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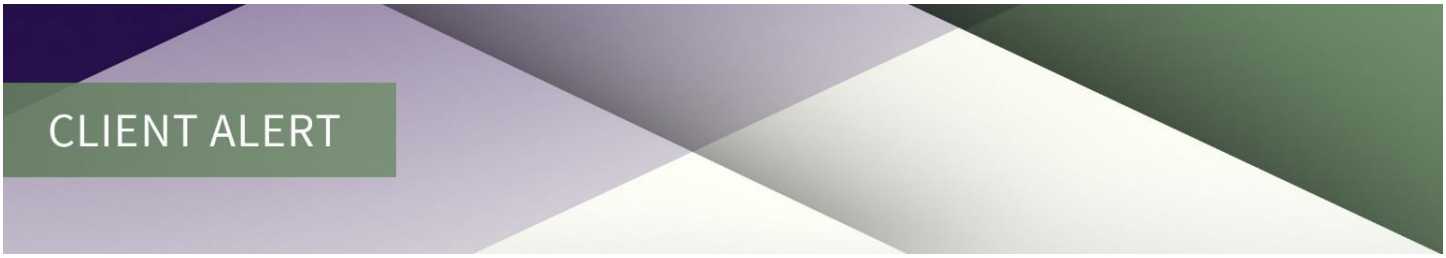

Unleashing the Hydra: Recent Trends in Parallel Criminal and Regulatory Investigations

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A recent decision by a federal judge in Illinois caps a series of setbacks for federal prosecutors bringing cases born out of parallel investigations with U.S. regulatory agencies. Increasingly, courts have faulted the U.S. Department of Justice ("DOJ") and regulatory agencies for failing to ensure that their respective investigations remain separate and distinct, triggering broader disclosure obligations for prosecutors. Those higher hurdles, while increasing government transparency for those being investigated, may also increase the risk of greater costs for financial institutions and companies confronting multiple, uncoordinated investigations. If government authorities interpret their latest reversals as mandating less coordination and collaboration with one another, then investigatory targets may ultimately pay the price.

The Decision

Parallel investigations—separate investigations conducted by different state or federal government entities into the same or a similar set of facts—are common practice. It is not new that a civil enforcement agency, such as the Securities and Exchange Commission, pursues an investigation at the same time as a criminal law enforcement agency, such as the DOJ. Prosecutors and agencies frequently take pains to remain in separate lanes but still coordinate, which results in efficiencies for investigatory targets and subjects. While coordination between government agencies in parallel proceedings regularly occurs, certain implications may arise if an investigation is concluded to be "joint" rather than parallel. Under the well-known *Brady* doctrine, the government has an affirmative duty to disclose any material evidence

favorable to the defendant.[1] Where the government conducts a "joint investigation," however, prosecutors also have a duty "to learn of any favorable evidence known to [another agency] acting on the government's behalf in [a] case."[2] To fulfill that duty, prosecutors must "review documents in the possession, custody, or control" of the other agency to determine if any *Brady* material exists.[3]

On February 24, 2021, the U.S. District Court for the Northern District of Illinois issued an order compelling the DOJ to produce any information discoverable under *Brady* in the possession of the Commodity Futures Trading Commission ("CFTC") based on the finding that the DOJ and CFTC conducted a "joint investigation" into the trading activities of the defendants.[4] In that case, the DOJ and CFTC had investigated various financial institutions and their traders in connection with possible spoofing and manipulation in certain precious metals futures markets.[5] From 2015 through 2018, the DOJ and CFTC shared information and jointly participated in interviews, meetings, and calls. The two agencies also conducted dual interviews of witnesses, which are a common feature of almost every parallel investigation.

The DOJ argued that there was not a "joint investigation" because, at most, the CFTC's involvement was limited to participating in some witness interviews with the DOJ and providing the DOJ with trading data pursuant to an access request. The DOJ contended that it conducted an independent investigation by virtue of the fact that it interviewed and re-interviewed witnesses outside of the presence of the CFTC, secured its own cooperating witness, and hired its own data analysis expert. Likewise, the CFTC maintained that it and the DOJ conducted separate, parallel investigations. In support of their arguments, the DOJ and CFTC cited cases holding that jointly attending witness interviews is insufficient to create a joint investigation, where coordinated prosecutorial strategy is lacking.

The Court disagreed. The Court found that the facts illustrated "extensive cooperation, joint participation, and sharing of resources between the CFTC and DOJ related to the investigation."[6] The Court also highlighted a joint announcement by CFTC and DOJ officials as evidence of a joint investigation. In particular, the Court cited the DOJ's press release, which explained that the DOJ received "invaluable assistance from" the CFTC.[7] Further, the Court found that, "given that Defendants are the only two of the eight individuals investigated, who were charged by the DOJ and *not* by the CFTC . . . it is not unreasonable to believe that the CFTC might hold some exculpatory information as to them."[8] The Court held that

1 *See Brady v. Maryland*, 373 U.S. 82 (1963); *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

2 *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (quoting *Kyles*, 514 U.S. at 437–38).

