White-Collar Crime

Something Old, Something New: **Securities Enforcement** in the Age of **Social Media**

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BY PAUL H. SCHOEMAN AND MAXIM M.L. NOWAK

At a time when breaking norms has become the new normal, the recent battle between Tesla's charismatic chief executive, Elon Musk, and the Securities and Exchange Commission's regulatory enforcers captured the attention of the public. Musk's seemingly deliberate use of Twitter to pick a fight with the SEC, combined with his track record of fostering paradigm shifts in several industries, suggested to securities lawyers and white-collar practitioners that we would soon see something new under the sun. It was not to be. Although Musk himself has earned a reputation for being incredibly innovative, the SEC's case against him was not. We believe the absence of innovation provides an important opportunity to consider the road not taken, at least not yet.

Social Media And Securities Violations

Since its adoption in 1942, SEC Rule 10b-5 has been the SEC's principal tool for enforcing the securities laws. The rule makes it unlawful "(a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." This broad formulation has made the rule flexible enough to be applied to all manner of deceptive conduct and to keep pace with evolving information technology. The key to such adaptability is that the rule is agnostic with respect to the communication medium or technology being employed. Newspaper, radio, television, telephone, fax, email and the internet have been easily assimilated into the regulatory regime.

Enforcement actions alleging violations of Rule 10b-5 based on false and misleading tweets are, therefore, not new or innovative. For example, as far back as 2014, in *In re Krinos*, the SEC obtained a decision on default in administrative proceeding against Krinos Holdings and its principal for raising $1 million through the unregistered sale of securities while making materially false and misleading statements, at least one of which included a statement through Krinos Holdings' Twitter account. Criminal charges and a guilty plea soon followed in the Northern District of Ohio. In 2015, the U.S. Attorney's Office for the Northern District of California and the SEC unsealed parallel criminal and civil charges against James Alan Craig, alleging that Craig sent false tweets via Twitter accounts deceptively named to appear to belong to well-known research firms in order to manipulate the stock price of two public companies. The SEC has obtained a default judgment against Craig, who is fighting extradition from his native Scotland.

> The leaders of the SEC have clearly signaled their intention to **apply old rules to new technologies.**

And the leaders of the SEC have clearly signaled their intention to apply old rules to new technologies. In September 2017, almost a year before Musk's fateful tweets, Stephanie Avakian, co-director of the SEC's Enforcement Division, responding to priorities set by SEC Chairman Jay Clayton, announced the creation of a new Cyber Unit. While the Cyber Unit appears to be primarily occupied with matters relating to cryptocurrency, Avakian promised that "[t]he Cyber Unit will focus the Enforcement Division's substantial cyber-related expertise on targeting cyber-related misconduct [including] market manipulation schemes involving false information spread through electronic and social media."

Tweets Heard Around the World

On Aug. 7, 2018, Elon Musk, the then Chairman and Chief Executive Officer of Tesla, a prolific user of Twitter, used his mobile phone to tweet a message that could be viewed by his 22 million followers: "Am considering taking Tesla private at $420. Funding secured." Later that day, Musk posted messages that included "My hope is *all* current investors remain with Tesla even if we're private. Would create special purpose fund enabling anyone to stay with Tesla." And "Shareholders could either to [sic] sell at 420 or hold shares & go private" and "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote." The price of Tesla stock reacted immediately to Musk's initial tweet and common shares closed up almost 11 percent from the previous day.

Six days after his August 7th tweets, amid growing speculation that the SEC was investigating Tesla and Musk, Musk announced that he had held discussions with Saudi Arabia's sovereign wealth fund, a large Tesla shareholder, about a proposed going-private transaction. Musk added that he had "no question that a deal with the Saudi sovereign fund could be closed."

On August 15th, the *New York Times* and others reported that the SEC had subpoenaed Tesla. On September 27th, the SEC filed a complaint in the Southern District of New York, alleging that Musk "knew or was reckless in not knowing that each of [the August 7th tweets] was false and/or misleading" and that "Musk knew that he had never discussed a going-private transaction at $420 per share with any potential funding source, had done nothing to investigate whether it would be possible for all current investors to remain with Tesla as a private company via a 'special purpose fund,' and had not confirmed support of Tesla's investors for a potential going-private transaction." Two days later, Musk capitulated. Both he and Tesla entered into settlements that required each of them to pay $20 million in penalties. The settlements further required Musk to step down from his position as Tesla's Chairman for at least three years. Tesla was also required to appoint two additional independent directors and "establish a new committee of independent directors and put in place additional controls and procedures to oversee Musk's communications."

