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SELF-INCRIMINATION

Three attorneys at Skadden, Arps, Slate, Meagher & Flom LLP discuss the recent decision by the Second Circuit vacating the convictions of two former Rabobank traders who were found guilty of manipulating the Libor. The authors examine how the decision may impact how U.S. and foreign government agencies cooperate and approach cross-border investigations.

United States v. Allen and Its Check On Compelled Testimony in Cross-Border Investigations



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On July 19, 2017, the U.S. Court of Appeals for the Second Circuit vacated the convictions of Anthony Allen and Anthony Conti, two former Rabobank traders found to have manipulated the London Interbank Offered Rate (''LIBOR''), based on the use of the defendants' compelled testimony. *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017). The decision may well significantly impact how the U.S. and foreign governments approach cross-border investigations.

In this first U.S. criminal appeal arising out of the LIBOR investigations, the Second Circuit held that the Fifth Amendment prohibits the use of such testimony in U.S. criminal proceedings, even where lawfully compelled by a foreign government. The court found that when a U.S. government trial witness has been exposed to a defendant's compelled testimony, it is the government's ''heavy burden'' under *Kastigar v. United States*, 406 U.S. 441 (1972), to prove that the witness's exposure to that testimony did not ''shape, alter, or affect the evidence used by the government.'' *Allen*, 864 F.3d at 68-69. The decision may make international law enforcement collaboration more challenging, potentially requiring coordination at even earlier stages of cross-border investigations, and greater accommodations from all authorities involved, to ensure that any U.S. prosecution is untainted by compelled testimony.

Case Background

By 2013, U.K. and U.S. enforcement agencies had initiated investigations of the potential manipulation of LIBOR, an interest rate benchmark and reference index, by Rabobank and other financial institutions. U.K. and U.S. authorities were investigating whether financial institutions and their employees were manipulating LIBOR by making inaccurate submissions to the British

Bankers Association, the administrator responsible for calculating the index.

During the course of their investigations, the U.K.'s Financial Conduct Authority (''FCA'') and the U.S. Department of Justice (''DOJ'') conducted witness interviews. The FCA's interviews were compulsory; in the U.K., a failure to comply is punishable by imprisonment. The FCA granted the interviewees direct (but not derivative) use immunity, so the FCA could use information derived from the compelled interview against the witness, but could not use the witness' statements themselves.

To avoid falling afoul of the Fifth Amendment's protections against self-incrimination, the DOJ coordinated with the FCA to maintain a ''wall'' between the two authorities' investigations, intended to avoid a potential *Kastigar* violation. In *Kastigar*, the U.S. Supreme Court held that 18 U.S.C. § 6002 allows the U.S. government to compel testimony only if the witness is granted both direct and derivative use immunity. 406 U.S. at 453. If the immunized witness is later prosecuted, the government bears ''the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.'' *Id.* at 460. In the instant investigation, to avoid any *Kastigar* issues, the DOJ gave a presentation to FCA personnel on the Fifth Amendment and *Kastigar*, sent letters to FCA investigators requesting that no information from compelled interviews be shared with the DOJ, and arranged for the DOJ to conduct interviews before the FCA.

Consistent with this protocol, the FCA interviewed the defendants and several of their former co-workers, including Paul Robson. Later that year, the FCA brought an enforcement action against Robson. As part of its standard procedure, the FCA provided Robson with the relevant evidence against him, which included the transcripts of Allen and Conti's compelled testimony. Robson closely reviewed the transcripts on the advice of his U.K. counsel, annotating them and taking pages of handwritten notes. Shortly thereafter, the FCA stayed its enforcement action, and the DOJ moved forward with its prosecution of Robson.

