclusion one can draw from this evidence is that, rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation—and then built its own 'investigation' into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the Bank and its lawyers."

Although the Court concluded that the government had violated *Garrity*, it ultimately denied Black's request for relief, finding that compelled statements from the Deutsche Bank investigation had not tainted his prosecution, which was based upon independently obtained evidence.

III. Implications For Internal Investigations Conducted While Under Government Scrutiny

The Court itself made clear that its ruling could have "profound implications if the Government, 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-à-vis* potential targets of criminal activity." And, indeed, there now exists a quantifiable risk that, if a company engages in the once-common practice of taking direction from the government regarding the employees it interviews in the course of an internal investigation—specific or otherwise (notably, the CFTC did not explicitly name Black in its interview request but, rather, referred to unspecified "individuals" with whom three specific employees regularly interacted)—the company's questioning of those employees could be viewed as a compelled action that is fairly attributable to the government in violation of *Garrity*. This risk grows more acute in the face of certain variables:

- An employment policy in place requiring employees to fully cooperate in internal investigations or face disciplinary action;
- The government dictating that the company take certain actions as part of the investigation rather than passively receiving information about the results of interviews from counsel; and/or
- The government relying too heavily on the company's investigative efforts without conducting its own substantive parallel investigation (i.e., outsourcing its investigation).

So, how does a company seeking to cooperate with a government investigation actually do so while not subjecting itself to claims of impermissible state action?

More than ever, in-house and outside counsel will need to strategize early and often regarding how best to conduct internal investigations that allow companies to identify and disclose relevant facts regarding alleged misconduct (retaining the company's eligibility for cooperation credit) while also ensuring that these investigations are sufficiently independent (preserving the government's unfettered ability to individually prosecute wrongdoers).

We can also expect to see the government be more cautious when coordinating with companies conducting investigations at its behest, to prevent further ruling that might jeopardize its ability to rely upon company cooperation in helping to build cases against culpable individuals. Conversely, although DOJ prosecutors were once wary of being seen as too aggressive on the issue of "deconfliction"—asking a cooperating company to refrain from interviewing certain individuals as part of its internal investigation so that the government has the first bite at the proverbial apple—we may now see a resurgence in such requests as means of avoiding the potential Fifth Amendment concerns raised by the Court's ruling.

The Court's ruling may even have ripple effects beyond the way in which internal investigations are conducted. In the past, companies seeking credit for both cooperation and remediation often discussed with the government suspect employees and whether the company would take adverse employment action against particular individuals seen as culpable (even if uncharged). Although the government has never made a practice of directing employment decisions in this regard, even a tacit acknowledgement that increased credit might result from such employment actions could subject the company to serious employment litigation headaches. In fact, in 2015, a German court ordered Deutsche Bank to reinstate a Frankfurt-based employee whom the bank had agreed to terminate as part of its cooperation in a LIBOR-related settlement with New York state regulators.

Convenience and arguable efficiencies aside, now more than ever, companies and the government must forge their own respective paths in investigating potential corporate criminal wrongdoing.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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