

May 14, 2020

## **OFAC Enforcement Action against BIOMIN America, Inc. Highlights the Consequences of Failing to Seek and Implement Appropriate Compliance Advice**

On May 6, 2020, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") announced a \$257,862 settlement agreement with BIOMIN America, Inc. ("BIOMIN America"), an animal nutrition company based in Overland Park, Kansas, to settle potential civil liability for 44 apparent violations of the Cuban Assets Control Regulations ("CACR") resulting from sales to Alfarma S.A. ("Alfarma") in Cuba.<sup>1</sup> BIOMIN America and its owned or controlled non-U.S. affiliates (the "Non-U.S. Affiliates"<sup>2</sup>), which are also subject to the CACR, engaged in a total of 30 sales of agricultural commodities produced outside the United States to Alfarma between approximately July 2012 and September 2017. According to OFAC, BIOMIN America developed a transaction structure that it erroneously believed to be consistent with U.S. sanctions requirements, and failed to avail itself of an existing general license that could potentially have authorized the conduct at issue.

This action is significant because it underscores how "U.S. companies can benefit from seeking appropriate advice and guidance when contemplating business involving U.S. sanctions programs rather than developing alternative methods through non-U.S. companies in order to avoid prohibitions on U.S. companies."<sup>3</sup> It also serves as a reminder for U.S. companies with non-U.S.-owned or controlled affiliates to remain vigilant regarding sanctions requirements that apply to such affiliates, particularly with respect to Cuba and Iran sanctions.

### **The Apparent Violations**

According to OFAC, BIOMIN America managers determined that BIOMIN America could not directly export agricultural products to Cuba and, in order to take advantage of a sales opportunity with Alfarma, created a transaction structure whereby BIOMIN America processed purchase orders from Alfarma on behalf of BIOMIN America's Non-U.S. Affiliates, which then fulfilled the orders for Alfarma in Cuba. BIOMIN America coordinated, and received commissions on, these sales to Alfarma as executed by the Non-U.S. Affiliates.

This transaction structure was used to complete 30 sales of agricultural commodities produced outside the United States to Alfarma between approximately July 2012 to September 2017, which resulted in 44 apparent violations of the CACR. The underlying transaction value of these sales was \$17,391,950.25.

OFAC determined that BIOMIN America incorrectly believed that its transaction structure complied with U.S. sanctions requirements, and noted that the company might have avoided this outcome had it sought “appropriate advice or otherwise take[n] the steps necessary to authorize these transactions.”<sup>4</sup> Presumably knowledgeable OFAC counsel would have identified the ways in which the transaction structure violated the CACR, and would have been able to navigate potential licensing options. For example, OFAC suggested that the transactions might have been authorized by an existing general license as long as the exports had been consistent with the U.S. Department of Commerce’s Export Administration Regulations (the “EAR”). The relevant general license, 31 C.F.R. 515.533(a), authorizes transactions ordinarily incident to the exportation of agricultural commodities from the United States, or the reexportation of agricultural commodities from a third country, to Cuba, provided that the export or reexport is licensed by the EAR and certain other conditions, including payment-related conditions, are met. OFAC left open the factual question of whether the goods at issue were actually eligible for export under the EAR. OFAC also suggested that, if the general license did not apply, BIOMIN America could have applied for a specific license. Unfortunately, because BIOMIN America appears not to have understood the proper scope of the CACR, it was not in a position to take advantage of these potential licensing avenues.

#### **Factors Affecting OFAC’s Penalty Determination**

OFAC determined that BIOMIN America voluntarily self-disclosed the apparent violations and that the apparent violations constitute a non-egregious case. The statutory maximum civil monetary penalty amount for the apparent violations was \$2,149,230, and the base penalty amount was \$973,691.

In reaching the settlement amount, OFAC considered a number of aggravating factors, including that “BIOMIN America was reckless in its actions to develop, direct, and execute a transaction structure to export its products to Cuba, as fulfilled by its [Non-U.S. Affiliates], in a manner that violated the CACR for a period of several years.” Moreover, OFAC determined that the management at BIOMIN America and its owned or controlled entities “was aware of and involved in the development and execution of the transaction structure.” Lastly, OFAC identified as an aggravating factor that BIOMIN America and its Non-U.S. Affiliates are actively managed by divisions of a “commercially sophisticated, international company,” ERBER Group, and did not have a compliance program in place at the time of the conduct at issue.