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Indictment, Trial, And *Kastigar* Hearing

In April 2014, Robson was indicted in the Southern District of New York, pleaded guilty, and signed a cooperation agreement with the DOJ. Based in part on Robson's information, the DOJ indicted Allen and Conti in October 2014. They went to trial one year later, and Robson testified against them. Prior to trial, Allen and Conti moved under *Kastigar* to dismiss the indictment or suppress Robson's testimony on Fifth Amendment grounds, on the ground that Robson's testimony was tainted because it was derived in part from his review of their compelled testimony to the FCA. The district court declined to consider Allen and Conti's *Kastigar* challenge pre-trial, consistent with Second Circuit practice. The defendants were convicted on all counts and sentenced to two years' and a-year-and-a-day's imprisonment, respectively.

Following the trial, the district court held a two-day *Kastigar* hearing, at which Robson and an FBI agent, to whom Robson had relayed information, testified. After consideration, the district court denied the defendant's motion, holding that assuming that *Kastigar* applies to testimony compelled by a foreign sovereign, there had been no violation of the defendants' Fifth Amendment rights. The district court declined to apply the D.C. Circuit's standards, on which the defendants relied, and applied the standards set by the Second Circuit pursuant to *Kastigar*. *United States v. Allen*, 160 F. Supp. 3d 684, 691 n.9 (S.D.N.Y. 2016).

The district court concluded that the evidence provided by Robson, both at trial and prior to trial, was not tainted by his review of Allen and Conti's compelled testimony. The court found that the government had shown a wholly independent source for Robson's information – his ''personal experience and observations.'' *Id.* at 697. The court based this conclusion on Robson's *Kastigar* hearing testimony, corroborated by his fellow trial witnesses, which ''shows that the relevant information about defendants was known by co-workers who had not been exposed to their compelled testimony, raising the likelihood that Mr. Robson, through his years of personal experience of personal experience at Rabobank, had alternative sources for this information.'' *Id.* at 697-98.

The Second Circuit Decision

On appeal, the Second Circuit, in a unanimous opinion authored by Judge José Cabranes, found that the government failed to meet its *Kastigar* burden and that its use of evidence provided by Robson violated the defendants' Fifth Amendment right against compelled self-incrimination. Accordingly, the court reversed the convictions and dismissed the indictment

The Second Circuit made two key holdings in its decision. First, the court held that the Fifth Amendment prohibits the use of compelled testimony in criminal proceedings in the United States, ''even when the testimony was compelled by a foreign government in full accordance with its law.'' *Allen*, 864 F.3d at 82. The panel had little sympathy for the government's argument that such a prohibition could allow foreign governments to obstruct (inadvertently or intentionally) U.S. prosecutions by compelling and releasing a defendant's testi-

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mony. First, the court noted that the government already faces such risks within the U.S., where state authorities and the U.S. Congress can grant immunity and compel witness testimony. The court pointed out that the government could mitigate such risks through cooperation with foreign authorities, as had occurred in the present case. The Second Circuit placed the risks of a failure of coordination with foreign authorities squarely on U.S. prosecutors pursuing non-U.S. targets, ''rather than on the subjects and targets of cross-border investigations.'' *Id.* at 87-88.

Government's Burden Second, the Second Circuit rejected the district court's conclusion that the government could meet its *Kastigar* burden based on ''the mere fact that Robson himself asserted that his testimony was not tainted by his review of Defendants' compelled testimony and the fact that there was corroborating evidence for Robson's trial testimony.'' *Id.* at 93. The court observed that it had never addressed the circumstance in which a government trial witness reviewed a defendant's compelled testimony prior to testifying, but the D.C. Circuit had previously addressed the issue.

