New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 80
WEDNESDAY, OCTOBER 23, 2019

Expert Analysis

SECOND CIRCUIT REVIEW

The Meaning of 'Official Act' Under Bribery Laws

By **Martin Flumenbaum** And **Brad S. Karp**

In *United States v. Ng Lap Seng*, the U.S. Court of Appeals for the Second Circuit addressed whether the definition of "official act" in the general federal bribery statute, 18 U.S.C. §201, applies to 18 U.S.C. §666 and the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§78dd-2, 78dd-3. In an opinion written by Circuit Judge Reena Raggi, and joined by Circuit Judge Peter Hall, with Circuit Judge Richard Sullivan concurring in a separate opinion, the Second Circuit held that the definition of "official act"—as used in §201(b)(1), defined by §201(a)(3), and construed in the U.S. Supreme Court decision *McDonnell v. United States*—does not limit "bribery" as prohibited by §666 and the FCPA. Accordingly, the court affirmed Ng Lap Seng's conviction.

Against the backdrop of ongoing robust FCPA enforcement activity, the Second Circuit joined other circuit courts and dispelled any ambiguity as to whether the definition of "official act" in the general bribery statute limits the scope of other bribery statutes such as §666 and the FCPA.

> This decision clarifies that the 'McDonnell' standard does not apply to §666 and the FCPA and provides helpful guidance for both parties and judges drafting jury instructions in bribery cases.

Scheme in 'Ng Lap Seng'

Ng paid two United Nations (U.N.) ambassadors—one of whom served as president of the General Assembly—over $1 million to secure the U.N.'s commitment to use Ng's real estate development in Macau as the permanent site for an annual convention of its Office for South-South Cooperation. Following a jury trial, defendant Ng was convicted of violating §666 and the FCPA. Judge Vernon Broderick of the U.S. District Court for the Southern District of New York sentenced Ng "to serve concurrent 48-month prison terms on each of six counts of conviction, to forfeit $1.5 million, to pay a $1 million fine, and to make restitution to the U.N. in the amount of $302,977.20." *United States v. Ng Lap Seng*, 934 F.3d 110, 116 (2d Cir. 2019).

Relevant Provisions

The general bribery statute, 18 U.S.C. §201, prohibits "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any public official…with intent—(A) to influence any official act." 18 U.S.C. §201(b)(1)(A). Section 201(a)(3) defines "official act" as "any decision or action on any question, matter,

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss.* ELYSSA E. ABUHOFF, *a litigation associate at the firm, assisted in the preparation of this column.*

cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. §201(a)(3).

Federal criminal statute 18 U.S.C. §666 prohibits bribery with respect to programs that receive federal funds. Section 666 criminalizes "corruptly…giv[ing] anything of value to any person" (the *quid*) "with intent to influence… an agent of an organization or of a State, local or Indian tribal government" which receives federal funding "in connection with any business, transaction, or series of transactions of such organization…involving anything of value of $5,000 or more" (the *quo*). 18 U.S.C. §666. There is no mention of "official acts" in §666.

The FCPA criminalizes corruptly giving anything of value to a foreign official—the *quid*—for the purpose of any one of the four following *quos*: (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." 15 U.S.C. §§78dd-2(a)(1), 78dd-3(a)(1). There is no mention of "official acts" in the FCPA.

'McDonnell' Standard

In *McDonnell v. United States*, the former governor of Virginia was convicted of honest services fraud and Hobbs Act extortion, which the parties agreed would be defined according to the general bribery statute based on his acceptance of bribes. At issue was whether "arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject, including a broad policy issue such as Virginia economic development," constituted an "official act" as defined in the general bribery statute. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

> Against the backdrop of ongoing robust FCPA enforcement activity, the Second Circuit joined other circuit courts and dispelled any ambiguity as to whether the definition of "official act" in the general bribery statute limits the scope of other bribery statutes such as §666 and the FCPA.

The Supreme Court held that in trials for bribery, juries should be instructed on two requirements to prove an "official act": (1) "the government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official" and (2) "the government must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." Id. at 2368. The court further ruled that "arranging a meeting, contacting another official, or hosting an event—without more" did not constitute an "official act." Id. at 2372.

