

Banking Law News

INSIGHT: SEC Breaks New Ground With Sanctions, Export Control Penalties in FCPA Action

By Ola M. Tucker

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The SEC expanded its jurisdiction when it included U.S. sanctions violations against a marketing and printing company charged with violating the FCPA. Attorney and compliance professional Ola M. Tucker says it remains to be seen whether the SEC will continue to pursue these charges in the future but the best defense for companies is a comprehensive compliance program.

There is no dispute that the Foreign Corrupt Practices Act grants the Department of Justice and the Securities and Exchange Commission broad jurisdiction to enforce the statute's prohibition against bribery of foreign government officials. But in a recent FCPA action against Quad/Graphics Inc. (Quad), the SEC seems to have used the anti-corruption statute to penalize the public company not only for bribery, but also for violating U.S. sanctions and export control laws.

Jurisdictional Reach

Generally, the DOJ is the criminal enforcer of the statute's anti-bribery provisions as well as *willful* violations of the books-and-records and internal-controls provisions. Meanwhile, the SEC brings civil charges relating to violations of the anti-bribery provisions and the books-and-records and internal-controls provisions. The two federal agencies can work in concert when they have jurisdiction over the same matter.

As can be seen from the past decade of enforcement actions, the DOJ and the SEC have taken an ever-broader view of their territorial jurisdiction by pursuing foreign companies and individuals for conduct that took place outside of the United States.

However, in an action against Quad in September, it seems the SEC may have expanded its jurisdiction to include sanctions violations when it penalized the company not only with violating the FCPA, by engaging in bribery schemes in Peru and China, but also for violating U.S. sanctions against Cuba, an area previously within the realm of the Department of the Treasury's Office of Foreign Assets Controls (OFAC) and the DOJ.

SEC Order and DOJ Declination

Quad is a publicly-traded marketing and printing services company headquartered in Sussex, Wis., and has operations in 10 countries. It trades on the New York Stock Exchange under the ticker "QUAD," and thus falls squarely within the SEC's jurisdictional reach under the FCPA.

The SEC's cease-and-desist order (Order) states that Quad paid or promised to pay over a million dollars in bribes through its wholly owned subsidiaries in Peru and China from at least 2011 to January 2016.

The Order further states that in addition to bribery, Quad's Peruvian unit also violated U.S. sanctions and export control laws by engaging in illegal commercial transactions with Cuba's state-controlled telecommunications company, Empresa de Telecomunicaciones de Cuba SA (ETECSA), and that it sought to conceal the Cuban transactions by falsifying its books and records, including contracts, invoices, correspondence, and other documents, as well as falsely recording revenue in violation of the FCPA's accounting provisions.

Additionally, Quad failed to have sufficient internal accounting controls in place to detect or prevent the misconduct. Therefore, the SEC asserted that Quad's Peruvian unit violated the FCPA's books-and-records and internal-controls provisions, not only through their engagement in a foreign bribery scheme, but also by engaging in a scheme to evade U.S. sanctions.

While it isn't uncommon for companies that bribe foreign government officials, and run afoul of the FCPA, to also have committed sanctions-related violations, these sanctions violations, including OFAC civil violations, were previously not enforced by the SEC, and instead were pursued separately by different agencies.

In this case, the DOJ declined to prosecute Quad, and issued a declination letter citing Quad's prompt and voluntary self-disclosure, its proactive cooperation, its lack of prior criminal history, and its full remediation, including steps to enhance its compliance program, among other reasons for the DOJ's decision to forego prosecution.

Notably, although the DOJ stated in its declination letter, that it found evidence of bribe payments to foreign government officials, the department didn't mention anything about Quad violating U.S. sanctions and export control laws. Nor did the DOJ mention anything about the enhancement of Quad's sanctions compliance program as part of Quad's remediation efforts, or any other steps that Quad has taken to prevent future sanctions violations.

In its resolution with the SEC, Quad agreed to cease and desist from further violations of the federal securities laws, and will pay nearly \$10 million dollars to the SEC, including \$7.4 million in disgorgement and prejudgment interest, and a civil penalty of \$2 million. In an effort to remediate its compliance program failures, Quad will also self-report on its compliance program for a year, which includes conducting compliance reviews and the submission of formal reports to the SEC.

Final Thoughts

It remains to be seen whether the SEC will continue to penalize public companies for U.S. sanctions violations that have led to violations of the FCPA's books-and-records and internal-controls provisions.

Nonetheless, an organization's best offense to potential violations of either OFAC sanctions or the FCPA, is a solid defense, which consists of a comprehensive compliance program.

Organizations would be well advised to implement the guidance provided by the DOJ in its [Guidance Document on the Evaluation of Corporate Compliance Programs](#), issued in April, as well as the [Framework for OFAC Compliance Commitments](#), published by OFAC in May.

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