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In Sweeping FCPA-Style Enforcement Action, ComEd Enters $200 Million Domestic Corruption DPA

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FCPA/Anti-Corruption and White Collar Defense and Investigations

On July 17, 2020, Commonwealth Edison Company ("ComEd"), an Illinois utility company, entered into a deferred prosecution agreement (the "DPA") with the U.S. Department of Justice ("DOJ" or the "Department") to resolve allegations of bribery under 18 U.S.C. § 666, which prohibits theft or bribery concerning programs receiving federal funds.[1] Aside from the sweeping nature of the allegations, the ripple effect that the matter is likely to create in Illinois politics, and further enforcement actions that could stem from DOJ's investigation, the case is noteworthy because it may signal a significant expansion of corporate enforcement for domestic corruption. Indeed, the matter is reminiscent of a Foreign Corrupt Practices Act ("FCPA") enforcement action targeting corporate bribery schemes involving a foreign official. In that regard, the ComEd DPA serves as an important reminder for companies that a robust compliance program must include policies, procedures, and controls that address and mitigate both foreign and domestic bribery and corruption risks. Companies should thus take stock of the state of their compliance programs with respect to mitigating domestic bribery risks.

In this alert, we summarize the ComEd enforcement action and the key takeaways.

Allegations and Resolution

According to the DPA, between 2011 and 2019, ComEd improperly influenced and rewarded "Public Official A," identified in the DPA as the Speaker of the Illinois House of Representatives, by arranging to provide payments through third parties using subcontracts and jobs to Public Official A's associates, "even in instances where certain political allies and workers performed little or no work that they were purportedly hired to perform for ComEd."[2] During this period, ComEd allegedly paid approximately $1.3 million to Public Official A's associates through a consulting company, a law firm, and other third-party vendors.[3] In addition, ComEd allegedly appointed an individual to its

[1] Deferred Prosecution Agreement, *United States v. Commonwealth Edison Co.*, No. 20-cr-00368 (N.D. Ill. July 17, 2020), *available at* https://www.justice.gov/usao-ndil/press-release/file/1295241/download (hereinafter, the "DPA").

[2] *Id.* at A-4.

[3] *Id.* at A-4, A-8, A-10.

Board of Directors at Public Official A's urging and hired employees and interns at Public Official A's recommendation.[4] According to the DPA, certain senior ComEd employees were aware of and facilitated these arrangements as part of an "'old-fashioned patronage system.'"[5] Notably, however, the DPA does not assert that ComEd paid Public Official A's associates knowing that any of the funds would be passed on to Public Official A himself.[6]

In exchange for these payments, ComEd allegedly sought Public Official A's support for legislation favorable to ComEd and that would "improve ComEd's financial stability."[7] ComEd acknowledged in the DPA that "the reasonably foreseeable anticipated benefits to ComEd of such legislation exceeded $150 million."[8] Under the DPA, ComEd agreed to pay a criminal penalty of $200 million and to commit to a substantial remediation and compliance curriculum and ongoing reporting and cooperation obligations.[9] The $200 million criminal penalty reflected a discount of $40 million off the bottom of the applicable United States Sentencing Guidelines fine range due to ComEd's substantial remediation and cooperation to date.[10]

Key Takeaways

1. ***The ComEd Case May Signal a Significant Expansion in Corporate Enforcement of Domestic Bribery Cases – Bringing FCPA-Style Enforcement Home.***

In many ways, the DPA is reminiscent of DOJ's broad-based corporate FCPA enforcement program. For years, practitioners have noted that DOJ's corporate enforcement of domestic corrupt practices paled in comparison to its enforcement activities related to foreign bribery. On the domestic front, DOJ typically pursued bribe-takers, rather than the companies that engaged in

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[4] *Id.* at A-9–10, A-12.

[5] *Id.* at A-5, A-8.

