

CLIENT ALERT

# Federal Court Provides a Warning to the Government: DOJ Outsourcing of Investigations to Corporate Counsel Comes with Great Risk

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On May 2, 2019, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York handed down a decision in the case of *United States v. Matthew Connolly and Gavin Black* that has wide-reaching implications for internal investigations of corporations, led by outside counsel, but conducted at the behest of and in cooperation with the Justice Department and federal regulators. The Court's decision (and the defendant's motion that it decided) relied heavily on the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Allen*, in which Willkie lawyers successfully obtained the dismissal of bank fraud, wire fraud and conspiracy charges against a former employee of a London-based Dutch investment bank based on the Government's violation of the Fifth Amendment's Self-Incrimination Clause and the Supreme Court's decision in *Kastigar v. United States*.

Judge McMahon found that the Justice Department had effectively outsourced its investigation of Deutsche Bank's alleged manipulation of the London Interbank Offered Rate ("LIBOR") to Deutsche Bank's outside counsel. In doing so, Deutsche Bank and its counsel had become transformed into government agents and because Gavin Black was required to cooperate in the investigation as a condition of his employment, it was as if the Government had compelled him to be interviewed, thereby triggering scrutiny under the Fifth Amendment's Self-Incrimination Clause. Although the Court ultimately declined to throw out the indictment against Black as impermissibly tainted under the Fifth Amendment and *Kastigar*, Judge McMahon's opinion should serve as a warning to the Government with respect to its decisions to seek to direct or restrict corporate internal investigations. A summary of the Court's opinion and its implications is below.

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### The Deutsche Bank LIBOR Internal Investigation

In April 2010, the U.S. Commodity Futures Trading Commission (the “CFTC”) opened an investigation into LIBOR manipulation by Deutsche Bank, and advised Deutsche Bank that it expected full cooperation with its investigation, including that the investigation be conducted by external counsel, that regular reports be made to the CFTC on an ongoing basis, and that credit for cooperation might depend on whether Deutsche Bank entered into joint defense agreements with counsel for its employees. Although the CFTC’s letter was phrased as a “request,” the Court found that there was nothing voluntary about Deutsche Bank’s cooperation, given the business-ending consequences of a guilty plea by the bank. Deutsche Bank and its counsel agreed to undertake the investigation on the terms laid out by the CFTC. At around the same time that the CFTC opened its investigation, the U.S. Department of Justice (the “DOJ”) submitted an “Access Request Letter” to the CFTC, pursuant to which the CFTC provided it with all documents obtained as part of the investigation. As part of the investigation, outside counsel provided the DOJ with weekly updates on its progress, and the DOJ directed counsel as to which individuals at the bank to interview, at what times, what documents to confront witnesses with, and what tone or approach to take in those interviews. Additionally, as the law firm partner leading the investigation testified at trial, it was understood by all concerned that Deutsche Bank employees who did not cooperate with the investigation would be terminated.

Among the Deutsche Bank employees whom outside counsel was directed to interview as part of the investigation, and who was questioned under pain of losing continued employment, was Gavin Black, a London-based trader of LIBOR-derivative interest rate swaps. Black was interviewed on four occasions by Deutsche Bank’s counsel during the course of the investigation. During the first two of these interviews, in 2011 and 2012, respectively, Black was not represented by counsel, was given no indication in advance of what he might be asked, and was provided with standard *Upjohn* warnings. Black denied any wrongdoing with respect to LIBOR manipulation, even when confronted with documents which Judge McMahon found to have demonstrated the contrary. After a third interview with Black, again in 2012, outside counsel provided the DOJ with a detailed report and a roadmap to help it further investigate Black, were it to choose to do so. This report was used by the DOJ in questioning Black during a 2013 proffer session in London. In late 2014, as its investigation was drawing to a close, outside counsel requested the DOJ’s permission to interview Black a fourth time, and evidently did so.

