

## ComEd Case Shows Wide Reach Of FCPA Accounting Clauses

By **James Koukios and Nathan Lowry** (August 2, 2023, 12:26 PM EDT)

Over the last four years, the U.S. Department of Justice and the U.S. Securities and Exchange Commission have used both the anti-bribery and the accounting provisions of the Foreign Corrupt Practices Act to recover monetary penalties and disgorgement totaling more than \$9.5 billion from companies alleged to have paid and concealed bribes to government officials outside the U.S.

Indeed, from January 2020 to June 2023, roughly two-thirds of the DOJ's corporate foreign bribery cases and all of the SEC's corporate foreign bribery cases alleged violations of the FCPA's accounting provisions.

But even though they were enacted as part of the FCPA and have been used aggressively by the DOJ and SEC in foreign bribery cases, a violation of the FCPA's accounting provisions — which require publicly traded companies to make and keep accurate books, records and accounts, and to devise and maintain a system of internal accounting controls<sup>[1]</sup> — does not require a predicate violation of the FCPA's anti-bribery provisions.

The DOJ's willingness to enforce the books-and-records portion of the FCPA's accounting provisions without a predicate violation of the FCPA's anti-bribery provisions was dramatically illustrated in the recent Commonwealth Edison Co. prosecution.

In ComEd, federal prosecutors in the U.S. Attorney's Office for the Northern District of Illinois brought FCPA books-and-records charges in a domestic bribery case, U.S. v. McClain, in November 2020.<sup>[2]</sup>

According to prosecutors, a group of conspirators, including four ComEd executives and associates — Michael McClain, Anne Pramaggiore, John Hooker and Jay Doherty — conspired to bribe the former speaker of the Illinois House of Representatives, Michael Madigan.

The conspirators sought to influence the passage of legislation favorable to ComEd by providing jobs, contracts and payments to the former speaker's associates.

In furtherance of the scheme, the conspirators allegedly concealed the nature and source of the payments by creating false documents and records including invoices that indicated the payments intended for the speaker's associates were for legitimate services.



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Because ComEd is a subsidiary of Exelon Corp. — and Exelon's shares are traded on the Nasdaq — the grand jury charged the four defendants with four counts of

knowingly and willfully falsif[ying] and caus[ing] to be falsified certain ComEd and Exelon books, records, and accounts, so that those books, records, and accounts did not in reasonable detail, accurately and fairly reflect the transactions and dispositions of ComEd's and Exelon's assets.[3]

In other words, the grand jury charged the defendants with four counts of violating the FCPA's books-and-records provision in a domestic bribery case.

A petit jury in the U.S. District Court for the Northern District of Illinois agreed, finding the four defendants guilty on all four counts in May.

ComEd was just the most recent example of federal prosecutors using the FCPA's books-and-records provision in cases outside the foreign bribery context.

The provision has also been used to prosecute defendants for creating false documents in furtherance of other crimes, including Federal Election Campaign Act violations,[4] Anti-Kickback Statute violations,[5] stock-option backdating schemes,[6] insider trading,[7] revenue recognition schemes[8] and manipulating financial statements.[9]

Like the DOJ, the SEC has also used the FCPA's books-and-records provision outside the foreign bribery context.

For example, in *SEC v. E-Smart Technologies Inc.*, the SEC brought an enforcement action in 2011 against an issuer that falsified its books and records in order to conceal a convertible loan scheme to sell unregistered securities.[10]

In another case settled in 2013, *SEC v. Weatherford International Ltd.*, the SEC alleged that a company created false accounting and inventory records in an effort to hide sales to Cuba, Syria, Sudan and Iran that violated U.S. sanction and export control laws.[11]

Although criminal prosecution for an FCPA books-and-records violation outside the foreign bribery context is relatively rare, the criminal cases above, as well as the SEC's more prevalent use of the books-and-records provision in civil cases, can serve as useful lessons for public companies and their counsel.

First, as the old Watergate saying fittingly goes, "the cover-up is worse than the crime." For public company employees, creating books and records that seek to obscure any type of misconduct — foreign and domestic corruption, sanctions violations, campaign contribution violations or any other improper use of corporate funds — in and of itself can be a violation of the law.

In many cases, enforcement agencies might find it easier to prove that a corporate record was knowingly or willfully falsified than to prove the underlying crime itself.

And in some cases, it is the falsification of books and records alone that is the violation. For example, in one Enron Corp.-related case, *U.S. v. Howard*, the U.S. District Court for the Southern District of Texas in 2007 rejected the government's honest services fraud theory but suggested that, but for jury instructions that inextricably linked the two theories of criminal liability, it would have upheld the

defendant's books-and-records conviction.[12]

Second, to help avoid books-and-records violations, companies should institute sufficient internal accounting controls pursuant to the FCPA's other accounting provision, Title 15 of the U.S. Code, Section 78m(b)(2)(B).

These controls can help prevent books-and-records violations in the first instance by ensuring transactions are recorded with management authorization and conform with generally accepted accounting principles, and that access to company assets is permitted by management authorization.[13]

The DOJ and SEC will likely continue to use the FCPA's books-and-records provision aggressively in foreign bribery cases. But the ComEd prosecution is a reminder that the provision has a much wider application, and that an issuer and its officers and employees must ensure that all of the company's books and records are accurate.

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[1] U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition at 1 (2020).

[2] See Press Release, Dep't of Justice, Former Commonwealth Edison Executives and Associates Found Guilty of Conspiring To Influence and Reward Former Illinois House Speaker (May 2, 2023).

[3] United States v. McClain et al., No. 20 CR 812 (N.D. Ill. Nov. 18, 2020). The indictment is available here.

[4] See, e.g., United States v. Crop Growers Corp., 954 F. Supp. 335 (D.D.C. 1997).

[5] See, e.g., United States v. Holland, 2018 WL 8838854 (N.D. Ga. June 1, 2018).

[6] See, e.g., United States v. Reyes, 577 F.3d 1069 (9th Cir. 2009).

[7] See, e.g., United States v. Wolff, 263 F. App'x 612 (9th Cir. 2008).

[8] See, e.g., United States v. Johnson, 553 F. Supp. 2d 582, 618 (E.D. Va. 2008).

[9] See, e.g., United States v. Howard, 471 F. Supp. 2d 772 (S.D. Tex. 2007).

[10] See SEC v. e-Smart Techs., Inc., 82 F. Supp. 3d 97 (D.D.C. 2015).

[11] See Complaint, SEC v. Weatherford Int'l Ltd., No. 4:13-cv-03500, Doc. No. 1 (S.D. Tex. Nov. 26, 2013).

[12] See Howard, 471 F. Supp. 2d 772, *supra* at n. 9.

[13] 15 U.S.C. § 78m(b)(2)(B).