The ANTI-CORRUPTION REPORT
Formerly the FCPA Report
An Acuris Company

www.anti-corruption.com October 31, 2018

Will the FCPA Be Used to Prosecute Domestic Bribery Cases?

By David Bitkower, *Jenner & Block*, Nicholas Barnaby, *General Dynamics Corporation*, Karthik Reddy, *Jenner & Block*

In *McDonnell v. United States*,[1] the Supreme Court reined in the scope of the federal bribery statute,[2] holding that a bribe paid to a public official does not violate the statute unless it was paid in exchange for a narrowly defined "official act."[3] The 2016 *McDonnell* opinion came on the heels of several other Supreme Court decisions that narrowed sweeping criminal laws,[4] and was followed by the Court's decision to overturn a tax-obstruction conviction under another broadly-worded statute just last term.[5] This line of decisions suggests a Court that is increasingly distrustful of wide-ranging prohibitions that threaten to chill legitimate, protected activity.

McDonnell raised the issue of whether the Court's corseting of the domestic bribery statute would restrict DOJ's use of the anti-bribery provisions of the FCPA, another statute that criminalizes a wide range of payments, including those aimed at "influencing any act or decision" of a foreign official.[6] But contrary to these expectations, courts have not yet exported *McDonnell* to the FCPA's anti-bribery provisions. Instead, there are signs that the DOJ is envisioning a shift in the *opposite* direction: using the FCPA to more aggressively prosecute *domestic* bribery cases. If that maneuver – which DOJ hinted at in an FCPA resolution with Panasonic Avionics Corporation earlier this year– is successful, it could circumvent some of the limits that the Supreme Court has placed on prosecutions of domestic bribery, at least in cases involving public companies.[7]

See "Big Deals? Panasonic and Subsidiary Settle FCPA and Exchange Act Charges for $280 Million" (May 16, 2018).

McDonnell and Limits on Domestic Anti-Corruption Law

Jury Conviction for Receiving Bribes

The *McDonnell* prosecution began after Robert McDonnell, Virginia's then-sitting governor, accepted a Rolex watch, $20,000-worth of designer clothing, $65,000 in cash and loans and several outings and vacations from a Virginia businessman.[8] In exchange for the gifts, which ultimately totaled $175,000,[9] McDonnell used his office to set up meetings and events for the businessman to market a nutritional supplement.[10] McDonnell also promoted the supplement before state officials responsible for studying and procuring nutritional products.[11]

After hearing evidence of this trade of gifts for official influence, a Virginia jury convicted McDonnell of several crimes based upon the theory that he had received a bribe "in return for being influenced in the performance of an official act."[12]

Supreme Court Reversal: Interpreting "Official Act"

A unanimous Supreme Court reversed McDonnell's convictions.[13] The Court held that the term "official act," as defined in the federal bribery statute, 18 U.S.C. § 201(a)(3), did not reach McDonnell's use of official influence to set up meetings, host events and speak with other officials in an effort to boost his benefactor's business.[14]

The Court explained that by using the term "official act," Congress intended to limit the bribery statute to payments for a concrete decision or action on an official matter like "a lawsuit before a court, a determination before an agency, or a hearing before a committee."[15] The Court held that if McDonnell did nothing more than set up meetings and advocate for the businessman's product, he did not actually make a "decision" on anything and thus could not be punished under the statute.[16]

The *McDonnell* Court emphasized that a narrow construction of the bribery statute was necessary to avoid overcriminalization,[17] a concern that has animated a number of recent Supreme Court decisions cutting back the scope of criminal liability. In *Arthur Andersen LLP v. United States*,[18] for instance, the Court read a federal obstruction of justice statute to require proof of "consciousness of wrongdoing" out of concern that the law must provide individuals with "fair warning" about what activity is criminal.[19] In *Yates v. United States*,[20] that same worry prompted the Court to hold that DOJ could not apply the records-destruction provision of the Sarbanes-Oxley Act – a law designed to protect investors from financial crimes – to a boat captain who tossed red grouper overboard to avoid fishing conservation penalties.[21]

In an even more recent decision, *Marinello v. United States,*[22] the Court narrowly interpreted the obstruction provision of the Internal Revenue Code out of concern that, interpreted literally, "the provision could apply to a person who . . . fails to keep donation receipts from every charity to which he or she contributes."[23] And in *United States v. Sun-Diamond Growers of California,*[24] a forerunner of *McDonnell*, the Court cut back the federal bribery statute out of concern that the statute would otherwise "criminalize a high school principal's gift of a school baseball cap to the Secretary of Education."[25]