[6] While the DPA does not contain any specific allegation that Public Official A received any of the proceeds of the bribery, the Information (i.e., the charging document) filed with the DPA alleges that ComEd "agreed to give things of value, namely, jobs, vendor subcontracts, and monetary payments associated with those jobs and subcontracts, *for the benefit of Public Official A* and Public Official A's associates, with the intent to influence and reward Public Official A." Information, *United States v. Commonwealth Edison Co.*, No. 20-cr-00368 (N.D. Ill. July 17, 2020), *available at* https://www.justice.gov/usao-ndil/press-release/file/1295246/download (emphasis added) (hereinafter, the "Information"). To be sure, 18 U.S.C. § 666(a)(1)(B) prohibits public officials from corruptly soliciting or demanding something of value for the "benefit of any person." Nevertheless, the absence of evidence that Public Official A personally benefitted from the scheme could make it more difficult for DOJ to bring a case against him.

[7] DPA at A-1–3.

[8] *Id.* at A-12.

[9] *Id.* at 10, B-1–5, C-1–2.

[10] *Id.* at 7.

allegedly corrupt conduct. Accordingly, the ComEd case is notable as potentially foreshadowing an expanded approach to domestic corruption enforcement focusing on companies.

In what may be a further signal that DOJ intends to approach domestic corruption cases with FCPA-style enforcement, a number of the allegations and the allegedly corrupt schemes at issue in the ComEd case reflect fact patterns on which DOJ has focused in recent FCPA enforcement actions. In particular, like in FCPA hiring practices cases in which DOJ took an expansive view of what it considered to be a thing of value provided to a foreign official, the DPA does not allege that Public Official A directly received any monetary benefit or a thing of value from ComEd. Instead, the DPA focuses on benefits that ComEd provided to Public Official A's associates, albeit with the intent to influence or reward Public Official A. The DPA's focus on the use of consultants, law firms, and lobbyists, as well as the use of third-party contracts to conceal payments, is also evocative of FCPA-style theories of liability.

Even further reinforcing a potential FCPA mindset in pursuing corporate enforcement of domestic corruption schemes, although unnecessary to sustain a charge under 18 U.S.C. § 666, the DPA alleges that payments to Public Official A's associates were falsely recorded in ComEd's books and records or were otherwise unidentifiable in ComEd's vendor payment system. While these types of allegations are typical in FCPA enforcement actions, perhaps they will figure into DOJ's domestic corporate enforcement program as well, and it also is worth noting that the FCPA's accounting provisions themselves may be enforced for domestic conduct not involving a foreign official.

2. *Following McDonnell, 18 U.S.C. § 666 Gives Teeth to Domestic Bribery Enforcement.*

In *McDonnell v. United States*, the Supreme Court limited the types of domestic bribery cases that DOJ can bring by reaching a narrow definition of "official act" under 18 U.S.C. § 201, in effect foreclosing use of that statute to bring general influence-peddling cases against either bribe payors or recipients.[11] Section 666, however, does not contain the "official act" language found within § 201.[12] By charging a violation of § 666, DOJ would not have to prove that ComEd provided things of value to Public Official A's associates in exchange for an "official act."[13] Instead, it could broadly assert that the things of value were provided "in an effort to influence

[11] *McDonnell v. United States,* 136 S. Ct. 2355, 2372–73 (2016) (holding that the federal domestic bribery statute, 18 U.S.C. § 201, required a nexus between accepting something of value and an "official act," which must be specific and focused, and pending or capable of being brought before a public official for formal exercise of government power).

[12] 18 U.S.C. § 201(a)(3).

[13] Each circuit to directly address the question has concluded that *McDonnell* does not affect prosecutions under § 666, because that section does not require an official act. *See, e.g.*, *United States v. Ng Lap Seng*, 934 F.3d 110, 139 (2d Cir. 2019), *cert. denied sub nom. Seng v. United States*, No. 19-1145, 2020 WL 3492669 (U.S. June 29, 2020); *United States v. Reed*, 908 F.3d 102, 113 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2655 (2019), *and cert. denied*, 139 S. Ct. 2658 (2019); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018); *United States v. Jackson*, 688 F. App'x 685, 695 (11th Cir. 2017).