OFAC also noted the following mitigating factors, including:

- “BIOMIN America and its [Non-U.S. Affiliates] 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”; and
- “BIOMIN America, on behalf of itself and its owned or controlled foreign entities, [subsequently] engaged with outside counsel and export control consultants to conduct comprehensive training sessions for logistics, compliance, and senior management on country-specific embargoes, denied

persons screening, and export license requirements, among others. Further, BIOMIN America developed formal written policies and procedures to prevent [future] sales to or for unauthorized destinations, parties, or activities.”<sup>5</sup>

In addition, OFAC acknowledged that BIOMIN America and its Non-U.S. affiliates had not received a penalty notice or finding of violation from OFAC in the five years prior to July 2012, and cooperated fully with OFAC’s investigation and enforcement, including by executing a tolling agreement to extend the statute of limitations.

### **Implications**

Companies should consider the following lessons from the BIOMIN America action:

1. As OFAC has repeatedly cautioned over the past year, sanctions violations can all too easily result from “misinterpreting, or failing to understand the applicability of, OFAC’s regulations, including general licenses and authorizations.”<sup>6</sup> Management and sales teams would be wise to consult with internal and/or external legal or compliance experts to ensure that cross-border transaction structures do not run afoul of U.S. sanctions requirements. Such experts are also well positioned to identify potential eligibility for authorizations from OFAC, including general and specific licenses.
2. General licenses are not panaceas. A failure to identify an applicable general license and adhere to its conditions *prior* to engaging in a transaction with a sanctioned party or jurisdiction can render such an authorization inapplicable. Companies that intend to utilize a general license should make sure they have taken appropriate steps to comply with the conditions of the license (e.g., following payment conditions and recordkeeping requirements), and should seek advice whenever uncertainties arise.
3. U.S. persons should exercise caution to ensure that they are not directly or indirectly engaging in or facilitating transactions that cannot be conducted from the United States due to OFAC sanctions, either by referring business opportunities to non-U.S. persons (including their own affiliates), or by providing oversight or back-office support in connection with such business.

We will continue to monitor sanctions developments and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

H. Christopher Boehning  
+1-212-373-3061  
[cboehning@paulweiss.com](mailto:cboehning@paulweiss.com)

Jessica S. Carey  
+1-212-373-3566  
[jcarey@paulweiss.com](mailto:jcarey@paulweiss.com)

Christopher D. Frey  
+81-3-3597-6309  
[cfrey@paulweiss.com](mailto:cfrey@paulweiss.com)

Michael E. Gertzman  
+1-212-373-3281  
[mgertzman@paulweiss.com](mailto:mgertzman@paulweiss.com)

Roberto J. Gonzalez  
+1-202-223-7316  
[rgonzalez@paulweiss.com](mailto:rgonzalez@paulweiss.com)

Brad S. Karp  
+1-212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

Richard S. Elliott  
+1-202-223-7324  
[relliott@paulweiss.com](mailto:relliott@paulweiss.com)

Rachel M. Fiorill  
+1-202-223-7346  
[rfiorill@paulweiss.com](mailto:rfiorill@paulweiss.com)

Karen R. King  
+1-212-373-3784  
[kking@paulweiss.com](mailto:kking@paulweiss.com)

*Associate Sofia D. Martos contributed to this client alert.*

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- <sup>1</sup> See U.S. Dep't of Treasury, OFAC, "OFAC Settles with BIOMIN America, Inc. with Respect to Potential Civil Liability for Apparent Violations of the Cuban Assets Control Regulations," available [here](#) ("OFAC Web Notice").
- <sup>2</sup> According to OFAC, BIOMIN America owned a majority interest in several of the Non-U.S. Affiliates and directly managed another Non-U.S. Affiliate, which made them persons subject to the jurisdiction of the United States as defined by § 515.329 of the CACR.
- <sup>3</sup> OFAC Web Notice at 3.
- <sup>4</sup> OFAC Web Notice at 3.
- <sup>5</sup> OFAC Web Notice at 2.
- <sup>6</sup> OFAC Web Notice at 3, citing OFAC's 2019 Framework for Compliance Commitments. See our prior memorandum, available [here](#).