What Gov't Outsourcing Ruling Means For Investigations

By **Rachel Maimin** (May 10, 2019)

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In an opinion excoriating U.S. Department of Justice prosecutors that "may have implications that extend well beyond this particular case," Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York targeted the so-called "outsourcing" of government investigations to companies and their outside counsel.[1]

In particular, Judge McMahon held that the government effectively coerced Deutsche Bank — whose "only choice was about its 'level of cooperation' with the Government, not about whether to cooperate," "given the draconian consequences that would likely ensue" if it did not,[2] — to investigate alleged Libor violations, and then directed Deutsche Bank's outside law firm to do "everything that the Government could, should, and would have done had the Government been doing its own work."[3]

Among other things, Deutsche Bank's outside law firm, Paul Weiss Rifkind Wharton & Garrison LLP, interviewed the defendant — Gavin Black — at the government's behest; as a result, Judge McMahon held, the government violated the Fifth Amendment rights of the defendant — a former employee of Deutsche Bank — within the meaning of Garrity v. New Jersey.[4]

As Judge McMahon predicted, this decision is likely to have far-reaching effects on future relationships between the government and outside law firms in the context of internal investigations, as well as the manner in which outside law firms conduct investigations. It may mark a sea change in the interaction between the government and counsel during internal investigations.

Garrity

Garrity holds that the government violates an individual's Fifth Amendment right against self-incrimination when it coerces that individual's statements under threat of termination of employment.[5] Although Garrity itself involved a state actor who was also an employer, its impact has extended to private employers where that employer's actions "are fairly attributable to the government."[6] The key questions are whether: (1) "there is a sufficiently close nexus between the state and the challenged action";[7] and (2) the state "involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement."[8]

The Holding in Connolly

Judge McMahon held that, in the Deutsche Bank investigation, the government — which included the U.S. Commodity Futures Trading Commission, the U.S. Securities and Exchange Commission, and the DOJ — violated Black's Fifth Amendment rights under Garrity.

To be clear, Judge McMahon did not fault Deutsche Bank or its outside law firm whatsoever for the constitutional violation, noting that it was "indisputable that Deutche Bank was vindicating [its] purely private interests and responsibilities by cooperating with the Government to the uttermost."[9] Rather, Judge McMahon criticized the DOJ prosecutors'

handling of the investigation for several reasons.

Judge McMahon pointed out that the internal investigation began when the CFTC "demanded" that Deutsche Bank conduct a purportedly "voluntary" investigation into potential violations, noting the "draconian consequences that would likely ensue if it did not accept the agency's invitation."[10]

For five years, the outside law firm essentially conducted the government's investigation on its behalf, routinely updating the government on all developments and coordinating about next steps, as the government demanded it do.[11] Evidently, a "Government official" went so far as to direct outside counsel to approach a particular interview "'as if he were a prosecutor.'"[12] At one point, Deutsche Bank actually felt compelled to ask "the Government for 'permission' to interview its own employee."[13]

Accordingly, Black "was compelled, upon pain of losing his job, to sit for at least three, probably four interviews" with outside counsel.[14] Indeed, the first such interview was conducted at the "behest of the Government."[15] In essence, the government "outsourced the important developmental state 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."[16] As a result. "the investigation was a conspicuous success for Deutsche Bank," and resulted in a deferred prosecution agreement.[17]

That said, Judge McMahon ultimately denied Black's motion under Kastigar v. United States[18] to dismiss the Indictment because the Government did not make direct or indirect use of Black's interview statements[19] and, if it had, any error would have been harmless.[20]

The Bottom Line for Company Counsel

Judge McMahon's decision is a shot across the bow to prosecutors, warning them to conduct their own investigations and not simply rely on company counsel to do the work for them — or risk not only suppression, but, potentially, dismissal of Indictments. But what does Connolly ultimately mean for company counsel, in a reality where cooperation undoubtedly helps them to reach positive dispositions with the government?

Connolly does not directly implicate companies — or outside counsel — in improper conduct. Rather, Connolly chastises the government for, effectively, coercing a company to act as its agent for Garrity purposes. That, however, does not end the analysis.

Irrespective of whether a company suffers direct liability as a result of Connolly-like conduct, it is often advisable, if not all but mandatory, for a company to cooperate with a government investigation. Indeed, in many cases, cooperation is existential for a company. As Judge McMahon explained, "Deutsche Bank was facing the threat of ruin, such that the only 'choice' facing Deutsche Bank when it received the CFTC's letter was the 'level of cooperation' it would provide to the Government — because cooperating was not an option."[21]

Judge McMahon does not quarrel with the importance of such cooperation. However, she makes clear that the risk of surrendering complete control over such an investigation to the government is extremely serious — it could result in suppression or dismissal of indictments — even if it is borne by the government. This is not a risk to be lightly ignored by company counsel; if a court undermines the government's ability to prosecute certain individuals, the

government may offer the company a less-beneficial resolution than it might otherwise have offered, thereby subverting a primary reason for cooperating in the first place.[22]

Accordingly, company counsel can, and should, use Connolly in determining the framework for its internal investigations, and can cite Connolly to the government when negotiating the relationship between the government and the company in the course of that investigation. In other words, in determining the "level of cooperation" that a company will "provide to the Government,"[23] the company and the government should heed the lessons of Connolly and ensure that the company maintains control over its internal investigations.

In the end, the concerns leading to frequent corporate cooperation with the government are fundamentally unaltered. After all, "federal prosecutors and corporate leaders typically share common goals."[24] And, in furtherance of those goals, the government still factors into its decision to prosecute a company's "willingness to cooperate in the investigation of its agents," as well as its "remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies."[25]

However, competent counsel should be able to investigate thoroughly, cooperate effectively and help a company engage in proper remedial actions without direction from, and management by, government agencies. After Connolly, it is more important than ever that it do so.

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Disclosure: The firm represents Deutsche Bank National Trust Company solely in its capacity as trustee, in various matters. It is not involved in the case discussed in this article.

[1] United States v. Connolly, Memorandum Decision and Order Denying Defendant Gavin Black's Motion for Kastigar Relief, No. 16 Cr. 370 (CM) (S.D.N.Y. May 2, 2019) ("Connolly"), at 29.

[2] Id. at 4.

[3] Id. at 24.

[4] Garrity v. New Jersey, 385 U.S. 493 (1967).

[5] Id. at 496–97.

[6] United States v. Stein, 541 F.3d 130, 152 n.11 (2d Cir. 2008).

[7] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (internal quotation marks and citation omitted).

[8] United States ex rel. Sanney v. Montanye, 500 F.2d 411, 415 (2d Cir. 1974).

[9] Connolly at 27.

[10] Id. at 3–4.

[11] Id. at 6–7.

[12] Id. at 7.

[13] Id. at 13.

[14] Id. at 21.

[15] Id. at 22.

[16] Id. at 23.

[17] Id. at 16.

[18] Kastigar v. United States, 406 U.S. 441 (1972)

[19] Id. at 40–43.

[20] Id. at 43–47.

[21] Id. at 26.

[22] Cf. Filip Memo at 4 (noting, as a factor to be considered in determining a resolution, the "adequacy of the prosecution of individuals responsible for the corporation's malfeasance").

[23] Connolly at 26.

[24] Filip Memo at 1.

[25] Id. at 4.