

Second Circuit Declines To Extend *McDonnell*'s 'Official Acts' Standard to FCPA Prosecutions

Skadden

09 / 26 / 19

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorney or call your regular Skadden contact.

Matthew E. Sloan

Partner / Los Angeles
213.687.5276
matthew.sloan@skadden.com

Matthew J. Tako

Associate / Los Angeles
213.687.5108
matthew.tako@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

The U.S. Court of Appeals for the Second Circuit recently held that the heightened “official acts” standard for domestic bribery cases — announced by the U.S. Supreme Court in *McDonnell v. United States* — is inapplicable to prosecutions involving foreign officials under the Foreign Corrupt Practices Act (FCPA). The only appellate decision to address *McDonnell* in the FCPA context, the Second Circuit’s August 9, 2019, holding in *United States v. Ng Lap Seng* is consistent with prior court rulings that declined to extend *McDonnell*’s rigorous standard to bribery charges under other federal and state statutes. It likely dashed the expectations of many defense counsel who had predicted that *McDonnell*, which was decided in 2016, would significantly raise the bar for prosecutions under the FCPA.

Supreme Court’s Decision in *McDonnell*

The Supreme Court’s decision in *McDonnell* vacated the conviction of Robert McDonnell, the former governor of Virginia, who had been found guilty of accepting over \$175,000 in gifts and loans from the CEO of a nutritional supplement company. The CEO had asked McDonnell for help convincing Virginia’s public universities to study his company’s supplement, Anatabloc, so that it could obtain approval from the Food and Drug Administration. McDonnell passed along information about the supplement and arranged for meetings with certain university officials, but he never directed them to take any action to convince the universities to study Anatabloc. And the supplement was never tested by any of Virginia’s public universities.

McDonnell was convicted of honest services fraud and Hobbs Act extortion. The jury instructions for each of these counts was premised on the bribery statute governing domestic federal officials, 18 U.S.C. § 201, which among other things makes it a crime for a public official to corruptly “demand, seek, receive, accept or agree ‘to receive or accept anything of value’ in return for being ‘influenced in the performance of any official act.’” The statute defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official.” *McDonnell* established a two-part test to prove an “official act” under Section 201. First, the alleged conduct “must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” Second, “the public official must make a decision or take an action ... or agree to do so.”

In vacating McDonnell’s conviction, the Court ultimately found that the district court’s jury instructions were defective when it came to what constitutes an “official act.” The Supreme Court held that merely “hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone,” an official act because those do not constitute a “question, matter, cause, suit, proceeding or controversy” before a public official. Among the concerns the Court cited in adopting a more expansive definition of “official act” was that accepting too broad of an interpretation could have a chilling effect on federal officials and thus undermine their ability to effectively perform their jobs. For example, public officials might be afraid to interact with constituents who have made campaign contributions to them out of fear that that could subject them to prosecution.

Second Circuit’s Holding in *Ng*

Since *McDonnell*, courts around the country have consistently held that Section 201’s heightened “official acts” standard is not applicable to other bribery or corruption statutes. The Second Circuit’s decision not to extend *McDonnell* to the FCPA follows

Second Circuit Declines To Extend *McDonnell*'s 'Official Acts' Standard to FCPA Prosecutions

naturally from these earlier cases. The defendant in *Ng* was a Chinese real estate developer who was convicted of violating the FCPA and Section 666 by paying two U.N. ambassadors a total of more than \$1 million to secure a U.N. commitment to use his real estate development in Macau as the site for an annual U.N. conference. *Ng* appealed his conviction, arguing, among other things, that the jury instructions were deficient for failing to incorporate *McDonnell*'s heightened "official acts" requirement.

The Second Circuit rejected *Ng*'s arguments and affirmed his conviction. It noted that, unlike the "official acts" requirement in *McDonnell*, the FCPA "prohibits giving anything of value in exchange for any of four specified *quos*," which is broader than Section 201's "official act" definition. Specifically, the FCPA makes it unlawful to corruptly pay or promise to give anything of value to a foreign official for the 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 decisions of such government or instrumentality."

Lessons From *Ng*

The *Ng* ruling signals that the government will likely continue to aggressively pursue FCPA prosecutions even without evidence that the parties' conduct influenced an "official act." That does

not mean that merely setting up a meeting, talking to another official, organizing an event or agreeing to do so, without more, would be enough to justify a conviction. However, the FCPA's broad standards arguably do not rule out such a prosecution as long as the government has evidence that the party intended to influence an act or decision of a public official, or to secure an improper advantage for the party's company in order to obtain or retain business. The Second Circuit specifically highlighted this broad language in distinguishing the FCPA from *McDonnell*: "[T]he 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" (alteration in original).

While *Ng* is still the only appellate decision to address *McDonnell* in the FCPA context, the post-*McDonnell* landscape makes clear that courts are unlikely to hold that the "official acts" limitation applies to statutes beyond Section 201. Companies must therefore continue to maintain robust compliance programs and instruct employees to avoid providing anything of value to foreign officials that could be viewed as: (1) influencing the act or decision of a foreign official; (2) inducing such official to do or omit to do any act in violation of his or her lawful duty; (3) securing an improper advantage for the company; or (4) inducing such official to use his or her influence with a foreign government to affect or influence any act of such government for the purpose of obtaining or retaining business, or directing business to any person.