SECOND CIRCUIT REVERSES LIBOR CONVICTIONS; HOLDS PROSECUTOR'S USE OF TESTIMONY LAWFULLY COMPELLED BY FOREIGN SOVEREIGN VIOLATED FIFTH AMENDMENT

On July 19, 2017, the United States Court of Appeals for the Second Circuit overturned the criminal convictions of two former traders sentenced to jail in connection with the years-long, multi-jurisdictional investigation into LIBOR manipulations. In *United States v. Allen*, the Second Circuit held that the Fifth Amendment right against self-incrimination prohibits prosecutors from using a defendant's compelled testimony against him at trial, even if the testimony was lawfully compelled by a foreign sovereign under normal protocols in that jurisdiction. The court also clarified that when the government's evidence is challenged as having been derived from compelled testimony, prosecutors bear a heavy burden in proving that the evidence was wholly derived from a legitimate, non-compelled source. The *Allen* decision, which undoes the first individual convictions secured by the US Department of Justice ("**DOJ**") in connection with the LIBOR investigations, will meaningfully impact the DOJ's interactions with foreign regulators conducting parallel investigations, and is required reading for any practitioner representing individuals and entities in the increasingly active world of cross-border investigations.

Overview

The privilege against self-incrimination, rooted in the Fifth Amendment of the United States Constitution, is a central tenet of the US legal system (and perhaps one of the most well-known thanks to its feature in virtually every legal drama on US television). Most simply, it prevents a criminal defendant from being compelled to testify against himself at trial. In practice, the right also enables defendants and witnesses to refuse to respond to questions where the answer would be self-incriminating, and—should such testimony nonetheless be compelled—prevents the government from using the testimony against that individual in a criminal trial.

In the Fifth Amendment context, "use" of the compelled testimony is understood broadly. Not only is the government prohibited from using the compelled testimony itself, such as by introducing it at trial, the government is also prohibited from using any evidence that derived from the compelled testimony. In either instance, use of the compelled testimony can irreparably taint the government's case. Where the source of the government's evidence is challenged in a *Kastigar* hearing, named after the US Supreme Court decision *Kastigar v. United States*, the prosecution faces a heavy burden in proving that the evidence in question was obtained from a non-compelled source.

The *Allen* Opinion

In *Allen*, the Second Circuit grappled with the issue of witness taint arising from parallel investigations and enforcement actions by the Financial Conduct Authority ("**FCA**"), a UK enforcement agency, and the DOJ. Both agencies were investigating Coöperatieve Centrale Raiffeisen-Boerenleenbank BA's ("**Rabobank**") involvement in rigging LIBOR to benefit trading positions.

In connection with its investigation, the FCA compelled the testimony of former Rabobank traders Anthony Allen, Anthony Conti, and Paul Robson, under threat of imprisonment. The DOJ, recognizing the possible Fifth Amendment consequences of accessing the FCA's compelled testimony, attempted to shield itself from any taint by agreeing to specific procedures with the FCA to create a "wall" between their respective investigations. One such procedure was that each authority conducted separate interviews of the relevant individuals on different days. In November 2013, the FCA brought an enforcement action against Robson and, per FCA policy, disclosed the evidence they had collected against him—including the testimony the FCA had compelled from his colleagues, Allen and Conti. Robson closely reviewed the compelled testimony, annotated it, and took several pages of handwritten notes. Less than six months later, the FCA stayed its action against Robson in favor of the DOJ's criminal case against him.

By August 2014, Robson had been indicted, pled guilty, and became a key cooperating witness for the DOJ. One month later, Allen and Conti were charged with conspiracy and wire fraud based in significant part on information that Robson provided to the DOJ, which an FBI agent in turn repeated in the grand jury. Allen and Conti denied participating in the scheme to rig LIBOR and went to trial on the charges. Though Robson did not directly testify before the grand jury, he was a central government witness at trial, and Allen and Conti were convicted on all counts.