What's Next?

The message that the SEC is sending through the Musk settlement comes through loud and clear. Statements made via Twitter, or any other social media platform, will be » Page 11

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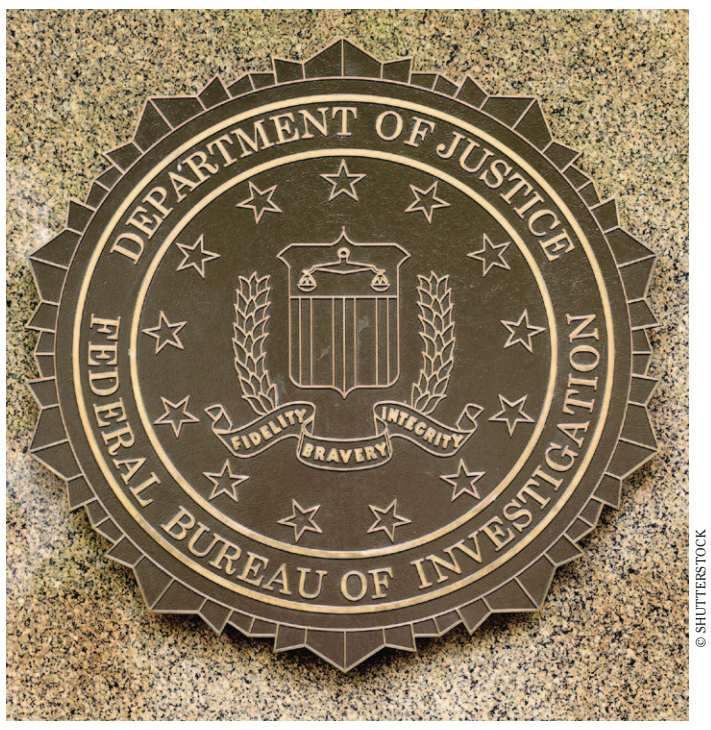

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The **Global Reach** Of U.S. Law Enforcement

BY HARRY SANDICK AND JEFF KINKLE

In the past decade, the Department of Justice has increased its focus on prosecuting white-collar crimes that are committed outside of the United States. Some observers have questioned the fairness of this emphasis on offshore targets, but DOJ has collected billions of dollars in financial penalties from international banks and corporations based on investigations relating to benchmark rates (LIBOR, foreign exchange), violations of the Foreign Corrupt Practices Act (FCPA), and money laundering. Jesse Eisinger, "France Sees Double Standard in U.S. Prosecution of BNP, but Justice is Weak," *New York Times* (June 18, 2014). "Cases such as LIBOR, and the subsequent cases involving manipulation of the foreign exchange markets," DOJ officials have explained, "reflect a natural continuation of the growing relationship between the Criminal Division and foreign law enforcement." Department of Justice, Office of Public Affairs, "Principal Deputy Assistant Attorney General David Bitkower Delivers Remarks At American Bar Association Southeastern White Collar Crime Institute," Sept. 8, 2016.

DOJ's international focus has expanded at the same time as courts have shown increased skepticism about using our laws to punish conduct that only indirectly or tangentially impacts the United States. Courts seem increasingly willing to limit the extraterritorial application of U.S. law. Given that DOJ typically resolves its corporate investigations with settlement agreements, it may be left to counsel for individual defendants to advocate for expansion of this developing body of law.

The Presumption Against Extraterritoriality

Securities fraud. This recent trend of limiting the global reach of U.S. law began in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), in which the Supreme Court considered whether §10(b) of the Securities Exchange Act of 1934 provided a cause of action to plaintiffs who sued foreign and American defendants for misconduct relating to securities of an Australian bank, traded on an Australian stock exchange. *Morrison* strictly applied the presumption against extraterritoriality and concluded there was no affirmative indication that §10(b) was meant to cover conduct occurring outside of the United States, overruling decades of circuit court jurisprudence. The court unanimously held that §10(b) reaches misconduct only in connection with the purchase or sale of a security listed on an American stock exchange, or the purchase or sale of securities in the United States. As the Supreme Court later explained in limiting the reach of the Alien Tort Claims Act, there is a "presumption that United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664 (2013).

