

# FCPA Update

A Global Anti-Corruption Newsletter



## Also in this issue:

7 U.K. Serious Fraud  
Office Issues Corporate  
Cooperation Guidance

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[prohlik@debevoise.com](mailto:prohlik@debevoise.com),  
[eogrosz@debevoise.com](mailto:eogrosz@debevoise.com), or  
[pferenz@debevoise.com](mailto:pferenz@debevoise.com)

## Second Circuit Rules that *McDonnell's* "Official Act" Requirement Does Not Apply to the FCPA

Since the Supreme Court's narrow reading of the domestic bribery statute in *McDonnell v. United States*,<sup>1</sup> there has been an open question as to whether a similar limitation should apply to the FCPA. On August 9, 2019, the U.S. Court of Appeals for the Second Circuit answered that question in the negative, when it declined to overturn the conviction of Chinese businessman Ng Lap Seng in a rare appellate court interpretation of the FCPA.<sup>2</sup> The Second Circuit agreed with the government, and

[Continued on page 2](#)

1. *McDonnell v. United States*, 136 S. Ct. 2355, 2370–72 (2016).
2. *United States v. Ng Lap Seng*, No. 18-1725-CR, 2019 WL 3755676, at \*1 (2d Cir. Aug. 9, 2019). Appellate courts have considered other aspects of the FCPA on rare occasion during the statute's more than 40 year history. See *United States v. Hoskins*, 902 F.3d 69, 84 (2d Cir. 2018) (holding that a foreign national who never came to the United States or worked for an American company during the scheme could not be held liable under the FCPA); *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (defining what constitutes a government "instrumentality" for purposes of defining "foreign official"); *United States v. Kay*, 513 F.3d 432, 441–42 (5th Cir. 2007) (determining that the FCPA was not void for vagueness).

Second Circuit Rules that  
*McDonnell's* "Official Act"  
Requirement Does Not Apply  
to the FCPA

Continued from page 1

declined to extend the "official act" requirement under domestic public bribery law, as interpreted by the United States Supreme Court in *McDonnell*, to the FCPA or to a related anti-bribery statute, 18 U.S.C. § 666.<sup>3</sup>

In *McDonnell*, former Virginia governor Bob McDonnell accepted over \$175,000 worth of loans and gifts, including a \$50,000 loan, \$15,000 in wedding expenses, a Rolex watch, and the use of a Ferrari. The U.S. government charged that the receipt of these gifts prompted McDonnell to take "official action" in violation of the honest services fraud provision and the Hobbs Act.<sup>4</sup> In overturning McDonnell's conviction, the U.S. Supreme Court looked to and applied the definition of "official act" as set out in 18 U.S.C. § 201,<sup>5</sup> holding that a U.S. public official violates these statutes only when the thing of value was offered or provided in exchange for an "official act."<sup>6</sup> The Court held that, the public official must also have made a decision or taken an action on the issue or agreed to do so in order for there to be a violation.<sup>7</sup> The Court found that merely arranging meetings and expressing support for a business venture did not rise to the level of an official act.

We previously opined that the *McDonnell* ruling raised questions about its applicability to the FCPA – particularly whether bribery of foreign officials under the FCPA similarly arose only in the context of an official act.<sup>8</sup> The Second Circuit's decision in *Ng* has answered that question in the negative, holding that, due to a difference in statutory language, the "official act" limitation in *McDonnell* does not apply.

Continued on page 3

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3. Section 666(a)(1)(A) prohibits an agent of an organization or of a state, local or Indian tribal government agency that receives \$10,000 or more annually in Federal assistance from the embezzlement, stealing, obtaining by fraud or otherwise unauthorized conversion to the use of any person other than the rightful owner or the intentional misapplication of property having a value of \$5,000 or more. Subsection (a)(1)(B) prohibits such agents from soliciting or accepting anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions involving \$5,000 or more. Lastly, subsection (a)(2) prohibits anyone from offering anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.
  4. See 18 U.S.C. §§ 1343, 1349 (honest services); § 1951(a) (Hobbs Act); see also *McDonnell v. United States*, 136 S. Ct. 2355, 2364–65 (2016).
  5. 18 U.S.C. § 201(a)(3) (defining "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, in such official's official capacity, or in such official's place of trust or profit"); see also *McDonnell*, 136 S. Ct. at 2369.
  6. *McDonnell*, 136 S. Ct. at 2371–72.
  7. *Id.* at 2372.
  8. See Should the Supreme Court's Ruling in *McDonnell* Influence SEC and DOJ Enforcement Under the FCPA?, available at [https://www.debevoise.com/-/media/files/insights/publications/2016/07/fcpa\\_update\\_july\\_2016.pdf](https://www.debevoise.com/-/media/files/insights/publications/2016/07/fcpa_update_july_2016.pdf).