Allen and Conti challenged their convictions at the District Court, arguing, *inter alia*, that their compelled statements were used against them at trial, in the form of Robson's testimony, that such use tainted the government's evidence, and that their Fifth Amendment rights were therefore violated under *Kastigar*. Though the government did not dispute that Allen and Conti's FCA testimony was compelled, it argued that Robson's testimony was permissible under *Kastigar* because it was not "tainted" by his access to the compelled testimony. The District Court agreed with the government and upheld the convictions. Specifically, without deciding whether *Kastigar* applied to testimony compelled by a foreign sovereign, the District Court held that the DOJ had satisfied its *Kastigar* burden as: (a) Robson denied that his testimony was tainted, and (b) the DOJ could demonstrate an independent source for the tainted evidence—Robson's personal experience and observations. Allen and Conti appealed to the Second Circuit.

In an 81-page opinion issued on July 19, 2017, the Second Circuit unanimously reversed the District Court, set aside the convictions, and dismissed the case in its entirety. **First**, the Second Circuit held that the Self-Incrimination Clause of the Fifth Amendment prohibits a defendant's compelled testimony from being used against him at a criminal trial, even if the testimony was compelled by a foreign sovereign lawfully in that jurisdiction. The court highlighted that the focus of the Self-Incrimination Clause is on what happens in US courtrooms: it is only violated when a criminal defendant's compelled testimony is used against him *at trial*. The court rationalized that compelling testimony is "the quintessence" of sovereign authority, whether done by US or foreign governments. Accordingly, the right against self-incrimination applies anytime a criminal defendant's compelled testimony is introduced against him in a US courtroom, even if the testimony was compelled by a foreign sovereign.

In reaching that conclusion, the court rejected the DOJ's argument that this result would seriously hamper the prosecution of cross-border criminal conduct. Though the court recognized that in cross-border investigations "intimate cooperation and coordination will be needed" in the securing of witness testimony, the plain message of the appeals court was that developments in international criminal enforcement should "not affect the fairness of our trials at home." The court cited remarks by senior personnel within the DOJ Criminal Division touting the Department's recent strides in coordinating with foreign regulators, and noted that the DOJ was "plainly aware" when it brought the case of "the need for close coordination of its efforts" with the English regulator. From that perspective, the court emphasized that the "practical outcome" of its ruling is that the DOJ, rather than the targets of cross-border investigations, will bear the "risk of error in coordination."[1]

Next, the Second Circuit held that, at a minimum, under *Kastigar* the DOJ must prove, by a preponderance of the evidence, that the government's access to the compelled testimony did not "shape, alter, or affect" the government's evidence at trial. Where an arguably tainted witness gave comparable testimony prior to his exposure to the compelled testimony, the DOJ can satisfy this burden by demonstrating that the post-exposure testimony was unchanged from the pre-exposure testimony. Here, the court found that this standard was fatal to the DOJ, as Robson's pre-exposure testimony to the FCA was markedly different from his post-exposure testimony to the grand jury and at trial.[2] The court further held that, as a matter of law, conclusory denials of taint do not satisfy *Kastigar* where the witness has provided materially inconsistent pre-exposure testimony.

Finally, the court held that in light of the significance of Robson's testimony—which provided the only firsthand and eye-witness account that Allen and Conti directly participated in the LIBOR rigging scheme—the DOJ could not demonstrate that the use of this testimony was harmless, whether in the grand jury or at trial. Accordingly, the convictions were reversed and the indictment dismissed.

Implications

The impact of *Allen* could be far-reaching and immediate. For one, as the *Allen* court recognized, cross-border prosecutions of corporate crime have become increasingly common. Indeed, the industry-wide LIBOR investigations—which began in 2010 and which have since seen criminal and

1 The government raised the possibility that foreign sovereigns could inadvertently taint US prosecutions by compelling testimony and making that testimony available to other potential witnesses, or even the public, and that a hostile government might do so for the express purpose of impeding US prosecutions. The court noted that its decision left open the issue of foreign sovereigns deliberately impairing US prosecutions.