Morrison involved a civil securities lawsuit, but the Second Circuit soon concluded in *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013) that neither §10(b) nor Rule 10b-5 can be applied to extraterritorial conduct in the context of a criminal prosecution. Thus, in the Second Circuit, a defendant may be prosecuted for securities fraud only in connection with a security listed on a U.S. exchange, or purchased or sold in the United States. Id. at 67.

Racketeering and wire/mail fraud. The Supreme Court followed *Morrison* in *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016), limiting the international reach of the Racketeer Influenced and Corrupt Organizations Act (RICO). The European Community sued RJR Nabisco in federal court, alleging racketeering based on the company's claimed involvement with drug traffickers, money laundering, and foreign terrorist organizations. Before the case reached the Supreme Court, the Second Circuit held that two RICO predicate acts—wire fraud and mail fraud—did not apply extraterritorially, notwithstanding the general reference to "foreign commerce" in the wire fraud statute. 764 F.3d 129 (2d Cir. 2014). The Supreme Court went further, holding that the presumption against extraterritorial application was rebutted with respect to certain, but not all, applications of RICO. In addition, the Court rejected the argument that RICO contained a "domestic enterprise requirement," but held that the "RICO enterprise must engage in, or affect in some significant way, commerce directly involving the [United States]" Id. at 2105.

FCPA. Most recently, in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), the Second Circuit held that the FCPA did not permit the government to employ theories of conspiracy or aiding and abetting to charge an individ- » Page 10

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When the Government and Outside Counsel **Get Too Close** in a Corporate Investigation

BY JASON P.W. HALPERIN AND DAVID SIEGAL

Outside lawyers and firms representing companies play a central role in current white-collar government investigations. Typically, they are called on to demonstrate the client's full and unfailing commitment to helping prosecute wrongdoers, including, often, its own employees. This frequently involves, among other things, gathering, analyzing, and producing voluminous documentary material, conducting dozens (perhaps hundreds) of interviews of relevant current and former employee witnesses, and ultimately providing their factual and legal conclusions to the government. For its part, the government regularly seeks to take full advantage of these privately funded inquiries. This article highlights some of the lurking pitfalls when the relationship between the government and the private law firms on which the government relies becomes a little too close.

The size and scope of resources, and the access to information that private companies can provide often outpace those available to the government. And government prosecutors are trained to "leverage" those private resources to bring cases that might not otherwise be possible. Companies "voluntarily" participate in this symbiotic system because the benefits have become enshrined in written policy and routine government practice: The Department of Justice's "Justice Manual" requires corporations to "identify all individuals substantially involved in or responsible for" and "all relevant facts relating to" misconduct in order to receive any cooperation credit in relation to that conduct. U.S. Dep't of Justice, Justice Manual 9-28.700 (2018). Similarly, corporations that self-report violations of the Foreign Corrupt Practices Act (FCPA) and "fully cooperate" can obtain up to a 50 percent fine reduction and avoid imposition of a monitor. Id. at 9-47.120. The DOJ recently announced, moreover, that it would extend the same policy beyond the FCPA. See Jody Godoy, "DOJ Expands Leniency Beyond FCPA, Lets Barclays Off," Law360 (March 1, 2018).

But in the government's eagerness to obtain these benefits, and company counsel's desire to please the government, their coordination can flirt with the line demarcating independence and constructive deputization and, once exposed, » Page 11

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Inside

WHITE-COLLAR CRIME: Angela Turturro, Sections Editor | Agnieszka Czuj, Design

Why the Public (and the President) Are Wrong About **What It Means to Take the Fifth**

BY ROSS M. KRAMER
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"The mob takes the Fifth," Donald Trump said at an Iowa campaign rally in September 2016. "If you're innocent, why are you taking the Fifth Amendment?"

The public and the media—and apparently the President—have a basic misimpression about the history and purpose of the Fifth Amendment's protection against self-incrimination. As the Supreme Court has long recognized, one of the basic functions of the Fifth Amendment is to protect the innocent, and the invocation of one's Fifth Amendment right against self-incrimination says nothing about guilt. Yet the (mis)perception remains that if a person "takes the Fifth" it must be because they have something to hide, because only guilty people invoke the Fifth.

The Fifth Amendment contains a number of foundational principles of our criminal justice system. It provides that serious criminal charges must be made by indictment of a grand jury. It prohibits double jeopardy, and the taking of private property for public use without just compensation. It provides for due process. The Fifth Amendment also provides that "No person … shall be compelled in any criminal case to be a witness against himself."