In *McDonnell*, the Court likewise expressed apprehension that a broad definition of "official act" in the federal bribery statute could entrap honest citizens, and thus discourage ordinary people from exercising their right to engage with their government.[26] As the Court explained, a campaign contribution could easily be interpreted as a bribe, and a conscientious politician's advocacy on behalf of a donor constituent could be seen as a favor in return.[27] The Court worried that a lack of notice about the limits of the criminal statute could chill political speech and advocacy in a system in which citizens are expected to engage politicians – who in turn are expected to "hear from their constituents and act appropriately on their concerns."[28] The Justices explained that politicians "might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."[29]

Narrowing the Federal Bribery Statute's Scope

The "interpretive restraint" that the Court chose to exercise in *McDonnell* sent a clear message to federal prosecutors that the federal bribery statute is not an all-purpose anti-corruption statute, even where there is clear evidence of a quid pro quo.[30] The decision was widely recognized as narrowing the scope of federal domestic corruption liability,[31] and has had a significant effect in the lower courts, among them the Third Circuit's recent decision to overturn the bribery convictions of Representative Chaka Fattah, and the Second Circuit's decision last year awarding a new trial to former New York Assembly Speaker Sheldon Silver.[32]

Reconciling McDonnell and the FCPA

Given this context, court watchers and commentators noted a tension between *McDonnell's* restrictive approach to domestic bribery and the more expansive view of foreign bribery charged by federal prosecutors enforcing the FCPA or set forth in resolutions between DOJ and companies that are the subject of FCPA investigations. Specifically, there is resonance between the domestic bribery statute's "official act" requirement and the FCPA's anti-bribery provisions, which prohibit (among other things) offering anything of value to a "foreign official" for the purpose of "influencing any act or decision of such foreign official in his official capacity."[33]

In light of this similarity, the argument went, *McDonnell* could "provide leverage for defense lawyers to push back against expansive government theories in FCPA cases."[34] As one former federal prosecutor put it, "if foreign officials' actions are akin to McDonnell's 'then how can paying for these legitimate actions constitute bribery?'"[35]

Whether appellate courts will apply *McDonnell's* holding to the FCPA's anti-bribery provisions remains an open question, but thus far the government has won the opening rounds.[36] The government has argued that the FCPA's language is not the same as that of Section 201:[37] in addition to the prohibition on influencing "any act or decision of such foreign official in his official capacity," the FCPA also prohibits offering anything of value to "induc[e] such foreign official" to violate his lawful duty, or simply to "secur[e] any improper advantage."[38] These phrases are not as obviously susceptible to the "official act" limitation at issue in *McDonnell*.[39]

The government has also argued that the FCPA's anti-bribery provisions may logically apply more broadly than the domestic bribery statute because other countries may have broader anti-corruption statutes than the U.S. law that the Supreme Court considered in McDonnell.[40]

No appellate court has yet weighed in on *McDonnell's* impact on the FCPA, but the Second Circuit may do so soon: in United States v. Ng Lap Seng,[41] a New York jury found businessman Ng Lap Seng guilty of FCPA violations in connection with his efforts to pay a U.N. official to help steer U.N. funding his way.[42] Ng appealed on the ground that the FCPA suffers from the same concerns that the Supreme Court found so troubling in McDonnell, and has argued that a narrow construction like the one adopted in that case is necessary to cure the defect.[43] The case remains pending in the Second Circuit, with argument scheduled for November 2018.

Reverse-McDonnell: Is DOJ Using the FCPA to Reach Non-Official Act Domestic Bribery?

The recent deferred prosecution agreement between DOJ and Panasonic Avionics Corporation suggests that, instead of feeling compelled by *McDonnell* to apply the FCPA more narrowly abroad, DOJ may instead seek to use the FCPA to expand its ability to prosecute domestic bribery. While DOJ cannot use the FCPA's anti-bribery provisions to charge domestic bribery cases – as noted, the statute requires that a bribe be paid to a "foreign official,"[44] – the agency's recent activities indicate that it may nonetheless seek to use the statute to pursue such matters.

See "What the Eleventh Circuit's 'Instrumentality' Decision Means for FCPA Practitioners" (May 28, 2014).

Books and Records Provision as a Supplement to Anti-Bribery Provision

Notably, the FCPA also contains a provision – enforced by both DOJ and SEC – requiring public companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of [their] assets."[45] The FCPA makes it a federal crime for a public company to violate this "books and records" provision by knowingly falsifying any such record.[46] The statute does *not* require that the falsified books and records relate to foreign transactions: the provision facially applies to both domestic and foreign transactions, so long as the company is subject to SEC reporting requirements.[47] And DOJ and the SEC have observed that, regardless of their underlying legality, "[b]ribes, both foreign and domestic, are often mischaracterized in companies' books and records" – leading to potential FCPA liability every time a payment to influence an official is made but not accurately recorded as such.[48]

See "DOJ and SEC Officials Provide Candid Insight Into the Recently Issued FCPA Guidance" (Nov. 28, 2012).