Second Circuit Opinion

At the district court level in *Ng Lap Seng*, the government argued that §666 bribery and FCPA bribery are not limited to "official acts" as defined in the general bribery statute and as construed by *McDonnell*. The district court, however, charged the jury that the government was required to prove that Ng "acted with the intent to obtain 'an official act' from those agents of the U.N. to whom he had given or offered something of value" with respect to §666, but not with respect to the FCPA claims. *Ng Lap Seng*, 934 F.3d at 129.

Ng argued on appeal, as he did below, that both §666 bribery and FCPA bribery require proof of an "official act." The Second Circuit rejected this argument, finding that the *McDonnell* standard does not apply to §666 or the FCPA. The court affirmed the conviction, finding that to the extent that the district court erroneously charged the jury with the "official act"

instruction with respect to §666, the error was harmless. Id. at 130.

In doing so, the court first stated that §666 and the FCPA are not textually limited to "official acts" as the term is defined in the general bribery statute and under *McDonnell*. The court found that this interpretation of §666 is supported by both Second Circuit precedent and precedent of its sister courts. In *United States v. Boyland*, the Second Circuit held that the *McDonnell's* "official act" standard governing the *quo* component of the general bribery statute did not apply to §666, which uses broader language. 862 F.3d 279, 291 (2d Cir. 2017), cert. den., 138 S. Ct. 938 (2018). The court also noted that the U.S. Court of Appeals for the Third, Fifth, Sixth and Eighth Circuits have interpreted *McDonnell* as cabining the term "official act" to the general bribery statute. See *United States v. Reed*, 908 F.3d 102 (5th Cir. 2018); *United States v. Porter*, 886 F.3d 562 (6th Cir. 2018); *United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017); *United States v. Maggio*, 862 F.3d 642 (8th Cir. 2017).

The court found that its reasoning in *Boyland* "applies with equal force to the FCPA." *Ng Lap Seng*, 934 F.3d at 134. The court noted that although the four *quos*, listed above, that are identified in the FCPA may be construed as referring to "official acts," the FCPA does not cabin acts or decisions to an enumerated list such as that provided in the general bribery statute.

The court next addressed certain constitutional issues. With respect to the void-for-vagueness doctrine, the court noted that "courts have uniformly rejected vagueness challenges both to Section 666 and to the FCPA." Id. at 135. The court similarly rejected Ng's argument, finding that the text of both §666 and the FCPA is adequate to alert a reasonable person about illegality of the type Ng engaged in while avoiding arbitrary enforcement.

The court next addressed Ng's argument that in light of our federalist and representative government structure, the *McDonnell* standard must apply since the "official act" in the general bribery statute cannot be applied so broadly that government officials will be unclear as to whether they could respond to common requests for assistance and citizens may avoid "participating in democratic discourse"; "[n]or could it be construed to invite unauthorized federal interference in states' ability to set standards of good government." Id. at 136 (quoting *McDonnell*, 136 S. Ct. at 2373).

The court ruled, however, that such concerns do not pertain to the FCPA and do not arise in the context of §666 because (1) Congress expressly recalibrated the federalism balance by "stat[ing] its intent to reach bribery within State and local governments insofar as they receive federal funding," (2) Congress more broadly prohibited offering "'anything of value' to the agent of an organization or State or local government 'in exchange for the influence or reward'" without limiting it to an "official act," and (3) Congress cabined bribery proscribed by §666 to organizations or government entities that "receive more than $10,000 in federal funding benefits over the course of a year" and to circumstances in which "the business or transaction intended to be influenced [has] a value of $5,000 of more." Id. at 137-38.

While the court ultimately concluded there was a charging error because the district court should not have charged "official act" at all with respect to §666, the court found that it was harmless. Judge Sullivan concurred, writing separately to reject the court providing an alternative holding hypothesizing on what it would have decided had *McDonnell* applied to §666, but otherwise "wholly concur[ing] in the majority's excellent opinion." Id. at 147.

Conclusion

The Second Circuit's decision in *United States v. Ng Lap Seng* builds on *McDonnell* and *Boyland* to further clarify the contours and scope of the bribery statutes. In particular, this decision clarifies that the *McDonnell* standard does not apply to §666 and the FCPA and provides helpful guidance for both parties and judges drafting jury instructions in bribery cases.