The Supreme Court has long understood that many misperceive the history and purpose of the privilege against self-incrimination. More than 50 years ago, in *Ullmann v. United States*, 350 U.S. 422 (1956), Justice Felix Frankfurter wrote that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor the patriots who sponsored the Bill of Rights[.] … The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application." A year later, in *Grunewald v. United States*, 353 U.S. 391 (1957), Justice Marshal Harlan reiterated that "one of the basic functions of the privilege is to protect innocent men," and noted that "[t]he privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

Nevertheless, the misperception that invocation indicates guilt continues to endure, and to impact decision-making in response to grand jury subpoenas. Although the Fifth Amendment right against self-incrimination is a bedrock of our legal system, many individuals confronted with a subpoena feel compelled to testify in front of a grand jury out of a basic misunderstanding of the privilege, or a fear that constituents, employers, or the public would view the exercise of their Fifth Amendment right as an admission of guilt. Likewise, many attorneys, particularly those who do not practice frequently in criminal courts, may not appreciate the breadth of situations under which a witness could make a reasonable showing that "self-incrimination" could follow from even seemingly innocent answers.

Given the history and purpose of this most basic American right, and its broad application in *ex parte* or sealed proceedings, such misapprehension should be put to rest. Put simply, the decision whether to invoke the Fifth Amendment should not be based on misplaced stigma, but rather on a reasoned analysis of its application to a witness's potential testimony. While navigating a criminal investigation—particularly one that is sprawling and complex—diligent attorneys should be mindful of the court's mandate that the privilege should be liberally construed; that the privilege protects a witness from having to give even innocent answers that could provide a "link in the chain" of evidence against him; and that a witness can still proclaim innocence while taking the Fifth.

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Historical Origins and Supreme Court Precedent

The origins of the Fifth Amendment right against self-incrimination have been traced back to protections granted by English Courts and Parliament in the 17th Century. Those protections were established in response to historical practices such as ecclesiastical inquisitions and proceedings of the Star Chamber, which in the words of the Supreme Court "placed a premium on compelling subjects of the investigation to admit guilt from their own lips."

Before those protections were granted, ecclesiastical courts would use the "oath ex officio" to force individuals in heresy inquisitions to swear before God that they would truthfully answer all questions posed to them—even before those individuals knew the specific accusations against them. By using the oath to conduct investigations, those courts put witnesses in what has been called the "cruel trilemma" of either: (1) refusing to take the oath, which constituted contempt and subjected the witness to torture; (2) taking the oath and telling the truth about their religious beliefs, which (depending on those beliefs) was punishable by death; or (3) taking the oath and lying about their religious beliefs, which was also punishable by death.

By the middle of the 17th Century, the "oath ex officio" was abolished, and by the late 18th Century, English courts in criminal cases began recognizing the privilege against self-incrimination as a fundamental rule of evidence.

Following the Revolutionary War, as colonists sought to codify and protect their rights, the privilege against self-incrimination was included in the constitutions of a number of the original states. The privilege was officially included in the Bill of Rights, ratified by Congress in 1791.

The Supreme Court has regularly examined and re-examined the Fifth Amendment privilege against self-incrimination. In the 1950s, the court considered a series of cases that helped define the privilege's purpose and contours; those decisions are still important today in connection with the representation of any witness subpoenaed to testify before a grand jury.

In *Hoffman v. United States*, 341 U.S. 479 (1951), the court explained that the privilege protects even a witness who might provide even seemingly innocent and innocuous answers, if those answers could form a "link in the chain" of evidence against him. The court explained that the Fifth Amendment privilege "not only extends to answers that would in themselves support a conviction … but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant[.]"

The court in *Hoffman* also addressed the central role of the trial court in evaluating claims of privilege. The court wrote that it is the trial judge's role to determine whether a witness's invocation of the Fifth is "justified," but at the same time any showing must be circumscribed to avoid the very harm the privilege is supposed to protect: "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."

Significantly, the court also noted the low threshold to be employed in any review, stating that in order for the privilege to be denied it must be "perfectly clear" to a trial court, after consideration of all the circumstances, that the witness is mistaken in his perception of danger, and that the witness's answers "*cannot possibly* have such tendency to incriminate."

