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New Trends In DOJ's Approach To Domestic Corruption

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The U.S. Department of Justice has not given up on prosecuting state-government corruption after all, and it may even be coming back with a vengeance.

In a string of decisions, the U.S. Supreme Court sharply limited the power of federal prosecutors to use the mail and wire fraud statutes to prosecute political corruption of state and local government officials.

But the DOJ's eagerness to pursue corruption has not abated, and recent cases signal three trends.

First, the DOJ is turning to other statutes in its toolbox, including the federal program fraud and bribery statute, Title 18 of U.S. Code, Section 666.

Second, it is willing to demand high-profile, expensive criminal settlements from private companies whose employees made corrupt payments, even if the DOJ does not have a rock-solid case against the public official who benefited from the payment.

Third, it is willing to challenge what look like genuine lobbying and campaign activities, if it believes those activities corruptly conferred a benefit on public officials. In view of these developments, companies should examine their state-government interactions when updating their compliance programs.

Past rulings often thwarted DOJ efforts to prosecute state and local government corruption.

After 20 years of Supreme Court rulings narrowing the mail and wire fraud statutes, the DOJ has good reason to consider new tools and methods. In lopsided and even unanimous decisions, justices appointed by presidents of both parties have reversed convictions and limited the substantive reach of the mail and wire fraud statutes.

In one line of cases, the court sharply limited the honest services theory of mail and wire fraud.

In the case of former Enron CEO Jeffrey Skilling, the court ruled that the statute only prohibits kickbacks and bribes, and does not prohibit a public official or private sector employee from fraudulently concealing self-dealing and conflicts of interest.[1]

In 2016, reversing the conviction of former Virginia Gov. Bob McDonnell, the court made clear that showering a public official with a stream of gifts — a Rolex watch, designer clothing, loans and the costs of a wedding reception — is not enough to support an honest services fraud conviction unless there is a clear connection between a thing of value and an official act, narrowly defined as a substantive matter akin to an agency decision or proceeding.[2]

An official's merely arranging meetings and talking with other officials, therefore, cannot support a conviction under the mail and wire fraud statute or the Hobbs Act.[3] Bribery is a quid pro quo — this for that. After McDonnell, prosecutors pressing bribery charges under those statutes must show that a thing of value — the quid — was given specifically in return for a narrowly defined quo.

Meanwhile, the DOJ was thwarted by a separate line of cases interpreting the "obtaining property" clause of the mail and wire fraud statutes. In 2000, the court overturned a mail fraud conviction based on a scheme to fraudulently obtain a state license to operate video machines.

A fraud to disrupt a state regulatory scheme cannot violate the mail fraud statute; instead, the scheme must aim to obtain property.[4] And earlier this year, the court took that doctrine a step further in the so-called Bridgegate case, Kelly v. United States, holding that obtaining property must be central to the scheme.

Although the plan to create gridlock at the George Washington Bridge imposed a cost on the Port Authority in the form of extra wages for tollbooth operators, the court concluded that was only an "incidental byproduct of the scheme" and therefore could not support a conviction under the property fraud clauses of the wire fraud statute and the federal program fraud statute, Title 18 of U.S. Code, Section 666.[5]

These cases evince that the Supreme Court is reluctant to interpret the mail and wire fraud statutes in a manner that could authorize federal prosecutors to "set standards of disclosure and good government for local and state officials."[6]

Lower courts have followed Kelly by dismissing wire fraud charges where the scheme was focused on defeating a system of regulation rather than obtaining property.[7] Though recent decisions have come in contexts other than government corruption, they augur continuing challenges to the DOJ's use of the mail and wire fraud statutes.

The DOJ is adjusting its approach to prosecuting state and local corruption.

Despite case law limiting some of its statutory tools, the DOJ is unready to leave political corruption prosecution to state officials and has recently taken aggressive enforcement steps in several noteworthy cases.

The Biden administration is likely to devote even more resources to white collar enforcement, including political corruption cases. How will the DOJ pursue domestic corruption in the teeth of Supreme Court rulings like McDonnell and Kelly? Part of the answer is that federal prosecutors are emphasizing different statutes and adopting tactics previously seen in foreign corruption cases.

