Securities Regulation Daily Wrap Up, ENFORCEMENT—N.D. Ill.: Court upholds verdict, denies new trial for ComEd FCPA defendants, (Jan 8, 2024)

By Anne Sherry, J.D.

Utility company officials were convicted of violating the FCPA, among other laws, by bribing then-Illinois House Speaker Michael Madigan.

The district court in Chicago said it could not acquit four defendants for corruptly influencing former Illinois House Speaker Michael Madigan. While there was no "smoking gun," the government's case provided sufficient evidence, and the defendants' arguments amounted to simply disagreeing with the way the jury weighed the evidence. The court also denied the defendants' motion in the alternative for a new trial, finding no error or only harmless error (*U.S. v. McClain*, January 4, 2024, Leinenweber, H.).

The defendants are a former CEO of Commonwealth Edison Company, two former external ComEd lobbyists, and a former ComEd external consultant. They were charged with conspiring between 2011 and 2019 to confer a stream of benefits on Speaker Madigan, intending to corruptly influence and reward Madigan's efforts to assist ComEd with respect to legislation affecting ComEd's business, and violating the Foreign Corrupt Practices Act by falsifying books and records to conceal the corrupt activity. After a six-week trial, the jury returned a guilty verdict on all charges.

The government's evidence—which included emails, business records, phone conversations, video surveillance, photographs, and law enforcement testimony—showed that ComEd paid $1.3 million to Madigan's political allies during an eight-year period where it had frequent business before the Illinois state legislature. The defendants also presented character testimony on their honesty, truthfulness, and integrity.

When facing a motion for a judgment of acquittal, a district court must afford great deference to the jury's verdict, viewing the evidence in the light most favorable to the conviction. This requires navigating the blurred line between reasonable and speculative inferences from the evidence provided. A juror must use their common sense, but the jury cannot find guilt by gut feeling, suspicion, or mere association. Ultimately, the court determined that the jury had sufficient evidence for a guilty verdict.

Regarding the FCPA counts specifically, the defendants argued that the government failed to demonstrate that the contracts and forms in question were false. These records did not need to list subcontractors, and they contained no falsehoods, the defendants said. But the court said that this mischaracterized the government's theory, which was not limited to a technical deficiency, but rather alleged that the defendants used the documents to disguise the true nature of the payments and subvert internal controls. The government introduced enough evidence for the jury to conclude that the documents were false.

The jury also had sufficient evidence on the element of mens rea. Inconsistent assertions in the books and records suggested willfulness on the part of the defendants. The jury also heard recorded phone conversations where defendants joked about the "off the beaten path" and "creative" payment arrangements. Furthermore, under the *Pinkerton* theory of liability whereby one conspirator can be held liable for the other's crimes in furtherance of the conspiracy, it was reasonably foreseeable that the conspirators would continue to falsify internal records over the years.

The court also rejected certain defendants' arguments that they did not circumvent internal controls because the Corporate Code of Business Conduct did not constitute internal accounting controls for the purposes of the FCPA. This was not the only internal control the government presented, and even if it had been, the Code directly concerned the company's internal accounting practices and qualified it under the statute.

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The case is No. 20-cr-00812.

Attorneys: Amarjeet Singh Bhachu, U.S. Attorney's Office, for the U.S. David P. Niemeier (Greensfelder, Hemker & Gale, P.C.) for Michael McClain. Scott R. Lassar (Sidley Austin LLP) for Anne Pramaggiore.

Companies: Commonwealth Edison Company; Exelon Corporation

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