In *Grunewald v. United States*, 353 U.S. 391 (1957), the court reiterated that invocation of the privilege against self-incrimination can be "wholly consistent with innocence," and that no inference to the contrary can be drawn in a subsequent proceeding.

> The invocation of one's Fifth Amendment right against self-incrimination **says nothing about guilt.** Yet the (mis)perception remains that if a person "takes the Fifth" it must be because they have something to hide, because only guilty people invoke the Fifth.

The court in *Grunewald* also noted that the nature of the grand jury process factors into a witness's decision to invoke the privilege. The court noted that in a grand jury proceeding an individual may be "a compelled, and not a voluntary, witness" who is not represented by counsel; that he can "summon no witnesses"; and that he has no opportunity to cross-examine witnesses testifying against him. The court wrote that "[i]nnocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth." The court further noted that particularly in a case where a witness may already be considered a potential defendant, it can be "quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain."

The court has maintained these principles through the decades, notably reaffirming them in *Ohio v. Reiner*, 532 U.S. 17 (2001).

The Fifth Amendment In Practice

Cautious and diligent attorneys faced with a grand jury subpoena should carefully consider the history and purpose of the Fifth Amendment, and the Supreme Court's liberal assessment of the privilege.

In many cases, a grand jury subpoena can give rise to reasonable cause for a witness to apprehend danger if they testify—even if they testify truthfully. Admitting facts that might seem neutral on their face, such as whether a witness knows, or has had contact with, or has done business with, a certain individual or entity, can provide an evidentiary link for law enforcement. This is particularly true as criminal investigations grow increasingly more complex, and the government's proof in criminal cases correspondingly involves more and more "links in the chain." And, this is particularly true when a witness has cause to believe he may already be the subject of a law enforcement investigation. Careful attorneys would be well advised to give great consideration to whether a client can reasonably assert the privilege, even if that witness proclaims his innocence and none of his potential answers are facially incriminating.

In some cases, non-legal considerations complicate a witness's decision on whether to testify or invoke the privilege, even when the witness is the subject of an investigation. Public figures, such as politicians and prominent executives at public companies, face a variety of pressures to testify. Some of that pressure is rooted in an expectation that they "cooperate" with investigations, and that they appear transparent; for example, politicians fear backlash from constituents if they refuse to testify in response to a subpoena, while executives fear a similar reaction from board members and shareholders. That potential backlash is largely due to the mistaken stigma attached to invocation of the privilege, but mistaken or not, it is a reality.

These additional considerations complicate a witness's decision, but rarely change a cautious attorney's analysis and recommendation. If a client would be exposed to criminal liability by testifying before a grand jury, diligent and experienced criminal defense attorneys can rarely recommend doing so, regardless of the potential collateral consequences to a client's career or business reputation. A client may—and sometimes does—choose to testify regardless of his attorney's recommendation, fearing that the public and the media may wrongly interpret a decision to invoke the privilege as a sign of having something to hide, or as an admission of guilt, even more than he fears potential criminal exposure from testifying.

Some of the public's misapprehension of the Fifth Amendment privilege against self-incrimination—how broad its scope is, how liberally it is applied, and how decisions are actually made by attorneys and trial judges—may be attributed to the secrecy of grand jury proceedings. Because those proceedings are normally sealed, the public has little appreciation for how often sophisticated criminal defense attorneys assert the privilege for their clients, and under how broad a range of circumstances trial courts accept that assertion. In fact, many trial courts are willing to take arguments from a witness's attorney ex parte and in camera, to ensure that a witness is not jeopardized in asserting the privilege as he would be if he were forced to support his assertion in open court.

Assuming guilt because a person invokes his Fifth Amendment right also presumes that the government's accusations and theories are always correct. In reality, that's simply not the case. Our criminal justice system does make errors. The belief that an innocent person should always want to provide evidence reflects an idealistic belief that, if all the evidence is presented, our system will always produce the right result. Unfortunately, that is not always so, for a variety of reasons ranging from simple human fallibility to more sinister causes, such as racism or political motivations. In many cases, therefore, a witness with a foundation for invoking the privilege is well served by doing so instead of providing evidence—even seemingly innocuous evidence—that can potentially be used against him.

There is nothing inconsistent in a person asserting his Fifth Amendment right against self-incrimination, while at the same time publicly proclaiming innocence. Any presumption of guilt—by the public, the media, or the President—demonstrates a profound misunderstanding of the privilege, and our criminal justice system.