2 The court noted that Robson's pre-exposure testimony "omits or contradicts in material parts" Robson's post-exposure testimony.

civil resolutions involving multiple banks and employees with a patchwork of agencies around the world—have been followed by sprawling investigations into the market for foreign currency exchange rates. Accordingly, there is an ever-increasing likelihood that law enforcement authorities of multiple foreign sovereigns will pursue parallel investigations and seek to speak to the same witnesses. In this new environment, and given the DOJ's renewed focus on pursuing individual accountability for corporate wrongdoing under the so-called Yates Memo, the possibility of Fifth Amendment violations of the sort at issue in *Allen* is at an all-time high.

Allen (appropriately, in the court's view) imposes hurdles on the DOJ's ability to prosecute cross-border conduct. In its wake, the DOJ will be highly incentivized to speedily investigate cross-border conduct, identify witnesses, and bring criminal charges. This will require a strong degree of cooperation with foreign regulators, which the DOJ may find challenging to obtain.

First, the DOJ will need to work closely with foreign sovereigns to ensure that potential witnesses are not exposed to compelled testimony gathered by foreign regulators—and should such a risk arise, at a minimum the DOJ will want to obtain pre-exposure testimony to use at any future *Kastigar* hearings. Second, by the time its foreign counterparties are conducting interviews (if not before), the DOJ needs to be in a position to identify the potential witnesses that it wants to protect. Yet, in intricate cross-border investigations, it can take years to get a sense of the relevant players, let alone the likely witnesses to be called at trial. Further, forcing the DOJ to quickly distinguish witnesses from criminal defendants could undermine the agency's longtime practice of "flipping" defendants to cooperate against others (as the DOJ did with Robson against Allen and Conti).

As a result, the DOJ may be forced to ask foreign regulators to stall their investigations in favor of its own. Of course, such delays could put foreign regulators under pressure to complete their investigations within the applicable statutes of limitations. And foreign regulators will unlikely warm to DOJ requests to refrain from obtaining witness testimony, particularly in the early stages of an investigation, when authorities seek to develop facts and determine whether to pursue the conduct further.

Notably, in *Allen*, all parties conceded that the testimony at issue had been compelled, as refusal to testify for the FCA could result in imprisonment. Future litigation in this area will likely focus on whether the consequences of refusing to testify in front of a foreign regulator will rise to the level of compulsion, i.e., whether the free will of the witness was overborne. As a result, practitioners advising clients in such circumstances need to understand precisely what the ramifications are should the requested testimony be refused. While threat of imprisonment and the loss of a professional license will generally be considered compulsion, lesser sanctions may not.

Finally, although the Fifth Amendment does not apply to corporations, corporate counsel need to be very mindful of the consequences of this decision. Efforts to cooperate with the DOJ could be affected in circumstances where the company's foreign executives and employees are called to testify in front of a foreign regulator prior to being interviewed by the DOJ, and where the resulting testimony may be made available to current or former employees in the context of foreign proceedings. Thus, an understanding of whether such testimony would be considered compelled by a US court and a protocol to handle its dissemination may be necessary when considering cooperation credit under the Yates Memo. Corporate counsel must also consider employment consequences for employees who may prefer to have their testimony compelled by a foreign regulator, rather than appear voluntarily in circumstances where the testimony could more easily be used against them by the DOJ.

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck@cliffordchance.com

Chris Morvillo
Partner

T +1 212 878 3437
E christopher.morvillo@cliffordchance.com

Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg@cliffordchance.com

Ed O'Callaghan
Partner

T +1 212 878 3439
E edward.ocallaghan@cliffordchance.com

Bob Rice
Partner

T +1 212 878 8529
E robert.rice@cliffordchance.com

Daniel Silver
Partner

T +1 212 878 4919
E daniel.silver@cliffordchance.com

Wendy Wysong
Partner

T +1 202 912 5030
E wendy.wysong@cliffordchance.com

John Friel
Associate

T +1 212 878 3387
E john.friel@cliffordchance.com

Tara McGrath
Associate

T +1 212 878 8502
E tara.mcgrath@cliffordchance.com