3 *United States v. Collins*, 409 F. Supp. 3d 228, 239 (S.D.N.Y. 2019); *United States v. Rigas*, No. 02-cr-1236 (LBS), 2008 WL 144824, at *2 (S.D.N.Y. Jan. 15, 2008), *aff'd*, *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009).

4 *See United States v. Bases*, No. 1:18-cr-00048 (N.D. Ill. 2018) (Feb. 24, 2021 Order).

5 *Id.* at 6–7.

6 *Id.* at 10.

7 *Id.* at 9–10.

8 *Id.*

joint fact-finding alone is sufficient to trigger the government's obligations under *Brady* because "the purpose of *Brady* is to apprise the defendant of exculpatory evidence obtained during the fact-gathering that might not otherwise be available to the defendant."[9] Thus, the Court ordered the DOJ to review any materials in the CFTC's possession that were part of the agencies' joint fact-gathering activities and produce any *Brady* material.[10]

Surrounding Context

The Illinois District Court's decision comes in the wake of other setbacks for the government.

In another recent case, the U.S. District Court for the Southern District of New York ordered the DOJ to open an investigation into possible prosecutorial misconduct in the U.S. Attorney's Office ("USAO") after it was discovered that the government had withheld exculpatory evidence in the prosecution of an Iranian-American banker, Mr. Sadr, for the alleged evasion of U.S. sanctions on Iran.[11] The document at issue, marked at Mr. Sadr's trial as exhibit GX 411, had apparently been obtained by the government during a prior, unrelated investigation.[12] In 2011, multiple federal and state actors began investigating Commerzbank, a German financial institution, for violating U.S. sanctions. During these parallel investigations, Commerzbank provided the New York County District Attorney's Office various documents, one of which was GX 411. Approximately one year into these investigations, an Assistant District Attorney ("ADA") was assigned to the District Attorney's investigation. That ADA would later be appointed a Special Assistant United States Attorney ("SAUSA") in Mr. Sadr's case. In 2015, Commerzbank resolved these investigations by entering into a universal deferred prosecution agreement.

Shortly thereafter, that same ADA was assigned to work on the District Attorney's investigation of a completely different matter, which ultimately led to the case against Mr. Sadr. The ADA was closing his files from the Commerzbank investigation that had recently ended, when he discovered GX 411 and realized that it related to the investigation of Mr. Sadr. The ADA set the document aside, and it lay dormant for years. By 2019, the USAO had indicted Mr. Sadr, and the parties were preparing for trial. The ADA, who was now an SAUSA, rediscovered the hard copy of GX 411 in his office. The prosecution used GX 411 at trial, without ever having disclosed it to the defense in discovery. The document—a letter from Commerzbank to the U.S. Treasury Department's office charged with enforcing sanctions—proved to be exculpatory, and Mr. Sadr's convictions were vacated. The USAO was then ordered to provide information regarding the *Brady* violations.

9 *Id.* at 11–12 (quoting *United States v. Gupta*, 848 F. Supp. 2d 491, 494 (S.D.N.Y. 2012)).

10 *Id.* at 16.

11 *See United States v. Nejad*, No. 1:18-cr-00224-AJN (S.D.N.Y. Feb. 17, 2021).

12 *Id.*, 2020 WL 5549931, at *8 (S.D.N.Y. Sept. 16, 2020).

Conclusion

The real impact of these cases remains to be seen. To the extent they call for more government transparency in conducting investigations, they will benefit those subject to regulatory enforcement and DOJ scrutiny. The risk is that the government, in attempting to ensure parallel rather than "joint" investigations, scales back the level of coordination, resulting in individuals giving multiple statements regarding the same conduct and thereby increasing the risk of inconsistent or conflicting accounts; subpoenas and document requests targeting the same information but in slightly different forms, resulting in inefficiencies in the gathering and production of responsive materials; and inconsistent outcomes, which seems contrary to recent guidance about coordinating settlements.[13] This shifting landscape may require company counsel to play a more central coordinating role themselves, a trend we've seen in our own inventory and which may now accelerate.

[13] *See* United States Department of Justice, Acting Deputy Assistant Attorney General Robert A. Zink, Virtual Speech (Dec. 9, 2020), *available at* https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-robert-zink-delivers-remarks-virtual-gir-live (reiterating the importance of the DOJ's "Anti-Piling On" policy, under which prosecutors should "endeavor, as appropriate, to coordinate with . . . other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct").

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