

Second Circuit: Supreme Court's McDonald Decision Does Not Delimit FCPA

The bribery provisions of Exchange Act Section 30A are one of the three critical components of the Foreign Corrupt Practices Act. The other two are the books and records and the internal control requirements. While the latter two sections have frequently been litigated in SEC and other securities cases over the years since they apply to all issuers, the FCPA bribery sections have not. A key question in the wake of the Supreme Court's decision in *McDonnell v. U.S.*, 136 S. Ct. 2355 (2016) which overturned the bribery based conviction of the former Governor of Virginia, is whether the approach used there applies to the FCPA bribery provision. The Second Circuit joined two other circuits in rejecting efforts to delimit the reach of Section 30A by applying *McDonald*. *U.S. v. Seng*, No. 18-1725 (2nd Cir August 9, 2019).

The Decision

Defendant Ng Lap Seng paid two United Nations ambassadors over \$1 million to obtain a commitment by the international organization to use his Macau real estate development as the site for its annual convention. Following a jury trial, Mr. Seng was convicted of paying and conspiring to pay bribes and gratuities in violation of a number of statutes including the FCPA. He was ordered to serve 48 months in prison, concurrently, on each of the six counts, to forfeit \$1.5 million, pay a \$1 million fine and make restitution to the U.N. of \$302,977.20. The Circuit Court affirmed.

Mr. Seng claimed that the each of the FCPA bribery provisions was delimited by Section 201(a)(3)'s definition of the phrase "official act," the predicate *McDonald*. The District Court erred by refusing to give an instruction on the point Mr. Seng argued.

In *McDonald* the former governor was convicted of honest services fraud based on his acceptance of bribes. The parties agreed that bribery would be defined for the jury according to the general federal bribery statute. It requires in part proof that the person "committed or agreed to commit an 'official act' in exchange for" undisputed loans and gifts. Central to the ruling was the question of whether arranging a meeting, contacting

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another public official or hosting an event concerning a subject was an official act. To establish this standard the Government was required to prove that there was a question, matter, cause, suit or controversy that was then pending and involved a formal exercise of governmental power and that the official made a decision or acted on it.

Under this standard a jury charge defining “official Act” in *McDonald* was over inclusive because: a) it failed identify the question, matter, cause , suit or proceeding; b) require that it was specific, focused and pending or may by law be brought before a public official; and c) that the Governor made a decision or took an action on the identified question, matter, cause suit or proceeding. The absence of such an instruction could not be deemed harmless error.

In examining the question of bribery, the *quid pro quo* element has always been key. Congress can define the particular *quid* and *quo* prohibited as it did in the FCPA. There the statute “addresses certain foreign trade practices, makes it a crime corruptly to give a foreign official anything of value . . .” to influence a decision of a foreign official or secure an improper advantage or have the foreign official use his influence” for the purpose of assisting “the giver in obtaining, retaining or directing business.” A comparison of the specific *quos* defined by Congress in the FCPA demonstrates that they differ from those included in Section 201(a)(3). That section thus cannot be used to cabin the reach of the FCPA bribery provisions. Accordingly, the District Court did not error by declining to give a *McDonell* instruction.

Comment

The Supreme Court in *McDonald* rejected the broad application of bribery which was the predicate for the conviction of the former Virginia Governor. In contrast, the Second Circuit rejected the effort of Mr. Seng to cabin the reach of the FCPA. To the contrary, the Court’s reading of bribery provisions of that statute permits the kind of expansive reading *McDonald* rejected. Interestingly, *Seng* is based largely on reading the text of the section with no reference to the legislative materials or the overall focus and purpose of the statute. While this approach may be consistent with the so-called conservative approach to statutory construction, it presents significant questions about the Court’s conclusion.