The FCPA books and records provision sweeps very broadly as a facial matter, and DOJ has used the provision to criminally prosecute an array of domestic accounting fraud cases; the SEC has also used its corresponding authority to widely enforce the books and records provision as a civil matter. But in the past DOJ has traditionally refrained from using the provision to target domestic bribery cases. Instead, DOJ's FCPA prosecutors have, in a number of cases, used the books and records statute as a supplement to the FCPA's anti-bribery provisions to prosecute firms that made suspicious foreign payments in circumstances suggestive of official bribery, but where the available evidence may not have established that the payments were actually made to foreign officials for a prohibited purpose.

As DOJ's FCPA Resource Guide itself states, "DOJ's and SEC's enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systematic pattern of bribery."[49]

For instance, as early as 1983, DOJ charged a Texas construction company with books and records violations related to payments that the firm made to a Trinidad and Tobago official responsible for construction procurement.[50] More recently, in 2014, a California medical diagnostics company paid a $14.35-million penalty to resolve books and records charges arising out of improper payments it made in Russia.[51]

See "Bio-Rad Settles FCPA Charges For $55 Million Through DOJ Non-Prosecution Agreement and SEC Administrative Action" (Nov. 5, 2014).

Expanding Books and Records to Domestic Officials

Putting aside the merits of DOJ's use of its prosecutorial discretion in such cases, that discretion has the virtue of not using the FCPA's criminal prohibitions to target domestic bribery conduct, for which Congress enacted a set of different statutes, with their own limitations not textually reflected in the FCPA. Rather, when it came to bribery offenses, DOJ generally aimed the books and records provision at foreign conduct.

Recently, however, in the Panasonic Avionics case, DOJ took things in a different direction. To resolve books and records charges brought by DOJ, Panasonic Avionics agreed to a deferred prosecution agreement under which it paid a $137.4-million criminal penalty, on top of a $143-million disgorgement payment to the SEC.[52]

Much of the case was unremarkable for a books and records case: although DOJ did not charge Panasonic Avionics with bribery, the company admitted to making substantial payments to a so-called "consultant" who was actually a contracting officer at a foreign, state-owned airline involved in negotiating a deal with Panasonic Avionics.

Panasonic Avionics acknowledged that it inaccurately recorded these payments as fees for "consulting services" rather than as "bribes" or "influence payments."[53] This aspect of the case – a resolution with a publicly traded company for misrepresenting the nature of questionable payments abroad – fell squarely within DOJ's prior practice using the FCPA's books and records provision as a way to indirectly prosecute what it likely suspected was foreign official bribery.

But the resolution against Panasonic Avionics also swept in a second consultant who, unlike the first consultant, worked for a *domestic* airline.[54] In exchange for $825,000 in "consulting payments," the U.S. consultant, like the foreign consultant, provided Panasonic Avionics with nonpublic information about the airline's contracts and negotiations with Panasonic Avionics' competitors. With the help of this "insider" information, Panasonic Avionics won several contracts from the airline. The company ultimately acknowledged that because the consultant did "little" actual consulting work, the $825,000 that it paid the consultant was "falsely record[ed]" as a "legitimate" expense.[55]

The domestic aspect of the Panasonic Avionics case attracted little attention, perhaps because it was not essential to the resolution of the charge – the foreign conduct that Panasonic Avionics admitted in the statement of facts was already enough to establish liability under the FCPA's books and records provision. But the fact that DOJ also brought a criminal books and records charge based on domestic acts intended to corruptly influence domestic actors may be far more important if it represents a new attempt by DOJ to use the FCPA to prosecute purely domestic corruption: applying the provision domestically could permit DOJ to prosecute public companies and their agents and employees for payments to American officials without the need to prove any "official act" under *McDonnell* so long at the company has not accurately recorded the payments. And as noted above, DOJ has already taken the position that companies rarely record such payments accurately in their books and records.

What Would Happen in the Courts?

Courts have not raised the question of whether, after *McDonnell*, DOJ may use the books and records provision to target domestic corruption. Panasonic Avionics resolved its case – including both the foreign and domestic conduct – with a negotiated DPA. But it is questionable whether this use of the FCPA's criminal books and records provision would ultimately hold up if challenged in court. Such a prosecution would risk running the same course as DOJ's efforts against Governor McDonnell, Captain Yates and Arthur Andersen.