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Reach

« *Continued from page 9*

ual outside the category of persons directly covered by the statute. The relevant FCPA provisions prohibit American companies, persons, and their agents from paying bribes to foreign officials, and prohibit foreign nationals and businesses from taking part in such schemes while in the United States. Based on the plain language of the statute and its legislative history, as well as the presumption against extraterritorial application, the court held that the defendant, who worked in France for a global corporation headquartered there, did not fall within the FCPA's purview unless he acted as an agent for a covered person or entity.

Domestic Application

Taken together, these cases place notable limitations on the ability of prosecutors in the Second Circuit to use securities law, RICO, wire fraud, mail fraud, or the FCPA to prosecute individuals or entities for extraterritorial conduct. It is important to observe, however, that most courts have held that even a crime that transpires primarily outside of the United States does not require extraterritorial application of the law if part of the crime occurs within the United States.

United States v. Hayes, 118 F. Supp. 3d 620 (S.D.N.Y. 2015) exemplifies this point. In *Hayes*, the moving defendant was a Swiss national who worked for a Swiss bank in Asia. He was charged with conspiracy to commit wire fraud by manipulating LIBOR and falsifying the bank's Yen LIBOR submissions to the British Bankers' Association. He allegedly influenced the final LIBOR fixings published both abroad and in the United States to move in directions favorable to his employer. Despite the relative paucity of alleged U.S. connections, the complaint did allege the use of U.S. wires. This was enough to render the indictment a domestic application of the wire fraud statute. See also *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (holding that jurisdiction for wire fraud where crime involved wire communications between Hong Kong and Manhattan).

To be sure, there was some U.S. connection alleged in *Hayes* and in other LIBOR cases. See *United States v. Allen*, 160 F. Supp. 3d 698, 707 (S.D.N.Y. 2016) ("[T]he wires used to settle payments under interest rate swap contracts, and the wires used to publish LIBOR to subscribers in New York, originated or terminated in New York … [met] the requirements for domestic application."). But it seems inconsistent with the spirit of *Morrison* for such a limited connection to be sufficient. *See Morrison*, 130 S. Ct. at 2884 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."). To permit charges based on just a single wire also seems inconsistent with the developing trend in the area of personal jurisdiction, where the Supreme Court has limited the exercise of general personal jurisdiction over corporations to those states in which the corporation's contacts are "so constant and pervasive as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (internal quotation omitted; alteration in original). Arguments seeking to build upon *Morrison* and *Daimler* may be fruitful for overseas defendants seeking to block prosecution here.

Other Options

For overseas defendants who cannot attack the extraterritorial reach of a particular statute or challenge the domestic component of the conduct, recent decisions suggest two other options. One is to use the conduct of prosecutors overseas to advance an argument based on a defendant's U.S. constitutional rights. In *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017), the Second Circuit held that the Fifth Amendment's prohibition on the use of compelled testimony against a defendant applies even when a foreign sovereign does the compelling. In *Allen*, the defendants gave compelled testimony to U.K. authorities; U.K. law permits such compulsion. This testimony was then shared by U.K. authorities with the government's cooperating witnesses, who later testified at trial in federal court. The court reversed the defendants' convictions as a violation of the right against self-incrimination. Notably, at oral argument, Judge José Cabranes, who authored *Vilar* and is an apparent skeptic of extraterritorial application, questioned the government's focus on these defendants—U.K. nationals who worked for a Dutch bank outside of the United States.

Another option is to consider fighting extradition. While most defendants in Western nations who contest extradition have ultimately been extradited to face criminal charges in the United States, the same types of jurisdictional arguments discussed above recently appealed to U.K. judges who declined to order the extradition of an HSBC currency trader. The court found that "most of the harm took place" in the U.K., not the United States, and that the trader had no significant connection or links with the United States other than working for an international bank, making extradition not in the "interests of justice." "Former HSBC trader wins extradition appeal against US," *Financial Times* (July 31, 2018).

Conclusion

As DOJ persists in its international focus in prosecuting white-collar crime and the courts restrict the global reach of various statutes while expanding the scope of constitutional protections for defendants, DOJ and the courts do appear to be on a collision course. This is likely to open up opportunities for defense attorneys to move the law in the direction of *Morrison* and its progeny and to expand the reach of U.S. constitutional rights, as in *Allen*.

Government

« Continued from page 9

may create significant problems for resulting prosecutions.