Greater Emphasis on the Federal Program Fraud and Bribery Statute

Recent cases hint that the DOJ may be placing increased emphasis on the federal program fraud and bribery statute. Section 666 has long been used by prosecutors, but one aspect of it may have acquired increased significance: it does not require that a bribe be in exchange for an official act. This frees prosecutors from the strictures of McDonnell.

Section 666 prohibits gratuities as well as bribes, and the required quo is not an official act; instead the statute criminalizes a corrupt "intent to influence or reward an agent of an organization or of a State, local or Indian tribal government," any part of which receives federal funding, "in connection with any business, transaction, or series of transactions of such organization" involving $5,000 or more.[8]

Courts have held that the McDonnell official act standard does not apply to a bribery prosecution under Section 666.[9]

It's not just that the statutory language is different. A prosecution under Section 666 is less apt to raise the federalism concerns reflected in the Supreme Court's hostility to wire fraud and Hobbs Act cases.

In a Section 666 case, federal dollars are at stake, however attenuated the link to the case itself is, so there is less of a concern that federal officials are telling the states how to govern themselves.

With the Biden administration taking office amid vast federal funding of COVID-19 relief programs, the DOJ's focus on protecting federal dollars likely will increase. Targets of these enforcement efforts will argue that the federalism and lenity concerns underlying McDonnell should motivate courts to limit the reach of Section 666.

One question is whether the DOJ will continue to pursue cases where a stream of benefits goes to an official to win influence.[10] Two current prosecutions suggest the answer is yes.

One case involves a utility company, Commonwealth Edison Co., which the DOJ alleges moved $1.3 million to associates of the then-Speaker of the Illinois House of Representatives Michael Madigan between 2011 and 2019.

In exchange, ComEd sought Madigan's support for legislation that would benefit ComEd to the tune of more than $150 million. Earlier this year, ComEd entered into a deferred prosecution agreement and paid a $200 million fine.

The criminal information charged ComEd with federal program bribery in violation of Section 666(a)(2). Notably, the DPA does not allege that the money went into the pocket of the Madigan, who so far has not been charged.

Instead, payments were made to people close to Madigan, through third party no-work contracts involving a consulting company and a law firm, and ComEd hired employees and appointed a board member at Madigan's recommendation.

These benefits are more indirect and less eye-catching than the Rolex watch and other personal benefits in McDonnell, where the quo element caused the prosecution to fail despite quid evidence the Supreme Court called distasteful and tawdry.

A second closely watched development is a growing set of prosecutions involving alleged corruption in the Los Angeles City Council. Prosecutors obtained a nonprosecution agreement and a $1.05 million fine from Jia Yuan USA Co. Inc., and they have indicted two other companies — Shenzhen New World I LLC and 940 Hill LLC — and a number of individuals.

The company that entered into the NPA is a real estate developer. The quid going to a then-city council member looks like a classic stream of benefits: concert tickets, personal travel for the official's family, campaign contributions to political candidates, some reimbursed by the company, in-kind contributions to political candidates by hosting reduced-cost fundraisers and a dangled but never-made $100,000 contribution to a PAC.

The alleged quo was that the council member voted to approve the company's hotel project. The NPA alleges several statutory violations, including Section 666, wire fraud, and foreign national and conduit campaign contributions.

Two aspects of the NPA stand out: (1) not all of the alleged conduct would constitute an official act under McDonnell, and (2) the allegations do not appear to draw strong links between specific benefits and specific actions.

These cases may portend that the DOJ is increasingly deploying Section 666 as a weapon instead of the old stand-by mail and wire fraud statutes.

Greater Emphasis on Pursuing Business Entities in FCPA-Style Settlements

Another trend is that the DOJ, without charging a public official, has recently entered into negotiated settlements with business entities that made corrupt payments.

In domestic corruption cases, the DOJ has traditionally set its sights on punishing office holders who abuse the public trust. By contrast, in enforcing the Foreign Corrupt Practices Act with foreign officials beyond the U.S. government's reach, the DOJ pursues private sector entities that pay or fund bribes.

Recent cases feature an interesting twist: the DOJ pursuing — and settling without indictment — high-profile enforcement actions against bribe payors in domestic corruption cases.