Although the FCPA's books and records provision facially reaches both payments that raise bribery suspicions and payments that have nothing to do with corruption, the statute's core concerns are[56] – and, for the most part, DOJ's prior use of the statute has been – focused on public corruption abroad.[57] If DOJ were to try to use the provision backhandedly to prosecute conduct that the *McDonnell* Court explicitly held was *not* bribery, skeptical courts would likely consider whether DOJ had stretched the statute beyond its proper application.

Consider the following hypothetical, based on a recent case: In 2017, DOJ filed an information against Sociedad Química y Minera de Chile (SQM), a Chilean concern that made payments to several Chilean politicians.[58] The information alleged a violation of the books and records provision on the ground that SQM had falsely recorded the payments as "consulting" fees.[59] But the information did not allege that SQM's payments were made in exchange for any official act.

See "$30M SQM Settlement Demonstrates the Hazards of Discretionary Accounts for CEOs and Charitable Donations to the Politically Connected" (Feb. 15, 2017).

Now imagine that an American public company had made the same payments to U.S. politicians; in the absence of any official act, the payments would not be illegal under the federal bribery statute interpreted by *McDonnell*.

In that case, an attempt by DOJ to prosecute the payments under the FCPA's books and records provision would directly raise the question of whether it is appropriate to use a statute designed to fight foreign bribery to prosecute domestic activity that the Supreme Court has held is not bribery. A court might be tempted to look to *Yates*, where DOJ used a statute designed to fight corporate fraud to prosecute wildlife conservation crimes. Even though DOJ was able to support its case with a literal reading of the Sarbanes-Oxley Act, the Supreme Court largely confined the statute to the corporate context that Congress had initially envisioned.[60]

More generally, cases like *McDonnell* and *Yates* – and *Arthur Andersen*, *Marinello,* and *Sun Diamond Growers* – make clear that criminal laws must not be interpreted in a way that could chill legitimate conduct here in the United States. DOJ's use of the criminal books and records provision to target accounting fraud and improperly booked foreign payments has – until now – not squarely implicated that concern.

But if prosecutors can use the provision to criminally target payments to domestic officials, firms might think twice before making even legitimate payments to public officials, out of fear that DOJ could ultimately object to how those payments were categorized on the corporate books, or what the outer borders of a "consultant's" work may be. Faced with that prospect, courts might look skeptically at DOJ's use of the books and records provision domestically.[61]

Looking Ahead

DOJ's use of the FCPA to target domestic conduct in the Panasonic Avionics case is a surprising development that turns court watchers' speculation about the future of anti-corruption law on its head: instead of the Supreme Court's narrow reading of domestic criminal statutes limiting the FCPA's reach abroad, DOJ's broader reading of the statute may be expanding prosecutors' ability to prosecute corruption at home. However, there are good reasons to think that if courts ultimately weigh in on DOJ's new use of the FCPA's books and records provision, DOJ's efforts to circumvent *McDonnell* will be met with the same skepticism that greeted prosecutors' efforts to aggressively enforce the bribery statute.

David Bitkower is a partner in Jenner & Block's investigations, compliance and defense practice. With more than a decade of experience as a federal prosecutor, including serving as principal deputy assistant attorney general, the second-highest ranking position in the Criminal Division of the DOJ, Bitkower has been involved in some of the country's most significant investigations and prosecutions of corporate wrongdoing, including corruption cases, as well as counterterrorism, espionage, export and sanctions enforcement, international organized crime and cybercrime cases.

Nicholas Barnaby is a director and assistant general counsel at General Dynamics Corporation. He was previously a partner in Jenner & Block's investigations, compliance and defense practice, where he advised clients in complex investigations and anti-corruption matters.

Karthik Reddy is an associate in Jenner & Block's litigation practice. Karthik has represented individual and corporate clients in criminal and civil investigations before the DOJ and the Federal Trade Commission.

The opinions expressed in this article are solely those of the authors, and do not necessarily reflect the view of their respective employers.

