

Client Alert

May 2020

OFAC Settles Apparent Violation of the Cuban Assets Control Regulations with Animal Nutrition Company That Improperly Structured Transactions Which May Have Been Permissible

What Happened: BIOMIN America, Inc., agreed to pay \$257,862 to settle potential civil liability for 44 apparent violations of the Cuban Assets Control Regulations (CACR) for coordinating sales of agricultural commodities to a company in Cuba without authorization from OFAC, which transactions may have been permissible if properly structured to comply with OFAC's Cuban sanction regime.

The Bottom Line: US companies can potentially obtain authorization from OFAC to engage in transactions involving US sanctions programs by seeking appropriate advice and guidance when contemplating such transactions. OFAC's enforcement action emphasizes the importance of US companies' and foreign-based subsidiaries' or affiliates' maintaining OFAC compliance procedures and internal controls to detect and prevent potential violations and structure permissible transactions in compliance with OFAC sanctions.

The Full Story

On May 6, 2020, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) published enforcement information regarding a settlement reached between OFAC and BIOMIN America, Inc. (BIOMIN America), an animal nutrition company based in Overland Park, Kansas. From approximately July 11, 2012, to September 29, 2017, BIOMIN America coordinated 30 sales of agricultural commodities to Alfarma S.A. (Alfarma) in Cuba without authorization from OFAC, resulting in 44 apparent violations of the CACR.

According to the enforcement information, BIOMIN America could have potentially availed itself of authorization from OFAC, through an existing general license under the CACR or an application for a specific license. Nevertheless, it failed to seek appropriate guidance or take the steps necessary to authorize the transactions. Instead, BIOMIN America structured its transactions in a way that it believed would be consistent with US sanctions, processing purchase orders from Alfarma on behalf of foreign affiliates that would then fulfill the orders. However, BIOMIN America's foreign affiliates were persons subject to the jurisdiction of the United States, as defined by the CACR, because BIOMIN America owned a majority interest in some and directly managed another. Thus, the transaction structure was not consistent with US sanctions requirements; that is, BIOMIN America and its owned or controlled foreign entities sold agricultural commodities in apparent violation of the CACR.

As part of the aggravating factors, OFAC listed that (i) BIOMIN America was reckless in its actions to develop, direct and execute a transaction structure to export its products to Cuba in a manner that violated the CACR; (ii) BIOMIN America's management was aware of and involved in the development and execution of the transaction structure; and (iii) BIOMIN America and its owned or controlled foreign entities are actively managed divisions of a commercially sophisticated, international company.

When determining the settlement amount to be requested with respect to the apparent violations of the CACR, OFAC considered that BIOMIN America voluntarily self-disclosed its apparent violations. Additional mitigating factors considered to work in favor of BIOMIN America included the facts that (i) BIOMIN America and its owned or controlled foreign entities' transactions may have been eligible for authorization through an existing general license or a specific license, if the relevant general license conditions had been complied with or a specific license obtained; (ii) BIOMIN America and its owned or controlled foreign entities had not received a penalty notice or finding of violation from OFAC in the five years preceding the earliest date of the transactions giving rise to the apparent violations; and (iii) BIOMIN America undertook steps to implement comprehensive training sessions on country-specific embargoes, denied persons screening, and export license requirements, and developed formal written policies and procedures to prevent sales to or for unauthorized destinations, parties or activities.

This recent enforcement information highlights that persons subject to US jurisdiction, which may include foreign affiliates of US companies, should familiarize themselves with OFAC's regulations and should maintain OFAC compliance procedures and internal controls. It also emphasizes the importance of exercising caution when dealing with foreign affiliates and of seeking appropriate advice or guidance when considering transactions involving US sanctions programs, as many transactions may be possible within OFAC's regulatory framework if structured correctly and could give rise to liability if not structured correctly.

The Latin America group at Hunton Andrews Kurth LLP will continue to closely monitor related developments and enforcement actions. Please contact us if you have any questions or would like further information regarding the Cuban Assets Control Regulations or sanctions governing the Cuban embargo.

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