The Second Circuit agreed with the D.C. Circuit that when the government calls a witness who has been exposed to a defendant's compelled testimony, *Kastigar* requires the government to prove that the witness's review of the compelled testimony ''did not shape, alter, or affect the evidence used by the government.'' *Id*. The court explained that the most effective way for the government to meet its heavy burden under *Kastigar* when dealing with a witness who reviews compelled testimony is to have memorialized the witness's testimony prior to the witness's exposure (so-called ''canned testimony'') to show a lack of impact from the compelled testimony. In the present case, the court found that Robson's testimony to the FCA prior to his exposure to the defendants' compelled testimony was ''toxic'' because it was meaningfully different from his later testimony. In particular, the Court of Appeals concluded that Robson had testified at trial as to certain events and communications that he had no personal involvement in and which he did not discuss with the FCA, raising the question whether he learned of those facts through his review of the compelled testimony.

The Second Circuit concluded that the government had not satisfied its heavy *Kastigar* burden hearing by presenting ''bare, self-serving'' denials by Robson that his testimony was not tainted, and corroborating evidence for his trial testimony, rejecting the district court's conclusions that Robson's personal experience and observations, along with corroboration of those observations by other witnesses, established that his testimony had an independent source.

Implications Of the *Allen* Decision

In *Allen*, the Second Circuit sent a strong signal that it will safeguard the procedural protections afforded all defendants in the United States, even if both U.S. and foreign authorities acted lawfully when conducting a cross-border investigation in their respective jurisdictions. Indeed, the court appeared concerned that such investigations may pose risks to such procedural protections. The court noted:

> We do not presume to know exactly what this brave new world of international enforcement will entail. Yet we are certain that these developments abroad need not affect the fairness of our trials at home. If as a consequence of joint investigations with the foreign nations we are to hale foreign men and women into the courts of the United States to fend for their liberty we should not do so while denying them the full protection of a ''trial right'' we regard as ''fundamental'' and ''absolute.'' Id. at 90 (internal citations omitted).

In the wake of *Allen*, the burden to remain ''taint-free'' falls squarely on the shoulders of U.S. authorities, who will need to remain vigilant in ensuring that the conduct of cross-border investigations does not jeopardize prosecutions at home.

To guard against such risks—and the potential for reversal – is no simple task. While the impact of *Allen* is yet to be determined, U.S. prosecutors are likely to seek not only to collaborate earlier and more closely with their foreign counterparts, but specifically:

(1) to identify and assign potential targets to U.S. or to foreign jurisdictions, including potential cooperators, at earlier stages of a prosecution,

(2) to press foreign counterparts to avoid taking compelled testimony from targets that are intended to be prosecuted in the U.S., and/or to take testimony under conditions that would permit the statements to be admitted under U.S. law, and

(3) to gather and ''lock in'' statements of potential cooperator-witnesses before any compelled testimony, if taken, is shared with that potential cooperator.

Real Challenges These steps pose real challenges to international collaboration, however. First, it may be difficult to determine in which jurisdiction a target should be prosecuted in the early stages of an investigation, before all relevant evidence has been developed and before it is clear which targets ultimately may cooperate and be available as witnesses. At such early stages, non-U.S. authorities may be reluctant to forgo certain investigative techniques that they could otherwise lawfully employ with respect to potential targets, particularly without a commitment that the U.S. will prosecute those targets should they develop a case warranting prosecution. Of course, such commitments can never be certain, and are harder to make in early stages of an investigation, where the nature and quantity of evidence may not yet be clear. Even with such a commitment, a foreign authority may be reluctant to forgo such techniques, potentially losing valuable evidence should a U.S. prosecution ultimately not be viable, or should a foreign authority conclude that its own interests in prosecution outweigh those of the U.S.

Second, ''locking in'' a potential cooperator's statement at the early stage of a prosecution, and prior to his or her review of any compelled testimony, is not always possible. Cooperator statements often evolve over time, as the witness's recollection is refreshed, and/or as he or she fully commits to assisting authorities. That is, a defendant-witness may be unwilling to speak thoroughly and accurately at an early interview—as may have been the case with Robson—or not fully recall all key events, but as his or her case progresses, may speak more openly and transparently with investigators and may find that he or she recalls additional factual details. Such witnesses who review compelled statements may

become effectively un-usable to U.S. criminal authorities and therefore find cooperation in the U.S. foreclosed to them, given that *Allen* suggests it will be difficult if not impossible to establish a wholly independent source for their information. Relatedly, a defense counsel may choose to forgo having his or her client review compelled statements—though a defendant in certain non-U.S. jurisdictions may have the right to do at an early stage of the case and doing so is generally beneficial from the defense perspective—so as to preserve the client's viability as a cooperator in the U.S.

