

Corporate Compliance Lessons From FirstEnergy Scandal

By **Jessica Lonergan, Nicholas Hakun and Scott Maughan** (September 15, 2023)

In late June, two prominent Ohioans were sentenced for their involvement in one of the largest political scandals in Ohio's history.

Former Speaker of the Ohio House of Representatives Larry Householder, and former chair of the Ohio Republican Party and lobbyist Matthew Borges, were both found guilty after a seven-week jury trial earlier this year.

In addition, multiple other individuals pled guilty and agreed to cooperate with the government. The corporation behind the scandal, FirstEnergy Corp., signed a deferred prosecution agreement, or DPA, and admitted its role in the scheme.[1]

Householder was sentenced to 20 years in prison. Borges received five years. FirstEnergy signed a DPA and agreed to pay \$230 million in fines.

As these punishments make clear, political corruption threatens more than just those holding elected office. Corporations interacting with politicians need to be aware that they are increasingly likely to be swept up into state and federal investigations of political corruption.

This article lays out the bribery scheme underlying these cases, discusses the respective outcomes for FirstEnergy and the individuals charged in U.S. v. Householder, and offers practical tips for companies and professionals concerned with navigating this highly complex area of law.

Background

As of 2016, Ohio was home to two failing nuclear power plants owned and operated by FirstEnergy and its subsidiaries. FirstEnergy had made clear that, absent a government bailout, it would have to shut down the plants or have its subsidiary declare bankruptcy.[2]

FirstEnergy and then-Ohio state representative Householder agreed in late 2016 to early 2017 that Householder would run to be speaker of the Ohio House of Representatives with financial assistance from FirstEnergy, and that, in exchange, Householder would further FirstEnergy's efforts to save the power plants.

This scheme was orchestrated using multiple 501(c)(4) companies. A 501(c)(4) is a nonprofit corporation that does not require donors to identify themselves and does not limit the amount of donations.

As FirstEnergy said in an internal presentation around the time of the scheme, 501(c)(4) groups were the company's preferred manner of donating because they were "considered 'dark money'" and did not require disclosing where the donations come from. FirstEnergy's



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"presentation noted that 'the bulk of [its] contribution decisions [were] to 501(c)(4)s.'"

FirstEnergy's 501(c)(4) was Partners for Progress. It was incorporated just weeks after some FirstEnergy senior executives traveled with Householder on the company's jet to the presidential inauguration in January 2017.

Despite appearing to be an independent organization on paper, Partners for Progress was, in reality, controlled in part by former FirstEnergy executives, who funded it and directed its payments to entities associated with public officials.

FirstEnergy funded this entity with approximately \$25 million between 2017 and 2019, and used this entity as a vehicle to send payments to Householder's 501(c)(4), Generation Now.

Generation Now, also an ostensibly independent nonprofit, operated as Householder's "slush fund" for his political operations. He used the funds provided by FirstEnergy through the 501(c)(4)s to promote his bid for the speakership, and to purchase advertisements and media for others loyal to him that were running in general elections in 2018 and 2020 for the Ohio Legislature.

This bribery scheme between FirstEnergy and Householder was very successful: Householder received approximately \$60 million from FirstEnergy and its affiliated companies, was elected speaker in 2019, and passed H.B. 6, which provided an approximately \$1.3 billion bailout to FirstEnergy and the power plants.

The Politicians' Prosecutions

Householder, Borges and three other Ohio political operatives — Jeffrey Longstreth, Juan Cespedes and Neil Clark — were all charged in the U.S. District Court for the Southern District of Ohio in July 2020 for conspiring to violate the racketeering statute through honest services wire fraud, receipt of bribes and money laundering.

If you are experiencing thoughts of suicide, the Suicide and Crisis Lifeline is available 24 hours a day at 988 or online at 988lifeline.org.

Within six months, two operatives had pled guilty; the third died by suicide in March 2021.

Householder and Borges maintained their innocence. Earlier this year, after a seven-week trial in which Householder testified in his own defense, both defendants were found guilty.[3]

The defendants were sentenced in June. Householder received 20 years, and Borges was sentenced to five years. Householder and Borges have both filed appeals of their convictions. Neither cooperating witness has been sentenced to date.

Corporate Resolution

In July 2021, FirstEnergy signed its DPA with the U.S. Attorney's Office for the Southern District of Ohio.

As part of the DPA, FirstEnergy agreed to pay \$230 million, to be split evenly between the

federal government and the Ohio state entity.

The DPA also requires FirstEnergy to make governance changes that should generally enhance its culture of compliance, such as separating the chief ethics and compliance officer function from the chief legal officer function.

Other conditions in the DPA specifically address the bribery violations, including the requirement that FirstEnergy revise its internal policies on political activity and provide robust disclosures about its lobbying efforts going forward.