Second Circuit Rules that  
*McDonnell's "Official Act"*  
Requirement Does Not Apply  
to the FCPA

Continued from page 2

### The Second Circuit's Decision in *Ng Lap Seng*

#### Relevant Facts

Ng (a Chinese national) was convicted for making more than \$1 million in bribe payments to two U.N. ambassadors in exchange for their help formally designating his convention center as the permanent location for the U.N. Office of South-South Cooperation's annual expo.<sup>9</sup>

While Ng offered use of the facility to the U.N. without charge, the court of appeals rejected the argument that the FCPA and § 666 only applied to commercial relationships by noting that a jury could have found that the use of Ng's conference space by the U.N. would also increase the value of his adjacent properties, which included hotels and luxury apartment buildings.<sup>10</sup>

**“[T]he *Ng* decision has made incongruent the domestic bribery statute and the foreign bribery statute, applying a narrower standard to payments to U.S. officials and a broader one in the context of foreign officials.”**

According to the evidence adduced at trial, Ng appointed one of the U.N. ambassadors to be the president of Ng's media organization and began paying him a \$20,000 salary, which the ambassador admittedly understood to be a bribe to secure the convention center.<sup>11</sup> Ng funneled payments to the other ambassador, which were disguised as payments to the ambassador's wife for consulting services, although no such consulting services were provided.<sup>12</sup> Ng also paid \$200,000 for a concert hosted at the U.N. as well as a vacation for an ambassador's family, all in order to ensure continued support for the convention center.<sup>13</sup> In exchange for the payments, the U.N. ambassadors took actions in furtherance of the scheme, including placing documents in support of the convention center plan into the U.N. record and ultimately executing a formal invitation to Ng to host the convention.<sup>14</sup>

Continued on page 4

9. *Ng Lap Seng*, at \*1.

10. *Id.* at \*23.

11. *Id.* at \*2.

12. *Id.*

13. *Id.* at \*2,\*4.

14. *Id.* at \*2-\*5.

Second Circuit Rules that  
*McDonnell's* "Official Act"  
Requirement Does Not Apply  
to the FCPA

Continued from page 3

### Ng's *McDonnell* Challenge

On appeal, Ng argued that the FCPA, as well as § 666 bribery, require proof of an "official act" and that actions such as writing a letter and arranging meetings fall short of that requirement.<sup>15</sup>

Noting that there is no uniform definition of the word "bribe" in the federal code, the Second Circuit held that the *McDonnell* standard – which is derived from § 201's definition of an "official act" – does not "delimit the quid pro quo elements of § 666 and FCPA bribery."<sup>16</sup> The Court based its decision both on the "textual differences" within the statutes and on the fact that the FCPA specifically includes four categories of prohibited acts:

- influencing any act or decision of such foreign official in his official capacity;
- inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official;
- securing any improper advantage; or
- 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<sup>17</sup>

The Court was additionally persuaded not to apply the "official act" language more broadly because the concern expressed by the Supreme Court in *McDonnell* – that a broad reading of the statutory text could chill communications between citizens and their representatives<sup>18</sup> – was not present in the FCPA and § 666 contexts, which involve non-U.S. governments.<sup>19</sup>

The Court notes that its decision was consistent with the 3rd, 5th, 6th, and 8th Circuits, which previously applied §201's definition narrowly.<sup>20</sup>

In addition, Ng argued that his "pro bono" agreement with the U.N., which did not impose any monetary obligation on the counterparty, was not "commercial" business for him.<sup>21</sup> In rejecting this argument, the Court relied on the FCPA's prohibition on commercial bribery without regard to whether the individual

Continued on page 5

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15. *Id.* at \*11.

16. *Id.* at \*12 –\*13.

17. See 15 U.S.C. §§ 78dd-1, et seq.; see also *Ng Lap Seng*, at \*14.

18. See *McDonnell*, 136 S. Ct. at 2372. Some of these concerns relate to the federal structure of the United States system of government.

19. *Ng Lap Seng*, at \*17.

20. *Id.* at \*15.

21. *Id.* at \*23.