Parallel Criminal and Civil Investigations in the U.S.

Equally consequential, the *Allen* decision may lead to additional complexities in cross-border cases involving parallel investigations by the DOJ and U.S. regulatory agencies, such as the Securities Exchange Commission (''SEC'') or the Commodity Futures Trading Commission (''CFTC''). While *Kastigar* does not apply in SEC and CFTC enforcement proceedings, the SEC's and CFTC's work with foreign authorities who obtain compelled statements may well complicate their ability to also coordinate with the DOJ following *Allen*.

The SEC and CFTC's reliance on foreign authorities in conducting their investigations continues to grow as financial markets increasingly are open to global participation. For example, the SEC and CFTC frequently obtain assistance pursuant to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding (''the IOSCO MMoU''), the first global multilateral information-sharing arrangement among securities and derivatives regulators. The arrangement has more than 100 signatories, including the SEC, CFTC and securities and derivatives authorities from every major financial center worldwide. The IOSCO MMoU provides for, among other things, obtaining documents or the taking and compelling of a person's statement or testimony, and requests for assistance under the MMoU have increased more than 600 percent over the last decade. While statistics for the SEC are not publicly available, the CFTC reports that it made approximately 200 requests for documents or testimony to foreign authorities in FY 2015, nearly three times the number of enforcement actions filed in the same period.

Following the *Allen* ruling, when the SEC or CFTC obtains compelled testimony from a foreign authority, a defendant may argue that the testimony tainted other evidence collected by those agencies, which would then be unavailable to the DOJ for use in its prosecutions. For example, a defendant might argue that an CFTC or SEC attorney's review of compelled testimony tainted leads or evidence subsequently developed by that attorney. Those leads or evidence could become unusable by criminal prosecutors in a criminal case, and criminal prosecutors exposed to such information might be deemed tainted as well.

Furthermore, the SEC and CFTC have expressed interest in relying on cooperating witnesses to advance investigations and both agencies have expanded the use of their cooperation programs in recent years. Such expanded use of cooperating witnesses could also raise issues under *Allen*, if, for example, compelled testimony forms the basis of questions asked of a potential cooperating witnesses or is otherwise deemed to have contributed to the witness' knowledge or understanding of relevant events. As a result of these risks, the Department of Justice and civil enforcement agencies may now face the same coordination challenges as those arising in cross-border investigations.

As the number of simultaneous cross-border investigations continue to increase, the Second Circuit's decision in *Allen* highlights the importance of remaining cognizant of the evolving legal landscape in jurisdictions with different regulatory and criminal procedures. Indeed, *Allen's* impact is already being felt in cases brought by the Department of Justice—as recently as September 25 two former Deutsche Bank traders, who are also charged with manipulating LIBOR, urged a U.S. district court to grant their motion for a Kastigar hearing (over the DOJ's opposition) on whether testimony compelled by the FCA tainted the government's case. Among other things, the traders argued that potential witnesses in the case against them were interviewed long after one of the traders gave a compelled statement to the FCA, and the DOJ's ''wall'' between U.S. prosecutors and the FCA was illusory because the CFTC attended interviews on both sides of the wall. The traders asserted that these issues raised the possibility that government's case was tainted by exposure to compelled testimony.

As of the publication of this article, the court has not yet ruled on the traders' motion for a *Kastigar* hearing, but likelihood of a hearing appears probable given the court's prior observation that it ''certainly can't just accept the [government's] representation that there isn't a *Kastigar* problem here.''

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