One such example arose recently in *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y.), where a former Deutsche Bank trader, charged with criminally collusive manipulation of the bank's LIBOR submissions, argued that statements he made to the bank's outside counsel during the course of a private internal investigation should be excluded as improperly "compelled," in violation of *Garrity v. New Jersey*, 385 U.S. 493 (1967). (*Garrity* held that forcing *government* employees to testify or suffer the penalty of losing their job violates the Fifth Amendment.) The defendant in *Connolly* argued that *Garrity*'s exclusionary rule was available to him (despite his private sector job) because Deutsche Bank, which threatened him with firing, was essentially acting on the government's behalf when it questioned him.

The *Connolly* defendant argued that the government had "federalized corporate internal investigations" by directing the bank's outside counsel to hand over compelled testimony of employees, while threatening to indict the bank. Defendant Gavin Campbell Black's Individual Motions In Limine at 1, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. April 23, 2018). The government thus bore "constitutional responsibility" for the compulsion of the defendant's statement. Id. at 8. He pointed to Deutsche Bank's counsel's "frequent contact with the Government concerning the status of the internal investigation and … regular direction from the Government," and asserted that the bank's outside counsel effectively became an arm of the government. Id. at 2.

While the government pointed to, among other things, the absence of proof that it pressured Deutsche into firing uncooperative employees (see United States' Response to Defendant Gavin Campbell Black's Individual Motions In Limine at 4-7, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. May 7, 2018)), Southern District Chief Judge Colleen McMahon nevertheless paused the trial to hold an evidentiary hearing on the *Garrity* issue, taking testimony from the outside counsel, a partner at Paul, Weiss, Rifkind, Wharton & Garrison who had led the bank's investigation. In the court's view, the factual inquiry turned on whether the bank "interviewed the defendant in pursuit of its own duties or interests," and whether any penalty the bank might impose "for refusing to sit for the interview [would be] meted out, whether by policy or discretionary act, without government pressure." Decision on Defendants' Motions In Limine, Black's Motions In Limine, and Connolly's Motions In Limine at 21-22, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. May 15, 2018).

In his testimony, the Paul, Weiss attorney conceded that the defendant had faced the choice "to cooperate or find new employment, basically." Trial Transcript at 1527, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. Oct. 2, 2018) (Ricciardi Tr.). In addition, the attorney admitted that the bank initiated its investigation into alleged collusion in response to a letter from the Commodities Futures Trading Commission (CFTC) "request[ing]" that the bank "voluntarily conduct by outside counsel a full review … and report on an ongoing basis the results of that review" to the CFTC. Id. at 1532. Further, documents demonstrated that the CFTC and the bank subsequently agreed on specific interviews and investigative steps that the outside counsel would take, subject to further direction from the CFTC. Trial Transcript at 2288-96, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. Oct. 5, 2018) (*Garrity* Hearing Tr.).

> Counsel for companies and the government should take note that overly directive communications on private firm investigation tactics and strategy, or other indicia of overreliance by the government on private law firm resources, **could undermine or derail otherwise viable investigations**.

Judge McMahon observed that the hearing evidence "creates a problem for the government on the state actor question." *Garrity* Hearing Tr. at 2360. "The government," she said, "can't get around *Kastigar* by outsourcing its investigative responsibilities to the target, especially when … government compulsion can be … [*de jure*] coercion or *de facto* coercion." Id. at 2283. In *Kastigar v. United States*, 406 U.S. 411, 460 (1972), the Supreme Court held that the government may not use evidence derived from compelled testimony and that the government has the burden of proof in a *Kastigar* hearing to show it obtained the evidence through independent means. In the court's view, the letter from the CFTC "would fall within the second of those two, because I don't believe that the word 'voluntary' means voluntary; I don't believe the word 'requests' means requests." Id. at 2284. She noted that the outside counsel agreed in his testimony that, while "there are choices in terms of your level of cooperation … , if a company wasn't cooperating or a bank wasn't cooperating, [the government] can bring massive resources to bear." *Garrity* Hearing Tr. at 2284; Ricciardi Tr. at 1499, 1507. That the government gave Deutsche Bank's outside counsel "marching orders" throughout its investigation and then conducted little investigation on its own were also key factors for the court: "[I]f what the government is telling me is that nobody from the government ever talked to anybody, you just took Paul Weiss's handiwork and built a case … , I know how this is going to come out." *Garrity* Hearing Tr. at 2360, 2301.