Second Circuit Rules that  
*McDonnell's* "Official Act"  
Requirement Does Not Apply  
to the FCPA

Continued from page 4

offering the bribe profits directly from the business obtained.<sup>22</sup> The Court held that while such a contract might appear to provide all of the commercial benefit to the U.N., a reasonable jury could have found that by creating the relationship with the U.N., Ng thought he could maximize profits from the commercial complex of which the convention center was a part.<sup>23</sup>

Finally, the Court cited its 2011 decision in *United States v. Kozeny* in holding that "corrupt" intent under the FCPA does not require breach of a specific duty, rather an individual acts corruptly when he makes an offer, payment, or promise intending to influence an official to misuse his official position.<sup>24</sup>

### Implications for the FCPA

*McDonnell* was significant because it assuaged the reasonable concerns of those who felt that a broad interpretation could have a chilling effect on important interactions between officials and their constituents. Although not exactly analogous, the manner in which the FCPA is enforced raises similar concerns about the dividing line between permissible and impermissible interactions with foreign government officials, especially with regard to gifts, meals, and entertainment. Because of the different statutory language, and the lack of constitutional concerns relating to interactions between constituents and representatives in the U.S. system, it was always somewhat questionable whether *McDonnell* would be read to limit the FCPA's application. Nor did the facts of the Ng case, in which one of the ambassadors testified the he viewed the payments as a bribe, present the best vehicle for raising the issue. The Second Circuit is the first federal appellate court to evaluate *McDonnell's* applicability in the FCPA context, but the true breadth of the FCPA's statutory language as it relates to gifts and other inducements remains unexamined by a U.S. appellate court. Meanwhile, the enforcement agencies continue to take a broad view.<sup>25</sup>

While understandable from the perspective of statutory interpretation, the Ng decision has made incongruent the domestic bribery statute and the foreign bribery statute, applying a narrower standard to payments to U.S. officials and a broader one in the context of foreign officials. As a result, a gift of a Rolex watch to a U.S. government official may be merely a "tawdry tale" while a gift of a Cartier watch to a foreign official is often a violation of the FCPA's anti-bribery provisions.<sup>26</sup>

Continued on page 6

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22. *Id.*

23. *Id.*

24. *Id.* at \*21 (citing *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011)).

25. See *In the Matter of Telefonica Brasil*, SEC Admin. Pro. File No. 3-19162 (May 8, 2019); *Nortek*, SEC Non-Prosecution Agreement (June 7, 2016); *Akami*, SEC Non-Prosecution Agreement (June 7, 2016); *In the Matter of BHP Hilton*, SEC Admin. Pro. File No. 3-16546 (May 20, 2015).

26. See *United States v. Data Systems and Solutions LLC*, Document #2, Information, ¶ 17vv, Case 1:12-cr-00262-LO (E.D.VA June 18, 2012).

**Second Circuit Rules that  
McDonnell's "Official Act"  
Requirement Does Not Apply  
to the FCPA**

Continued from page 5

**Bruce E. Yannett**  
**Kara Brockmeyer**  
**Philip Rohlik**  
**Jil Simon**  
**Leonie M. Stoute**

*Bruce E. Yannett is a partner in the New York office. Kara Brockmeyer is a partner in the Washington, D.C. office. Philip Rohlik is a counsel in the Shanghai office. Jil Simon is an associate in the Washington, D.C. office. Leonie M. Stoute is an associate in the New York office. Full contact details for each author are available at [www.debevoise.com](http://www.debevoise.com).*

Continued on page 7

## U.K. Serious Fraud Office Issues Corporate Cooperation Guidance

On August 6, 2019, the U.K. Serious Fraud Office (“SFO”) published long-anticipated internal guidance (the “Guidance”) on how it assesses cooperation by corporate entities for the purpose of making charging decisions and determining whether to enter into deferred prosecution agreements (“DPAs”).<sup>1</sup>

The Guidance explains that cooperation means “providing assistance to the SFO above and beyond what the law requires,” and it provides a set of expectations of good practice. The Guidance emphasizes that no amount of cooperation – even “full” cooperation – guarantees a particular outcome from the SFO, that there can be no checklist for what constitutes cooperation, and that each case will turn on its individual facts. This of course leaves it unclear what the minimum degree of cooperation required is and whether some of the more burdensome aspects of the Guidance are indispensable to, in particular, qualify for a DPA.

In issuing the Guidance, the SFO has broken with the previous Director’s refusal to provide formal guidelines to the industry on cooperation with the SFO.<sup>2</sup> However, much of the Guidance’s contents have already been articulated in earlier public statements by the SFO. The novelties in the guidance relate to the management and supervision of privilege claims made by a cooperating corporate.

