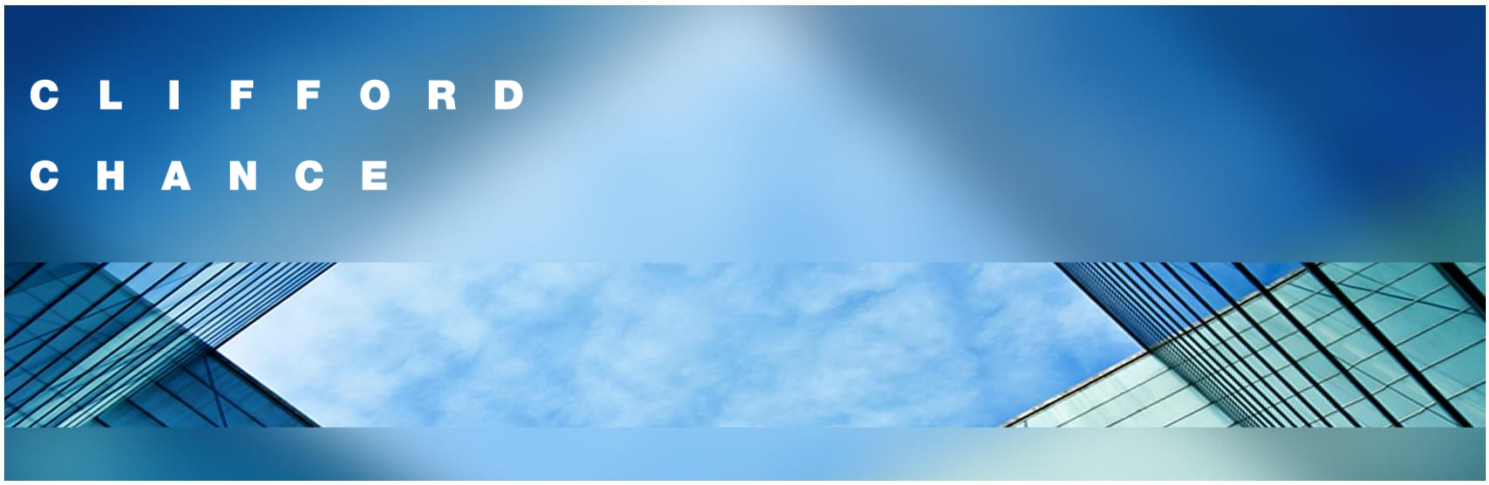

DISTRICT COURT DECISION HIGHLIGHTS RISKS OF COOPERATING TOO CLOSELY WITH GOVERNMENT INVESTIGATIONS

On May 2, 2019, a federal district court judge found that a bank and its external counsel had become a *de facto* arm of the government through efforts to cooperate with the government and minimize the bank's exposure to criminal and regulatory penalties. The ruling serves as a reminder that by aligning too closely with the government's investigative priorities, companies risk opening themselves up to massive discovery obligations in subsequent litigation. In order to minimize these risks, companies seeking cooperation credit should seek to maintain their independence, to the greatest extent possible, in conducting internal investigations.

Background

In 2010, the Securities and Exchange Commission ("SEC") opened an investigation into a large bank's potential role in a scheme to manipulate the London Inter-Bank Offered Rate ("LIBOR").[1] The bank retained counsel to respond to the inquiry from the SEC.[2] Shortly after, the Commodity Futures Trading Commission ("CFTC") also opened an inquiry, which requested that the bank conduct a voluntary internal investigation.[3] The investigation lasted five years, and involved extensive coordination between the bank's external counsel, the SEC, the CFTC, and the United States Department of Justice ("DOJ").[4] The internal investigation included regular updates to the government, which in turn instructed counsel on "what to do and how to do it."[5] Over the course of the

1 *United States v. Connolly*, No. 1:16-cr-00370-CM (S.D.N.Y. May 2, 2019).
2 *Id.* at 3.
3 *Id*. at 4. The Court further clarified that the investigation was not truly "voluntary," given the dire consequences to the Bank had it declined to cooperate with the CFTC. *Id*.
4 *Id*.
5 *Id*.

investigation, derivatives trader Gavin Black was interviewed three or four times.[6] Black would have been fired if he had refused to participate in these interviews.[7]

In October 2018, Black was convicted in the Southern District of New York of one count of wire fraud and one count of conspiracy in connection with LIBOR manipulation.[8] Black moved for relief from his conviction, arguing that his conviction violated the self-incrimination clause of the Fifth Amendment.[9] Black argued that the law firm conducting the internal investigation had acted as a *de facto* arm of the government in conducting its investigation, and had compelled him to make incriminating statements under threat of firing.[10]

The district court agreed that the law firm had acted as an arm of the government in conducting its internal investigation.[11] In reaching this holding, the court considered whether there was a "close nexus of state action" between the government and the conduct of the internal investigation, and whether the government had influenced the interviews of Black.[12] Based on the record before it, the court found that the investigation could be attributed to the government, because federal prosecutors and the CFTC exerted control over the way the investigation was conducted.[13] Among other things, the court cited: an instruction by prosecutors to one of the bank's external lawyers to approach the interview as if he were a prosecutor; the bank's provision of its interview summaries to the government; the fact that the bank had no choice but to cooperate with the government because an indictment would be devastating; and—critically—that the government elected to be spoon-fed facts from the internal investigation, rather than conduct its own substantive parallel investigation.[14]