Ultimately, Judge McMahon gave the government a choice of swiftly presenting further evidence to rebut the claim that it had simply deputized a law firm or of running the serious risk that the court would not allow the defendant's statements to be presented to the jury. Id. at 2367-68. The government ultimately dropped its plan to offer into evidence the defendant's statements made during Paul, Weiss' investigation.

The repercussions of such a close relationship between the government and a law firm can bleed into other areas as well. During the arguments in *Connolly*, one of the defense attorneys told the court: "It goes beyond *Garrity*, Your Honor. This is a *Brady* issue … ." Id. at 2332. Picking up on this theme, Judge McMahon noted, "The issue for me, frankly … is for the first two years of this investigation, was the FBI function being performed by Paul, Weiss, Rifkin, Wharton & Garrison?" Id. at 2334. Thus, although the court never had to rule on the precise issue, the question was at least raised in *Connolly* as to whether the government's *Brady* obligations could possibly extend to the files of the outside counsel who led the corporate investigation.

Beyond *Connolly*, other cases also illustrate that problems can ensue when government investigators become too closely involved in outside counsel's investigative tactics, or provide too many marching orders. In *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006), the court found a *Garrity* violation where the government persuaded the defendant's employer, KPMG, to decline to pay his legal expenses and to terminate employees who were uncooperative with the government.

Takeaways

Government prosecutors will undoubtedly continue to seek robust cooperation from outside corporate counsel in investigations. And in their understandable desire to obtain the full benefits of cooperation, company counsel will continue to be sharply attuned to the requests and preferences of the government. While it remains unclear whether these cases suggest that courts are beginning to pay closer attention to establishing boundary markers at the border between acceptable coordination and improper deputization, counsel for companies and the government should take note that overly directive communications on private firm investigation tactics and strategy, or other indicia of overreliance by the government on private law firm resources, could undermine or derail otherwise viable investigations.

Social Media

« Continued from page 9

subject to the same scrutiny as other more traditional forms of communication. As a result, corporations and their outside professionals will need to develop rigorous programs to educate company insiders on the dos and don'ts of social media use. Corporate leaders will likely be discouraged from the spontaneous tweet or post, social media accounts will be closely monitored and the same lawyers and investor relations professionals that flyspeck a corporation's regulatory filings will vet all social media communications before they are disseminated. This is not necessarily a desirable result.

The particular facts and circumstances of the Musk case should not lead lawmakers, regulators and commentators to overlook the differences between social media and traditional media. Social media gives individuals—including CEOs and U.S. presidents alike—the ability to communicate with wide audiences directly and spontaneously. As the world has come to understand, the content of tweets and other social media is often exaggerated, hyperbolic and unreliable. Evidence of the public's awareness of this reality can be found in the SEC's own complaint against Musk, which cites numerous examples of recipients of the tweets expressing doubts about its truth and seriousness. Tesla's own head of Investor Relations sent Musk a text asking, "Was this text legit?" A business reporter texted Musk's chief of staff, "Quite a tweet! (Is it a joke?)" and another texted Musk directly, "Are you just messing around" and asking "Are you serious?" These reactions might well have provided the kernel of an interesting defense for Musk had he not in subsequent tweets doubled down on his initial message.

But the fact remains that social media has the capacity to provide more information to investors, and deliver it much faster and more efficiently than an SEC filing. Chances are better that what a CEO is really thinking will be manifested in an unvarnished tweet than in scripted communications drafted and tempered by cautious gatekeepers.

The particulars of the Musk case should not obscure the possibility that perhaps a different model is needed. What would it look like? One possibility would be to adapt the "safe harbor" concept that the Private Securities Litigation Reform Act created for "forward looking statements." Corporations and their executives, who currently must alert investors if they plan to announce material information via a Twitter account, could be given the option to identify their Twitter accounts as containing "spontaneous statements" and disclose certain risk associated with the abbreviated nature of those statements. Such statements could then be exempted from civil actions, and even regulatory enforcement, unless they were made with actual knowledge of their falsity. Another approach would be to give corporations a grace period in which to decide to adopt, clarify or disavow statements made by an executive on a social media platform. Any such reforms to the securities laws would be premised on the idea that investors may have to take responsibility for distinguishing between a "mere tweet" and news that should impact investment decisions. That is a skill that everyone, not merely investors, are likely to find increasingly useful.

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