Client Alert

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OFAC Penalizes Trade with Cuba

On July 10, 2012, Great Western Malting Co. ("Great Western"), of Vancouver, Washington, agreed to pay $1,347,750 to settle apparent violations of the Cuban Assets Control Regulations. The Company produces malt for the brewing, distilling, and food markets. The apparent violations by Great Western occurred between August 2006 and March 2009, when it performed various back-office functions for the sales by a foreign affiliate of non-U.S. origin barley malt to Cuba.

The base penalty amount for the apparent violations was $5,990,000. This matter was not the subject of a voluntary disclosure to the Office of Foreign Assets Control (OFAC), and in the view of OFAC, the apparent violations constituted a non-egregious case. The settlement amount reflects OFAC's consideration of the following facts and circumstances: (i) Great Western is a large, sophisticated entity; (ii) the company did not have an adequate OFAC compliance program in place at the time of the violations; (iii) a number of the violations involved transactions with Specially Designated Nationals (SDNs) in Cuba; (iv) some of the violations involved transactions which involved an SDN vessel; (v) Great Western has no history of prior OFAC violations; (vi) the company substantially cooperated with OFAC, including entering into a statute of limitations tolling agreement; and (vii) if the subject goods had been shipped from the United States, they would have been eligible for an OFAC license.

There are several takeaways from this settlement:

- All companies should assess their OFAC risk exposure against their current, and future, business operations, and develop a compliance program that reflects the company's size, goals, and culture. OFAC's settlement guidelines clearly state that a compliance program can be the most significant mitigating factor (if there is one in place) or the most significant aggravating factor (if there is not one in place) in adjusting penalty amounts. The Great Western settlement also implies that large, sophisticated US entities—especially—should have robust OFAC compliance programs.

- OFAC sanctions programs are directed at countries (Cuba, Iran, Sudan, North Korea, and Syria) as well as designated persons or entities from those, and many other jurisdictions, as included on the SDN List. An effective customer screening protocol should include both a jurisdictional check and a review against the SDN List.

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- OFAC sanctions programs not only target direct transactions with embargoed countries and persons, but the programs also prohibit transactions whereby a US company facilitates a transaction involving an embargoed country or person. OFAC's guidance on facilitation prohibits US companies from assisting with or aiding transactions that violate a sanctions program. The facilitation does not need to be material or significant-- even minor or indirect actions that support an unlawful transaction could constitute prohibited facilitation.

- Making a voluntary disclosure of embargo violations to OFAC can help mitigate the penalties associated with the illegal conduct. Such disclosure is not the easiest thing for a US company to do—in some ways, it goes against business instinct—but a robust compliance program should call for voluntary disclosures of OFAC embargo violations, once the company develops the facts of the situation (but within a reasonable time from the occurrence of the violation). OFAC guidelines indicate that voluntary disclosures can significantly reduce penalties.

- The fact that a transaction could be appropriately licensed by OFAC does not relieve US companies from actually obtaining a license for the transaction. There is no "would have been eligible for a license" license exception under OFAC regulations.