Ultimately, Black and Matthew Connolly, another Deutsche Bank employee, were indicted by the DOJ and subsequently tried and convicted on charges of wire fraud and conspiracy to commit the same in connection with LIBOR manipulation. During the lead-up to trial, Black sought to have the indictment against him dismissed under *Kastigar*, which prohibits all use and derivative use by the Government of a defendant’s compelled testimony. Like in *Allen*, Black’s initial *Kastigar* motion asserted that testimony he was compelled to give to the United Kingdom’s Financial Conduct Authority (“FCA”) was improperly used against him in obtaining an indictment. The Court denied that motion, but after trial, Black renewed it, arguing this time that because of the relationship between outside counsel and the DOJ, his prosecution was predicated on and fatally tainted by statements he gave in interviews during the internal investigation, and that under the

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Second Circuit's decision in *Allen*, his conviction should be overturned and the indictment dismissed. Black also argued that the Court's earlier *Kastigar* decision was erroneous because it was predicated on incorrect information about the relationship between Deutsche Bank, its counsel, and the Government.

### The Court's Opinion in *Black*

The Court's opinion in *Black* can be divided into two main sections. The first section concerns whether Deutsche Bank and its counsel effectively functioned as the Government's agents under the Supreme Court's decision in *Garrity v. New Jersey*, and thus, whether Black's statements in his interviews during the internal investigation, made under penalty of termination, constituted compulsion for the purposes of the Self-Incrimination Clause. The Court answered this in the affirmative. The second section concerns whether Black's compelled statements were used against him as part of his criminal prosecution in violation of *Kastigar*. The Court answered this question in the negative.

With respect to the *Garrity* analysis, the Court held that there was no question that Black was compelled to answer questions from Deutsche Bank's outside counsel under pain of losing his job and that Deutsche Bank's counsel's steps in the investigation could be fairly attributed to the Government. The Court supported this conclusion with a detailed discussion of the relationship between the Government, Deutsche Bank, and Deutsche Bank's counsel, citing: (i) that the Government had directed counsel's conduct of the investigation generally, including identifying employees to interview, documents to be used in those interviews, and the tone and strategy to adopt in those interviews; (ii) that outside counsel had provided regular, weekly updates to the Government on the investigation; (iii) that the Government specifically directed that Black be interviewed; (iv) that Deutsche Bank's counsel had asked the Government's *permission* to interview Black on a later occasion; (v) that the Government had directed counsel as to the manner in which employees should be questioned, even telling counsel to approach an employee interview "as if he were a prosecutor;" and (vi) that counsel had provided the Government with a detailed roadmap on how to further investigate Black if the Government chose to do so. The Court held that Deutsche Bank's counsel did everything that the DOJ would have done had the DOJ been doing its own investigation. The Court was scathing in its appraisal of the Government's oversight of the investigation, its failure to conduct an independent, parallel investigation, and its decision to decline to make a record sufficient to rebut Black's *Garrity* arguments. Judge McMahon stated that she was "troubled" by the DOJ having effectively outsourced the investigation to Deutsche Bank and its counsel, and outright rejected the Government's policy arguments that such outsourcing did not run afoul of *Garrity* since doing so was necessary given the Government's limited resources and the complexity of the investigation. The Court characterized these arguments as "unconvincing" and "unworthy," holding that such concerns were a matter of mere Government "convenience" and paled in comparison to the constitutional implications of the practice.

Ultimately, however, the Court concluded that despite the fact that Black had effectively been compelled to be interviewed by Deutsche Bank's outside counsel acting on the Government's behalf under *Garrity*, no *Kastigar* violation had occurred. The Court acknowledged that *Kastigar* provides use and derivative use immunity for compelled statements and requires

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the Government to shoulder the burden of affirmatively proving, when faced with a *Kastigar* challenge, that the evidence it proposes to use is derived from a legitimate source wholly independent of compelled testimony. It held, however, that merely tangential, non-evidentiary uses of compelled testimony do not violate *Kastigar*.

The Court rejected Black's contention that *Kastigar* relief would follow automatically from the finding of a *Garrity* violation, holding that in order to trigger a *Kastigar* inquiry, a defendant must show a sufficient nexus between the immunized or compelled testimony and the subsequent federal prosecution. The Court acknowledged that once the defendant makes the minimal showing to establish this nexus, the Government bears the burden of proving that none of the broad range of impermissible uses was made of the compelled testimony, including obtaining an indictment based upon such testimony, presenting tainted evidence at trial or to the grand jury, or impacting trial preparation. The Court held that Black's theory of a *Kastigar* violation – that during the early stages of the investigation, Deutsche Bank's outside counsel (acting as the Government) had relied on Black to understand the LIBOR process and the swaps trading derived from it, develop investigative leads, and identify evidence – was sufficient to meet the minimal standard for articulating a *Kastigar* violation, but only just so, and that because Black's theory did not lay a "firm foundation" resting on more than mere suspicion of a violation, the Government had successfully carried its burden to show that evidence it used was derived from sources wholly independent of Black's testimony.