[or] reward Public Official A's efforts, as Speaker of the Illinois House of Representatives, to assist ComEd with respect to legislation concerning ComEd and its business."[14]

Further, DOJ's reliance on § 666 appears to be an expansion of its enforcement efforts under that statute, which prohibits theft or bribery concerning programs receiving federal funds. Indeed, the Justice Manual indicates that the statute "is designed to facilitate the prosecution of persons who steal money or otherwise divert property or services from state and local governments or private organizations that receive large amounts of Federal funds."[15] The Justice Manual also directs that "[f]ederal prosecutors should be prepared to demonstrate that a violation of 18 U.S.C. § 666 affects a substantial and identifiable Federal interest before bringing charges."[16] Finally, the Justice Manual notes that "prosecution under 18 U.S.C. § 666 should be limited to cases in which the Federal assistance is given pursuant to a specific statutory scheme that authorizes assistance to promote or achieve policy objectives."[17] The DPA does not, however, contain allegations specifically addressed to each of these directives and limitations contained in the Justice Manual – potentially foreshadowing the statute's reach in future actions.

Indeed, notwithstanding the limitations set out in the Justice Manual, and as relied upon in the ComEd Information,[18] § 666 facially applies to any "organization, government, or agency" that receives more than $10,000 in federal benefits per year – including a "grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."[19] In an environment in which corporations are increasingly receiving federal benefits of some sort – whether in the ordinary course of business or through COVID-19 relief programs – the statute can have an incredibly broad reach. Even more, § 666 criminalizes a broad range of conduct, including providing gratuities, as well as traditional *quid pro quo* bribery schemes.[20] Thus, combined with deploying FCPA-style theories of liability and enforcement on the domestic corruption front, and through the use of non-litigated resolution vehicles such as a DPA, DOJ may begin to broadly rely upon § 666 to extend the scope of enforcement of domestic bribery against companies.

3. ***Companies Should Ensure that Compliance Programs Target both Foreign and Domestic Corruption***.

Beginning in April 2019, DOJ expanded the scope of its Evaluation of Corporate Compliance Programs guidance (the "Guidance"), which serves as a reference for prosecutors in assessing corporate compliance programs, to all Criminal Division investigations and enforcement actions

[14] DPA at A-3.

[15] Justice Manual § 9-46.100.

[16] *Id.* at § 9-46.110.

[17] *Id.*

[18] Information at 2–3.

[19] 18 U.S.C. § 666(b).

[20] *See United States v. Boender*, 649 F.3d 650, 655 (7th Cir. 2011); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995); *but see United States v. Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013) (holding that gratuities are not illegal under § 666).

involving business organizations. Previously, the Guidance applied only to DOJ's Fraud Section. Together with this expansion in applicability, the Department has continued to signal the seriousness with which it approaches expectations for corporate compliance programs, including through a recent update to the Guidance, which we covered in a previous alert.

While the expansion of the Guidance in April 2019 provided a clear signal that compliance programs must extend beyond addressing and mitigating foreign bribery and corruption risks, the ComEd DPA strongly reinforces the point. In particular, the remediation and compliance obligations imposed on ComEd in the DPA – themselves reminiscent of obligations imposed in FCPA resolutions – serve as an important reminder that DOJ's expectations apply as much to domestic corruption risks as they do to foreign corruption risks or to any other risk area. Companies that ignore domestic corruption risks, including under the potentially much broader remit of § 666, may do so at their own peril.

Accordingly, companies that have not already done so should consider conducting anti-corruption risk and program assessments aimed specifically at identifying risks and gaps in their domestic activities and operations.

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