While the court agreed with Black on the threshold issue that counsel had acted as an arm of the government and had compelled him to make incriminating statements, it ultimately rejected Black's claim, reasoning that the government did not use Black's statements to counsel in its trial against him in either a direct or indirect manner.[15] Moreover, the statements were not used by the government in its dealings with cooperators or witnesses in preparation for trial. Nor did the government make use of the statements (directly or indirectly) before the grand jury or in the course of its investigation.[16] Finally, the court concluded that any violation would ultimately be harmless error, because Black would have been indicted and convicted even if he had never been interviewed.[17]

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6 *Id*. at 21.
7 *Id*. at 6.
8 Department of Justice, *Two Former Deutsche Bank Traders Convicted for Role in Scheme to Manipulate a Critical Global Benchmark Interest Rate* (Oct.17, 2018), https://www.justice.gov/opa/pr/two-former-deutsche-bank-traders-convicted-role-scheme-manipulate-critical-global-benchmark.
9 U.S. Const. amend. V.
10 *United States v. Connolly*, No. 1:16-cr-00370-CM, at 3 (S.D.N.Y May 2, 2019).Under the Supreme Court's decision in *Garrity v. New Jersey*, statements made under the threat of firing are not admissible in a criminal prosecution if they are "fairly attributable to the government." 385 U.S. 493 (1967).
11 *Id*. at 19–21.
12 *Id*. at 20–21 (applying a test from *United States v. Stein*, 541 F.3d 130, 152 (2d Cir. 2008)).
13 *Id*. at 17, 22–23, 27.
14 *Id*. at 22–24.
15 *Id*. at 40.
16 *Id*. at 40–42.
17 *Id*. at 43–46.

Lessons For Future Investigations

Although the court ultimately concluded that Black's compelled testimony did not warrant overturning his conviction, the case serves as a reminder of the risks that a company can face when seeking to cooperate with the government. If its cooperation is not sufficiently robust, it will invite larger penalties. But by cooperating too closely with the government, it risks being found to be an arm of the government, which could create problems of a different sort.[18]

Most troublingly, the company's files could, in a subsequent criminal action against an employee, become subject to the prosecution's discovery obligations. For example, a court might conclude that if a company acts as an arm of the prosecution, then any exculpatory documents in the company's possession must be turned over to the defendant pursuant to the government's obligations to disclose exculpatory materials to criminal defendants.[19] The costs and burdens associated with such a broad, open-ended search, potentially years after the resolution of an internal investigation, are likely far more than most companies think they are signing up for when deciding to cooperate.

Companies may find it increasingly difficult to receive cooperation credit while maintaining a sufficient distance from the government to avoid being characterized as an arm of the prosecution. Indeed, the government's cooperation requirements have grown more stringent since the investigation in the Black case occurred. That investigation predates both the DOJ's November 2015 publication of the Yates Memo, which requires cooperating companies to go to greater lengths in identifying culpable employees,[20] and the CFTC's January 2017 publication of updated cooperation guidelines, which require greater efforts by companies seeking cooperation credit.[21] However, in order to protect themselves to the greatest extent possible, cooperating companies conducting internal investigations should consider the following:

- Declining to accept specific instructions from the government regarding the conduct of employee interviews;
- Providing information learned in interviews through oral attorney proffers, rather than providing the government with interview summaries;
- Obtaining "non-waiver agreements" from the DOJ and regulators, which specify that any provision of privileged information will not act as a waiver

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18 In statements made on May 8, 2019, Christopher Cestaro, a supervisor in the DOJ's Foreign Corrupt Practices Unit insisted that the DOJ does not "direct" companies' internal investigations. Cestaro also insisted that prosecutors do not tell companies to "go conduct this interview" or direct the investigation in a way that would make the company an agent of the DOJ. That is further reflected in the DOJ's recently-amended FCPA corporate enforcement policy, which now states: "the department will not take any steps to affirmatively direct a company's internal investigation efforts." *'We Don't Direct' Probes, Feds Say After Paul Weiss Ruling*, LAW 360 (May 8, 2019), https://www.law360.com/whitecollar/articles/1157751/-we-don-t-direct-probes-feds-say-after-paul-weiss-ruling?nl_pk=e7caeff6-aad6-4ccb-9690-30539d80677c&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

19 *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment".); *United States* v. *Lekhtman*, No. 08-CR-508 (DLI), 2009 WL 5095379, at *6 (E.D.N.Y. Dec. 15, 2009) (quoting *United States* v. *Bin Laden*, 397 F. Supp. 2d 465, 481 (S.D.N.Y. 2005) ("A prosecutor has constructive knowledge of any information held by those whose actions can be fairly imputed to him—those variously referred to as an 'arm of the prosecutor' or part of the 'prosecution team'".)).

20 Clifford Chance, *DOJ Revises Corporate Cooperation Policy but Leaves Individual Employees in the Crosshairs* (Dec. 2018).

21 Clifford Chance, *CFTC Self-Reporting and Cooperation Guidelines* (Sept. 2017).

of privilege as to third parties (although courts have not uniformly upheld such agreements[22]); and

- Seeking independent evidence to establish facts learned in privileged conversations. For example, if a bank trader divulges improper conduct in a privileged interview, counsel should look for evidence of that conduct in e-mails, chats and trade records, which would not be privileged, and then provide these to the government in lieu of explaining the contents of the interview.

[22] *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 2:05-2367 SRC, 2012 WL 4764589, at *4 (D.N.J. Oct. 5, 2012) (finding that voluntary disclosure of documents pursuant to a non-waiver agreement with the DOJ operated as a complete waiver of any applicable privilege); *but see In re financialright GmbH*, No. 17-MC-105 (DAB), 2017 WL 2879696, at *7 (S.D.N.Y. June 22, 2017) (finding that disclosure made pursuant to non-waiver agreements do not waive the protections of work-product doctrine and attorney-client privilege because of "a strong public interest in encouraging disclosure and cooperation with law enforcement agencies".).

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