### I. Preservation and Provision of Materials

The Guidance provides a list of steps – already widely applied in practice – indicating that a corporate has been cooperative in preserving evidence and providing it to the SFO. It emphasizes good record-keeping of both digital and physical materials, and maintaining an effective audit trail of data collections and productions.

The Guidance also formalizes the SFO’s long-standing position that corporates should not “trample on the crime scene”: cooperative defense counsel are expected to consult with the SFO before interviewing witnesses or suspects and to make employees and agents available for interview by the SFO.

Continued on page 8

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1. SFO Operational Handbook, Corporate Co-operation Guidance (August 2019), <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>.
  2. In October 2012, previous Director David Green QC withdrew the then three-year-old policy on corporate self-reporting of overseas corruption. See Debevoise & Plimpton LLP, “Serious Fraud Office Issues New Policies on Self Reporting, Facilitation Payments and Business Expenditures” (Oct. 12, 2012), [https://www.debevoise.com/insights/publications/2012/10/serious-fraud-office-issues-new-policies-on-self\\_\\_\\_](https://www.debevoise.com/insights/publications/2012/10/serious-fraud-office-issues-new-policies-on-self___).

A new indicator of cooperation under the Guidelines is the expectation that cooperative corporates will provide a privilege log – a record of all documents withheld on the basis of privilege, including the basis for asserting privilege. A practice common in the United States, privilege logs have hitherto not been standard in SFO practice. Indeed, historically the SFO has tended to request unfiltered data precluding the need for privilege logs to be produced ahead of production. Combined with the indication that material should be produced in a “structured” format, this may suggest that the SFO will in the future make more targeted document requests and expect corporates to review the documents for relevance and privilege before production.

## II. Handling of Witnesses and Waiver of Privilege

In this respect, the Guidance makes three key points.

*First*, the Guidance reaffirms the approach outlined in the 2014 DPA Code of Practice, which requires the identification of relevant witnesses and disclosure of their accounts and documents shown to them. The Guidance goes on to state that a cooperative corporate “seeking credit for cooperation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview,” as well as “identify a witness competent to speak to the contents of each interview.”

This may mark a shift to a stricter approach. Hitherto, a number of corporates, notably Sarclad, have secured DPAs after disclosing only incomplete summaries of interviews without waiving privilege. If the new Guidance is to be taken at face value, that would no longer be sufficient to warrant cooperation credit.

*Second*, the Guidance renders operational a framework for the management of privilege claims by a cooperating corporate that “elects not to waive privilege” over witness accounts (as well as other material) suggested in the case of *AL*.<sup>3</sup> In that case, the SFO was criticized for not complying with its disclosure obligations by having failed to challenge contestable privilege claims made by a cooperating corporate over records of interviews conducted in an internal investigation.<sup>4</sup>

In the Guidance, on the one hand the SFO expressly recalls the law on the absolute nature of privilege. On the other, it also recalls its disclosure obligations to defendants in ulterior proceedings and states that even a cooperating corporate can expect to receive witness summons which will force it to justify its privilege claims to a trial judge. Presumably with a view to avoiding this scenario as far as possible, the Guidance states that a cooperating corporate that claims privilege over

Continued on page 9

3. *R (AL) v SFO* [2018] EWHC 856 (Admin).

4. See Debevoise & Plimpton LLP, “English High Court Considers Status of Internal Investigation Interview Notes” (Apr. 25, 2018), <https://www.debevoise.com/insights/publications/2018/04/english-high-court-considers-status>.



U.K. Serious Fraud  
Office Issues Corporate  
Cooperation Guidance

Continued from page 8

records of internal investigation interviews (and other materials) needs to provide “certification by independent counsel that the material in question is privileged.” Independent counsel is a longstanding feature of privilege reviews in SFO investigations, but this use of independent counsel set out in the Guidance is novel.

*Third*, while waiving privilege will be considered for the purpose of assessing a corporate’s degree of cooperation, the Guidance states that the decision by a corporate *not* to waive privilege or provide witness accounts will not be penalized. It remains to be seen how this will work in practice: if, *e.g.*, a corporate that elects not to waive privilege thereby fails to obtain the maximum financial penalty discount under a DPA, such corporate will effectively be penalized.

“For corporates, the Guidance does provide some additional clarity on the SFO’s intended approach, mainly indicating more formalism and less flexibility, particularly in the areas of internal investigation interviews and privilege.”

### III. Conclusion

The Guidance is a clear manifestation of SFO Director Osofsky seeking to balance a rigorous approach to the collection and preservation of evidence and the management of privilege claims necessary to carry out its primary purpose of prosecuting serious and complex fraud, with the provision of some clarity and comfort to encourage corporates to come forward and cooperate.

