



Second Circuit: *McDonnell* "official act" requirement doesn't apply to FCPA violations

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By: Karl H. Buch | Benjamin Klein

The US Court of Appeals for the Second Circuit has held that the high bar for corruption cases set by the US Supreme Court in *McDonnell v. United States* does not apply to prosecutions under the Foreign Corrupt Practices Act (FCPA) as well as another federal anti-bribery law, 18 U.S.C. § 666, affirming the conviction of Chinese real estate developer Ng Lap Seng.

That is, the court found, prosecutors need not satisfy the heightened "official act" requirement established by the Supreme Court in *McDonnell* to prove an FCPA violation.

Disputed jury instructions and the *McDonnell* "official act" requirement

Following a five-week trial in mid-2017, a federal jury convicted Ng on charges stemming from a scheme to bribe United Nations ambassadors to get the international organization's support to use a conference center that he planned to develop in Macau. In May 2018, Ng was sentenced to four years in prison and three years of supervised release for his role in the scheme.

At trial, the judge instructed the jury that Section 666 bribery violations require that prosecutors prove an "official act," which the judge defined as "a decision or action that must involve a formal exercise of power" which is

"specific and focused on something that is pending or may by law or rule be brought" before the bribe recipient. Section 666 prohibits corrupt payments to influence or reward agents of organizations that receive more than \$10,000 in annual federal funding.

The trial judge rejected Ng's request to add similar "official act" language to the jury instructions for his FCPA charges. The FCPA makes it a crime to corruptly give a non-US government official anything of value for purposes of (1) "influencing any act or decision of such foreign official in his official capacity"; (2) "inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official"; (3) "securing any improper advantage"; or (4) "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality."

The Supreme Court's *McDonnell* decision – which arose from the bribery conviction of former Virginia Governor Bob McDonnell – requires that prosecutors prove that bribes committed in violation of 18 U.S.C. § 201 were paid in exchange for an "official act." Section 201, which has been described as a "general bribery statute," criminalizes the bribery of US officials and contains "official act" language. The *Ng* prosecution, in contrast to the *McDonnell* case, concerned two different anticorruption statutes – neither of which expressly require an "official act" – and focused on the bribery of non-US officials.

The DOJ argued – both at trial and on appeal – that the *quid pro quo* elements of the FCPA and § 666 are not limited to "official acts" as defined in Section 201 and as construed by the Supreme Court in *McDonnell*.

Second Circuit decision

The Second Circuit rejected Ng's argument, finding that the FCPA and Section 666 are written differently and target a broader set of corrupt activity than the law in the *McDonnell* case. According to the Second Circuit: "From these textual differences among various bribery statutes, we conclude that the *McDonnell* 'official act' standard, derived from the *quo* component of bribery as defined by § 201(a)(3), does not necessarily delimit the *quo* components of other bribery statutes." With respect to Section 666, the court explained:

Nowhere does § 666 mention "official acts." Nowhere does it place any definitional limits on the business or transactions to be influenced – beyond requiring them to be "of" the organization receiving more than \$10,000 in federal funding and to have a "value of \$5,000 or more." Further, the bribery proscribed by § 666 need not pertain directly to the business or transactions of an organization receiving federal funding; it need only be "in connection with" it.

The court made similar findings in its assessment of the FCPA's anti-bribery provisions:

[T]he FCPA . . . prohibits giving anything of value in exchange for any of four specified *quos*. While the first FCPA *quo* referencing an "act or decision" of "foreign official in his official capacity" might be understood as an official act, the FCPA does not cabin "official capacity" acts or decisions to a definitional list akin to that for official acts in § 201(a)(3). Nor does it do so for acts or omissions that violate an official's "duty," or that affect or influence the act or decision of a foreign government. Finally, the FCPA prohibits bribing a foreign official to "secur[e] an improper advantage" in obtaining, retaining, or directing business, without requiring that the advantage be secured by an official act as limited by the § 201(a)(3) definition.

The Second Circuit noted that other federal appellate courts – including the Third, Fifth, Sixth, and Eighth Circuits – have similarly declined to extend the *McDonnell* "official acts" requirement to other federal bribery statutes.¹

While the Second Circuit found that the "official act" instruction on Ng's Section 666 bribery charges was unnecessary and the trial judge erred in giving it, the court concluded that the error was harmless. As explained by the court, the jurors who convicted Ng under the higher standard

would presumably have done so under the lower one.

Implications

The *Ng* decision reinforces rulings by multiple federal courts of appeals that the *McDonnell* "official acts" requirement for bribery violations under Section 201 does not extend to violations of other federal anti-bribery laws, including the FCPA and Section 666. As a result, prosecutors need not overcome this additional hurdle – which ultimately resulted in the undoing of the *McDonnell* conviction – to successfully prosecute such bribery violations.

To learn more about the implications of this decision, please contact any of the authors.

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¹ See, eg, *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) ("In *McDonnell*, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here [i.e., § 666]."); *United States v. Ferriero*, 866 F.3d 107, 127-28 (3d Cir. 2017) (declining to apply *McDonnell* standard derived from § 201 to state bribery), *cert. denied*, 138 S. Ct. 1031 (2018); *United States v. Reed*, 908 F.3d 102, 111, 113 (5th Cir. 2018) (declining to apply *McDonnell* to wire fraud conviction because "troublesome concept of an 'official act'" was not an element of that crime, and further observing "fellow circuits' reluctance to extend *McDonnell* beyond the context of honest services fraud and the [general] bribery statute"); cf. *United States v. Maggio*, 862 F.3d 642, 646 n.8 (8th Cir. 2017) (declining to revisit precedent holding that § 666 requires no nexus between charged bribe and federal funding, explaining "*McDonnell* had nothing to do with § 666").

AUTHORS



Karl H. Buch

Partner

New York | T: +1 212 335 4500

karl.buch@dlapiper.com



Benjamin Klein

Of Counsel

Washington, DC | T: +1 202 799 4000

ben.klein@dlapiper.com