---

[1] 136 S. Ct. 2355 (2016).
[2] 18 U.S.C. § 201.
[3] McDonnell, 136 S. Ct. at 2371-73; see also 18 U.S.C. § 201(b)(1)(A), (b)(2)(A).
[4] See, e.g., Yates v. United States, 135 S. Ct. 1074, 1088-89 (2015) (plurality opinion); Bond v. United States, 134 S. Ct. 2077, 2089-90 (2014); Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005).
[5] See Marinello v. United States, 138 S. Ct. 1101, 1108 (2018)
[6] 15 U.S.C. § 78dd-1(a)(1)(A)(i).
[7] see McDonnell, 136 S. Ct. at 2371–73.
[8] McDonnell, 136 S. Ct. at 2363–64; Fred Wertheimer, Symposium: McDonnell Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens, SCOTUSBlog (June 28, 2016)
[9] McDonnell, 136 S. Ct. at 2361.
[10] Id. at 2363–64.
[11] Id.
[12] Id. at 2365 (quoting 18 U.S.C. § 201(b)(1)).
[13] McDonnell, 136 S. Ct. at 2375.
[14] Id. at 2370.
[15] Id. at 2369.
[16] Id. at 2370.
[17] See id.at 2372.
[18] 544 U.S. 696 (2005).
[19] Id. at 703, 706.
[20] 135 S. Ct. 1074 (2015).
[21] Id. at 1078–80, 1088 (plurality opinion).

[22] 138 S. Ct. 1101 (2018).
[23] Id. at 1108.
[24] 526 U.S. 398 (1999).
[25] Id. at 407.
[26] Id. at 2372.
[27] Id.
[28] Id.
[29] Id.
[30] Id. at 2371–72.
[31] See, e.g., Wertheimer, supra note 10.
[32] United States v. Fattah, 902 F.3d 197, 231 (3d Cir. 2018); United States v. Silver, 864 F.3d 102, 106 (2d Cir. 2017).
[33] 15 U.S.C. § 78dd-1(a)(1)(A)(i).
[34] Dylan Tokar, The Implications of the Supreme Court's McDonnell Ruling on the FCPA, Just Anti-Corruption (June 28, 2016) (spelling altered from original).
[35] Id. (quoting statement of Vincent Cohen) (internal quotation marks omitted).
[36] See United States v. Seng, No. S5 15 CR 706, 2018 WL 2287101, at *3 (S.D.N.Y. May 9, 2018); United States v. Jefferson, 289 F. Supp. 3d 717, 735-36 (E.D. Va. 2017).
[37] Brief for the United States at 34, United States v. Seng (2d Cir.) (No. 18-1725).
[38] 15 U.S.C. § 78dd-1(a)(1)(A)(iii).
[39] Tokar, supra note 37.
[40] See Brief for the United States at 25–26, United States v. Thiam (2d Cir.) (No. 17-2765) ("That a foreign government, including the government of Guinea, chose to criminalize bribery more broadly than Section 201 has been construed is neither unusual nor problematic. Therefore, this Court should not export McDonnell's interpretation of a specific federal statute to constrict the bribery laws of a foreign country." (citation omitted)).
[41] No. S5 15 Cr. 706, 2018 WL 2287101 (S.D.N.Y. May 9, 2018).
[42] Id. at *7.
[43] Brief of Appellant at 15, United States v. Seng (2d Cir.) (No. 18-1725).
[44] 15 U.S.C. § 78dd-1(a)(1)(A)(i) (emphasis added).
[45] Id. § 78m(b)(2)(A).
[46] Id. § 78m(b)(5). To prosecute an individual under this provision, DOJ must prove that she acted "willfully." Id. § 78ff(a).
[47] Id. § 78m(b)(2)(A).
[48] U.S. Dep't of Justice & U.S. Sec. & Exchange Comm'n, A Resource to the U.S. Foreign Corrupt Practices Act 39 (2012) (Resource Guide).
[49] Resource Guide at 39.
[50] Information, United States v. Sam P. Wallace Co. (D.P.R. Feb. 23, 1983) (No. 83-0034).
[51] Non-Prosecution Agreement Between U.S. Dep't of Justice & Bio-Rad Laboratories, Inc. (Nov. 3, 2014).
[52] Deferred Prosecution Agreement Between U.S. Dep't of Justice & Panasonic Aviation Corp., 8 (2018).
[53] Id. at A-12.
[54] Id. at A-5–A6.
[55] Id.
[56] Stanley Sporkin, The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday, 18 Nw. J. Int'l L. & Bus. 269, 274 (1998) (discussing origins of the books and record provision); see also "An Interview With Judge Stanley Sporkin, the 'Father of the FCPA' (Part One of Two)" (Jul. 11, 2012); Part Two (Jul. 25, 2012).
[57] See Resource Guide at 39.
[58] Information at 3–5, United States v. Sociedad Química y Minera de Chile, No. 1:17-CF-00013 (D.D.C. Jan. 13, 2017) (No. 1:17-CF-00013).
[59] Id. at 6.
[60] See Yates, 135 S. Ct. at 1088–89 (plurality opinion); id. at 1091 (Kagan, J., dissenting).
[61] See McDonnell, 136 S. Ct. at 2372.