The question is whether the Guidance should and / or will change the approach by corporates faced with information indicating potential criminal conduct within their business. Some may be inclined to view the requirements in the Guidance on interviews and the related privilege and waiver considerations as overly onerous and thus a disincentive to conducting internal investigation interviews at all.<sup>5</sup>

Continued on page 10

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5. There is precedent for this from *Tesco* where, at the request of the SFO, Tesco refrained from conducting any interviews as part of its internal investigation. See *SFO v Tesco Stores Ltd* Case No: U20170287 on April 10, 2017, at para 38.

**U.K. Serious Fraud  
Office Issues Corporate  
Cooperation Guidance**

Continued from page 9

However, such a cautious approach may be difficult in practice, particularly when the expectations of foreign authorities need to be considered. It is well-known that the approach of U.S. authorities to internal investigation interviews is more accommodating. Further, comparing the Guidance to the recent joint guidelines issued by the French PNF and AFA on the approach to the CJIP or “French DPA,”<sup>6</sup> while there are many similarities, the French guidelines insist more on a positive obligation of a cooperating corporate to conduct an internal investigation and an expectation that records of witness interviews will be shared with the authorities in an evidential format.

For corporates, the Guidance does provide some additional clarity on the SFO’s intended approach, mainly indicating more formalism and less flexibility, particularly in the areas of internal investigation interviews and privilege. Even so, key strategic issues, particularly whether and when to self-report, the degree of cooperation with the authorities, and how to manage privilege, will need to be considered on a case-by-case basis.

**Karolos Seeger**

**Jane Shvets**

**Robin Lööf**

**Thomas Jenkins**

**Andrew Lee**

**Alma M. Mozetič**

*Karolos Seeger is a partner in the London office. Jane Shvets is a partner in the New York office. Robin Lööf is an international counsel in the London and Paris offices. Thomas Jenkins, Andrew Lee, and Alma M. Mozetič are associates in the London office. The authors may be reached at [kseeger@debevoise.com](mailto:kseeger@debevoise.com), [jshvets@debevoise.com](mailto:jshvets@debevoise.com), [rloof@debevoise.com](mailto:rloof@debevoise.com), [tjenkins@debevoise.com](mailto:tjenkins@debevoise.com), [ahwlee@debevoise.com](mailto:ahwlee@debevoise.com), and [amozetic@debevoise.com](mailto:amozetic@debevoise.com). Full contact details for each author are available at [www.debevoise.com](http://www.debevoise.com).*

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6. See Debevoise & Plimpton LLP, French DPAs – First CJIP Guidelines Published (July 9, 2019), <https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines>.

# FCPA Update

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**Debevoise & Plimpton LLP**

919 Third Avenue  
New York, New York 10022  
+1 212 909 6000  
www.debevoise.com

**Washington, D.C.**  
+1 202 383 8000

**London**  
+44 20 7786 9000

**Paris**  
+33 1 40 73 12 12

**Frankfurt**  
+49 69 2097 5000

**Moscow**  
+7 495 956 3858

**Hong Kong**  
+852 2160 9800

**Shanghai**  
+86 21 5047 1800

**Tokyo**  
+81 3 4570 6680

**Bruce E. Yannett**  
Co-Editor-in-Chief  
+1 212 909 6495  
beyannett@debevoise.com

**Andrew J. Ceresney**  
Co-Editor-in-Chief  
+1 212 909 6947  
aceresney@debevoise.com

**David A. O'Neil**  
Co-Editor-in-Chief  
+1 202 383 8040  
daoneil@debevoise.com

**Jane Shvets**  
Co-Editor-in-Chief  
+44 20 7786 9163  
jshvets@debevoise.com

**Philip Rohlik**  
Co-Executive Editor  
+852 2160 9856  
prohlik@debevoise.com

**Andreas A. Glimenakis**  
Associate Editor  
+1 202 383 8138  
aaglimen@debevoise.com

**Kara Brockmeyer**  
Co-Editor-in-Chief  
+1 202 383 8120  
kbrockmeyer@debevoise.com

**Andrew M. Levine**  
Co-Editor-in-Chief  
+1 212 909 6069  
amlevine@debevoise.com

**Karlos Seeger**  
Co-Editor-in-Chief  
+44 20 7786 9042  
kseeger@debevoise.com

**Erich O. Grosz**  
Co-Executive Editor  
+1 212 909 6808  
eogrosz@debevoise.com

**Jil Simon**  
Associate Editor  
+1 202 383 8227  
jsimon@debevoise.com

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