When a public official is charged, the official's entire career is on the line. Some take a chance on a trial and challenge a conviction on appeal — even all the way to the Supreme Court, hostile territory to the DOJ in corruption cases. But companies are different. Unlike individuals, companies are inclined to negotiate a settlement, recognizing that an indictment could be fatal to the enterprise.

Because of this, DOJ can insulate itself from defending aggressive positions in court and obtain settlements in the comfort of a conference room. Obtaining a DPA or NPA against a company has long been a standard approach to FCPA enforcement.

The recent ComEd and Los Angeles City Council cases seem to suggest a trend toward FCPA-style resolutions in the domestic context. In ComEd, the DOJ obtained a settlement from the company without even alleging that the payments made their way into the pocket of the public official.

The DPA emphasized that the company had falsely recorded the payments in its books and records. The FCPA's books-and-records provision is well known to those in the FCPA world, although that section is not limited to falsely recording bribes to foreign officials.

These developments suggest that domestic corruption prosecutors are interested in borrowing techniques employed by the Fraud Section's FCPA Unit.

Willingness to Charge Conduct Involving Political Advocacy

Recent developments also reveal that the DOJ is willing to bring enforcement actions even where the conduct at issue involves political activity and campaigns.

One example is the Los Angeles City Council case, in which the charged quid includes providing venues for campaign events at below-market prices, as well as various campaign contribution offenses.

Another example is the prosecution of former Ohio House Speaker Larry Householder and four lobbyists for a bribe scheme that allegedly induced Householder to support a legislative bailout for a big energy company, FirstEnergy Corp.

The quid in the Householder case was not money or luxury items going to Householder. Rather, FirstEnergy spent $60 million on media ads, lobbying activity, and campaign literature to get the bailout passed, by contributing the money to Generation Now, a 501(c)(4) organization created to support passage of the bailout.

Some observers were surprised to see contributions to a Section 501(c)(4) organization treated as bribes, since (c)(4)s are permitted to engage in lobbying and can also engage in campaign activity as long as it is not their primary activity.

But the DOJ alleges that Householder secretly controlled Generation Now, and that it contributed millions of dollars to support his reelection campaign and his effort to become Speaker of the Ohio House. The DOJ, it appears, is not afraid to charge conduct that has the outward appearance of protected political speech.

Any company could unexpectedly be pulled into a corruption investigation.

In-house lawyers should be alert to the risks their companies face, given the DOJ's reenergized efforts to fight domestic corruption. Here are some key concerns:

- Even a compliance-focused company risks can be judged on the actions of its least scrupulous executive or the most crudely worded email sent by a low-level employee.
- The greatest risks are faced by regulated industries, companies that seek government approvals and participants in federally funded programs.
- Section 666 applies to many organizations and programs that are not obviously federal programs, since the required federal nexus is receipt of $10,000 in funds.
- A donor to a 501(c)(4) will incur legal expenses and reputational harm if it turns out someone else used the (c)(4) as a conduit for bribes. Vetting the organization's leadership and history in advance could reduce risk.

- Companies should calibrate FCPA-style controls to limit risks associated with state-government corruption, just as they do with respect to foreign government corruption.

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[1] See Skilling v. United States, 561 U.S. 358, 408-09 (2010) (interpreting the "honest-services" statute, 18 U.S.C. § 1346).

[2] See McDonnell v. United States, 136 S.Ct. 2355, 2368-72 (2016) (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999)).

[3] See id. at 2372.

[4] See Cleveland v. United States, 531 U.S. 12, 26-27 (2000).

[5] See Kelly v. United States, 140 S.Ct. 1565, 1573-74 (2020).

[6] Id. at 1574 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

[7] E.g., United States v. Palma, No. 19-20626, 2020 WL 6743144, at *3-4 (E.D. Mich. Nov. 17. 2020) (scheme to obtain regulatory approval); see also United States v. Ernst, No. 19-10081-IT, 2020 WL 6871040, at *7-8 (D. Mass. Nov. 23, 2020) (fraud in college admissions).

[8] 18 U.S.C. § 666(a)(2).

[9] See, e.g., United States v. Ng Lap Seng, 934 F.3d 110, 134 (2d Cir. 2019).

[10] Although the matter has been debated, lower courts have recognized stream-of-benefits cases even after Sun-Diamond and McDonnell. See, e.g., United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018).