In so holding, the Court cited as support the fact that none of Black's compelled statements were introduced at trial; that the witness statements produced by the Government showed no indication that the Government had used Black's compelled statements in dealing with cooperators or other witnesses; and that no direct or indirect use was made of Black's compelled statements before the grand jury. The Court distinguished Black's arguments from those made by Willkie in *Allen*, noting that in *Allen*, the Government had presented the defendant's compelled statements to the grand jury and then at trial through the testimony of both the cooperating witness and the FBI agent who had been exposed to them, and that the Government had failed to show in *Allen* that the statements in question were derived from an independent source. By contrast, the Court in *Black* found that everything presented to the grand jury and at trial could be derived from a legitimate, independent source.

### Conclusions and Takeaways

The principal takeaway from the Court's opinion in *Black* concerns the use of "internal" investigations conducted by corporations at the behest of and in cooperation with the Government as an investigative tool antecedent to a criminal prosecution. Judge McMahon criticized the practice of outsourcing such investigations to the target corporations and their outside counsel in the strongest terms, rejected the Government's policy arguments in defense of those practices as "not just unconvincing, but unworthy," and dismissed its concerns over resources as mere matters of "convenience." The Court's opinion in *Black* stands as a warning to the Government that if it chooses to direct an investigation of a corporation in the manner in which it did with respect to Deutsche Bank, the consequences could be potentially ruinous for potential future prosecutions of employees of those companies.

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The practices that the Court found most problematic included demanding the corporation and its outside counsel conduct the investigation; directing the corporation and its outside counsel as to which individuals to interview, when to interview them, whether and which documents to use in confronting witnesses, and the tone and strategy to be adopted in those interviews; questioning witnesses without counsel present; conditioning a finding of cooperation with the Government on not entering into joint defense agreements with employees; demanding regular and ongoing reports on the investigation's progress; and conditioning continued employment on cooperation with the investigation. Although it did not say so explicitly, the Court's opinion could be read to suggest that it was the *combination* of *all* of these elements that contributed to the finding of a *Garrity* violation. This leaves an open question as to whether some lesser combination of these elements might be sufficient for such a finding, or where exactly the threshold is between cooperation and coercion. Nevertheless, the opinion and its language, coming from one of the preeminent federal district courts in the prosecution of financial and white collar crime, is sure to have a chilling effect on the Government's decision to provide directions and restrictions over companies' internal investigations. The Government will need to tread carefully before instructing company counsel on how it wants "internal" investigations conducted.

The Court's opinion in *Black* is less clear with respect to its implications for *Kastigar*'s burden-shifting analysis. Although the Court stated that once the defendant meets the minimal showing of articulating a plausible *Kastigar* claim, the much heavier burden shifts to the Government to demonstrate no use or derivative use of the purportedly compelled statements, the Court appeared to inject into the analysis an intermediate requirement that the defendant lay a "firm foundation" resting on more than "suspicion" of a violation, in order to proceed to a *Kastigar* hearing. Although the Court acknowledged that *Kastigar* contemplates a broad range of prohibited uses of compelled testimony, including not just presentation of such evidence to a grand jury or at trial, but also formulation of trial strategy, it failed to find such a violation here, even though it accepted that Black's interviews had furnished counsel and the Government with important information about the functioning of LIBOR and LIBOR-derived swaps, provided them with investigative leads, and helped them develop evidence. The Court saw the Government's conduct in the investigation – however problematic from a *Garrity* standpoint – as distinct from that in *Allen* where the compelled statements had been put before the grand jury and used to obtain an indictment, and then introduced indirectly at trial through a cooperator who had earlier been exposed to them. However, as the Second Circuit in *Allen* itself noted, *Kastigar* prohibits more than just introducing tainted evidence at trial or before a grand jury. Rather, it prohibits the Government from using compelled testimony "in any respect," including use of evidence derived from such testimony, with a heavy burden on the Government to prove the negative. Therefore, Judge McMahon's distinction in *Black* may be one without a difference, and potentially the basis for an appeal.

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