While FirstEnergy is in the midst of complying with the terms of its DPA, it is also embroiled in civil litigation. It paid \$49 million to settle a class action brought by consumers in Ohio.[4] And, its proposed settlement to Employees Retirement System of the City of St. Louis v. Jones — a shareholder derivative suit — would, if approved by the court, include the resignation of six directors and other governance and compensation changes.[5]

It is also still fighting Owens v. FirstEnergy, a securities class action brought by investors.[6]

On top of all that, news stories indicate that the U.S. Department of Justice is still investigating FirstEnergy's former CEO Charles "Chuck" Jones and its former Vice President Michael Dowling.

These executives, who are also defendants in the securities class action, recently were forced to decide whether to invoke their Fifth Amendment rights against self-incrimination.

U.S. Magistrate Judge Kimberly A. Jolson denied their motions to stay the depositions, even while their personal attorneys have hinted that additional indictments may be on the horizon.[7]

Key Takeaways

Companies and individuals seeking to influence government policymaking can learn a lot from the DOJ's case against FirstEnergy, Householder and Borges.

To begin with, corporate anti-corruption compliance efforts often focus on foreign bribery schemes due to the DOJ's recent prioritization of the Foreign Corrupt Practices Act and the eye-popping penalties that companies have received under the FCPA. But the Householder conviction is a reminder that domestic bribery is alive and well.

Like their foreign counterparts, domestic bribery schemes can result in nine-figure penalties, reputational damage, disruption to business, follow-on civil litigation and — for individuals — prison terms.

Furthermore, in contrast to foreign bribery, domestic bribery can violate both federal fraud statutes and state-level bribery statutes, meaning it can be prosecuted by federal authorities, state authorities or both. These laws are complex and often subject to interpretation.

The line between legitimate lobbying efforts and quid pro quo corruption is often a fine one. Transparency is key, as efforts to conceal a benefit to a government official can be the surest indication of a corrupt, improper intent.

Companies that seek to influence government decision making — either directly, or indirectly through a lobbyist or other agent — would be best served to have those efforts scrupulously overseen by an independent compliance function.

Prosecutors are wary of 501(c)(4) nonprofits being used as slush funds for politicians. This type of funding scheme is now certainly on the government's radar.

For example, just last year the DOJ charged Joseph Fuentes-Fernandez, the president and treasurer of super PAC Salvemos a Puerto Rico, with lying to the Federal Election Commission about two shell 501(c)(4) entities he helped create.[8] He was sentenced to 14 months in prison.

Companies should be aware that some jurisdictions, like New York and Connecticut, require public disclosure of donors if the 501(c)(4) entity makes political expenditures or engages in lobbying. But even outside those jurisdictions, if the entity is accused of being a mere conduit for payments to government officials, that could lead to allegations of bribery or fraud.

Companies can, and should, examine the terms of the FirstEnergy DPA, and specifically the compliance improvements. Separating the role of the chief legal officer from the ethics and compliance officer can, in some cases, help detect improper behavior faster and more effectively.

Similarly, FirstEnergy's decision to create a formal process for analyzing compliance recommendations made by outside counsel may lead to faster implementation of external compliance solutions.

Finally, companies facing civil litigation adjacent to criminal investigations or prosecutions face additional risks with respect to their current or former executives.

While their right to invoke the Fifth Amendment protects them, as individuals, in any subsequent prosecution, companies run the risk of that invocation being used to generate adverse inferences against the company in their civil cases.

FirstEnergy likely faces some risk. Should Jones and Dowling invoke their Fifth Amendment rights, that could be sufficient to prevent the company from ending the securities class action at summary judgment.

Although, it should be noted that in some jurisdictions, while an adverse inference can prevent a court from deciding a case at summary judgment, the plaintiff must have more than merely the adverse inference to prevail.

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[1] <https://www.sec.gov/Archives/edgar/data/1031296/000103129621000071/ex101-8k7x22x21.htm>.

[2] The following description of events is taken from the FirstEnergy DPA.

[3] See *United States v. Householder et al.*, 1:20-cr-00077-TSB (S.D. Ohio).

[4] *Buldas v. FirstEnergy Corp.*, 2:20-cv-03987-EAS (S.D. Ohio), Dkt. No. 173 (Dec. 5, 2022).

[5] *Employees Retirement System of the City of St. Louis v. Jones*, 2:20-CV-04813-ALM (S.D. Ohio), Dkt. No. 205 (May 22, 2023).

[6] See *Owens v. FirstEnergy Corp.*, 2:20-cv-03785-ALM (S.D. Ohio).

[7] Marty Shalden, Former FirstEnergy execs say 'no doubt' the feds are after them amid ongoing corruption probe, WKYC Studios, <https://www.wkyc.com/article/news/local/ohio/firstenergy-execs-say-feds-after-them-corruption-probe/95-ac1925c3-f16d-4436-a1af-00027f09d892> (May 27, 2023).

[8] See *United States v. Joseph Fuentes-Fernandez, et al.*, 3:22-cr-00182-JL (D.P.R.).